IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY,

Petitioner,

vs.

THE STATE OF NEVADA,
ROBERT LEGRAND,

Respondent.
_____/

Sup. Ct. Case No. 73095
Case No. CR07-1728
Dept. 4

RECORD ON APPEAL

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SCN 73095
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BRENDAN DUNCKLEY vs STATE OF NEVADA, ROBERT LEGRAND
Date: AUGUST 31, 2017

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FILED
Electronically
01-03-2012:03:57:31 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2678618

Code: 3868
ROBERT W. STORY, ESQ., Bar No. 1268
STORY LAW GROUP
245 East Liberty Street, Suite 530
Reno, Nevada 89501
Telephone: (775) 284-5510
Facsimile: (775) 284-0800

Attorneys for Petitioner Plaintiff Brendan Dunckley

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY

Petitioner,

vs.

STATE OF NEVADA, et al.,

Respondents.

Case No. CR07-1728

Dept. No. 4

REQUEST FOR ROUGH DRAFT TRANSCRIPT

TO: Stephani Loder, Court Reporter, Captions Unlimited.

Petitioner Brendan Dunckley hereby requests preparation of a rough draft transcript of certain portions of the proceeding before the district court, as follows:

Evidentiary hearing on Petition for Writ of Habeas Corpus (Post Conviction) on June 3, 2011, before the Honorable Connie J. Steinheimer.

This notice requests a transcript of only those portions of the district court proceedings that counsel reasonably and in good faith believes are necessary to determine whether appellate issues are present. Voir dire examination of jurors, opening statements and closing arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless specifically requested above.

I recognize that I must serve a copy of this form on the above named court reporter and opposing counsel and that the above named court reporter shall have ten (10) days from the receipt

of this notice to prepare and submit to the district court the rough draft transcript requested herein.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned do hereby affirm that the preceding document does not contain the social security number of any person.

January 3, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story .
ROBERT W. STORY

Attorneys for Petitioner Brendan Dunckley

STORY LAW GROUP
245 E. Liberty, Suite 530
Reno, Nevada 89501
(775) 284-5510

EXHIBIT INDEX

Exhibit 1	Declaration of Robert W. Story, Esq.	1 page

FILED
Electronically
01-03-2012:03:57:31 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2678618

EXHIBIT 1

EXHIBIT 1

PROOF OF SERVICE

I, Robert W. Story, declare as follows:

I am a member of Story Law Group with business offices located at 245 E. Liberty Street, Suite 530, Reno, Nevada 89501. I am over the age of 21 and not a party to this action.

On January 3, 2012, I electronically filed the foregoing **Request for Rough Draft Transcript** with the Clerk of the Second Judicial District Court via the Court's e-Flex system.

I certify that all participants in the case are registered e-Flex users and that service will be accomplished by e-Flex.

Gary Hatelstad
Chief Deputy District Attorney
Washoe County, Nevada

I further certify that some of the participants in the case are not registered e-Flex users. I have mailed the foregoing document First-Class Mail, postage prepaid to the following non-e-Flex participants:

Stephanie Loder
Captions Unlimited
Post Office Box 20905
Reno, Nevada 89515

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on January 3, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story .
ROBERT W. STORY

STORY LAW GROUP
245 E. Liberty, Suite 530
Reno, Nevada 89501
(775) 284-5510

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	01-03-2012:15:57:31
Clerk Accepted:	01-03-2012:16:14:00
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Req to Crt Rptr - Rough Draft - **Continuation
Filed By:	ROBERT STORY, ESQ.
	You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

STATE OF NEVADA

BRENDAN DUNCKLEY

FILED
Electronically
01-09-2012:11:42:18 AM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2688283

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

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59957
District Court Case No. CR071728

D4

RECEIPT FOR DOCUMENTS

TO: Story Law Group/Robert W Story
Attorney General/Carson City
Washoe County District Attorney
Craig Franden, Washoe District Court Clerk ✓

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

01/03/2012 Appeal Filing fee waived. Criminal.

01/03/2012 Filed Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)

DATE: January 03, 2012

Tracie Lindeman, Clerk of Court
jm

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	01-09-2012:11:42:18
Clerk Accepted:	01-09-2012:11:44:58
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Supreme Court Receipt for Doc
Filed By:	Mary Fernandez
	You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

STATE OF NEVADA

BRENDAN DUNCKLEY

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	01-11-2012:10:46:07
Clerk Accepted:	01-11-2012:11:24:57
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Notice
Filed By:	ROBERT BELL, ESQ.
	You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59957

C607-1738
D4

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Brendan Dunckley's post-conviction motion to withdraw his guilty plea. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Dunckley argues that he did not knowingly and intelligently plead guilty because he erroneously believed that probation was a possible sentence when it was not as a matter of law under NRS 201.230(2) as it existed at the time of his offense. See 1997 Nev. Stat., ch. 641, § 19, at 3190.[1] Dunckley is mistaken. Having reviewed the statute, we conclude that probation was available as a possible sentence at the time of his offense through NRS 176A.110(3)(j). See 1997 Nev. Stat., ch. 524, § 7, at 2504-05. Moreover, at all times throughout these proceedings the district court, the State, Dunckley, and even this court, believed and operated as if

[1]The amended information contained allegations that Dunckley committed lewdness with a child under the age of fourteen years, a violation of NRS 201.230, on or between August 14, 1998, and August 13, 2000.

probation was a possibility under the statute and Dunckley would have received probation had the district court found that it was appropriate. Because Dunckley's belief that probation was a possible sentence was not erroneous, we conclude that the district court did not abuse its discretion in denying his motion. Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001) ("When reviewing a district court's denial of a motion to withdraw a guilty plea, this court presumes that the district court properly assessed the plea's validity, and we will not reverse the lower court's determination absent abuse of discretion."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	01-24-2013:15:39:21
Clerk Accepted:	01-24-2013:15:40:36
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Supreme Court Order Affirming
Filed By:	Annie Smith
	You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE &PROBATION

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

BRENDAN DUNCKLEY

STATE OF NEVADA

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59957

ORDER OF AFFIRMANCE

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[1]The amended information contained allegations that Dunckley committed lewdness with a child under the age of fourteen years, a violation of NRS 201.230, on or between August 14, 1998, and August 13, 2000.

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ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

FILED
Electronically
02-14-2013:02:35:28 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3533263

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59957
District Court Case No. CR071728

CR07-1728
DF

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 11th day of February, 2013.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 11, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

FILED
Electronically
02-14-2013:02:35:28 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3533263

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59957
District Court Case No. CR071728

CR07-1728
D4

REMITTITUR

TO: Joey Orduna Hastings, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 11, 2013

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on FEB 14 2013

District Court Clerk

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	02-14-2013:14:35:28
Clerk Accepted:	02-14-2013:14:36:08
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Supreme Court Order Affirming
	Supreme Ct Clk's Cert &Judg
	Supreme Court Remittitur
Filed By:	Deputy Clerk ASmith
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The following people were served electronically:

DIV. OF PAROLE &PROBATION

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

BRENDAN DUNCKLEY

STATE OF NEVADA

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419
PETITIONER IN PRO SE

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY,

PETITIONER,

VS.

STATE OF NEVADA,
ROBERT LEGRAND,

RESPONDENT:

CASE NO: CR07P1728 / CR07-1728

DEPT. NO: 4

PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST STATE CLAIMS

PURSUANT TO UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA'S ORDER (ECF. NO. 35) IN CASE NO. 3:13-CV-00393-RCJ-VPC, DUNCKLEY V. LEGRAND, THIS IS A **PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST** ALL HIS GROUNDS FOR RELIEF IN STATE COURT.

AS THE STANDARDS UNDER **RHINE V. WEBER**, 544 U.S. 269, 278 (2005) HAVE BEEN MET (GOOD CAUSE FOR HIS FAILURE TO EXHAUST, HIS UNEXHAUSTED CLAIMS ARE POTENTIALLY MERITORIOUS, AND THERE IS NO INDICATION THAT THE PETITIONER ENGAGED IN INTENTIONALLY DILATORY LITIGATION TACTICS) (EMPHASIS ADDED)

ALL THESE CLAIMS AND ENTIRE PETITION IS BASED UPON ALL THE PLEADINGS, PAPERS AND FILING OF THIS ENTIRE RECORD OF CR07-1728 AND THE FOLLOWING ORDER ATTACHED GRANTING THE PETITIONER JUDICIAL PERMISION TO FILE.

TABLE OF CASE CITATIONS:

TABLE OF CASE CITATIONS: CONT'

STATEMENT ON JURISDICTION:

ON JULY 21, 2009, PETITIONER DUNCKLEY FILED A PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) (AA 94-170). ON JUNE 3, 2011, THE SECOND JUDICIAL DISTRICT COURT (STEINHEIMER, J.) CONDUCTED AN EVIDENTARY HEARING. (AA 226-346.) ON DECEMBER 29, 2011, THE DISTRICT COURT ENTERED ITS ORDER DENYING PETITIONER'S WRIT OF HABEAS CORPUS, AND FINDINGS OF FACTS, CONCLUSION OF LAW AND JUDGMENT. (AA 357-367) ON DECEMBER 30, 2011, PETITIONER DUNCKLEY, BY WAY OF HIS APPELLATE COUNSEL (POST-CONVICTION, APPOINTMENT) ROBERT STORY, FILED HIS NOTICE OF APPEAL. (AA 348-368).

ON JUNE 25, 2012, THE APPELLANT OPENING BRIEF WAS FILED IN THE NEVADA SUPREME COURT UNDER CASE NUMBER: 59958. THE STATE FILED ITS ANSWERING BRIEF ON AUGUST 24, 2012. FINALLY ON OCTOBER 24, 2012 THE REPLY BRIEF WAS FILED. ON JANUARY 16, 2013 THE NEVADA SUPREME COURT ISSUED AN ORDER OF AFFIRMANCE IN CASE NUMBER 59958, AND FILED ITS REMITTITUR TO THE SECOND JUDICIAL DISTRICT COURT ON FEBRUARY 14, 2013. (EX "1")

AS ALL ISSUES RAISED IN THIS INSTANT WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254 HAVE BEEN PRESENTED TO ALL AVAILABLE STATE COURTS, AND DENIED, STATE REMEDY IS EXHAUSTED AND THUS THIS COURT HAS JURISDICTION OF THIS MATTER.

STATEMENT OF THE CASE:

ON JULY 12, 2007, THE STATE FILED IN THE SECOND JUDICIAL DISTRICT COURT AN INFORMATION AGAINST PETITIONER DUNCKLEY CHARGING HIM WITH, COUNT 1, SEXUAL ASSAULT ON A CHILD, COUNT 2, LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS (NRS 201.230) COUNT 3, STATATORY SEXUAL SEDUCTION, AND COUNT 4, SEXUAL ASSAULT. (AA 1-4) PETITIONER WAS BEING REPRESENTED BY A RENO JUSTICE COURT APPOINTED DEFENSE ATTORNEY, DAVID C. O'MARA ("O'MARA") FROM THE JACK ALAIN CONFLICT GROUP. AT ARRAIGNMENT PLEA, TRIAL/GUILTY PLEA, SENTENCING AND FINALLY FOR THE DIRECT APPEAL.

ON FEBRUARY 28, 2008, THE STATE FILED AGAINST MR. DUNCKLEY IN THE DISTRICT COURT AN AMENDED INFORMATION CHARGING WITH, COUNT 1, LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, AND COUNT 2, ATTEMPTED SEXUAL ASSAULT. (AA.5-8).

ON MARCH 6, 2008 PETITIONER- DUNCKLEY PLEADED GUILTY TO BOTH COUNTS IN THE AMENDED INFORMATION IN CASE NUMBER: CR07-1728, PURSUANT TO A GUILTY PLEA MEMORANDUM. (AA 16-31) DISTRICT COURT JUDGE CONNIE J. STEINHEIMER ACCEPTED MR. DUNCKLEY'S GUILTY PLEAS AND SET SENTENCING FOR AUGUST 5, 2008. (AA 33-69)

ON AUGUST 5, 2008, PETITIONER WAS SENTENCED AND ON AUGUST 11, 2008 THE DISTRICT JUDGE ENTERED JUDGMENT AGAINST PETITIONER AS FOLLOWS: COUNT 1: LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS, NRS 201.230 - IMPRISONMENT IN THE NEVADA DEPARTMENT OF PRISONS FOR A MAXIMUM TERM OF LIFE WITH THE MINIMUM PAROLE ELIGIBILITY OF 10 YEARS (EXPEDITED PAROLE ELIGIBILITY OF AUGUST 1, 2015) COUNT 2, ATTEMPTED SEXUAL ASSAULT, NRS 193.330 AND NRS 200.364 - IMPRISONMENT IN THE NEVADA DEPARTMENT OF PRISONS FOR A MAXIMUM TERM OF ONE HUNDRED TWENTY MONTHS (120) WITH THE MINIMUM PAROLE ELIGIBILITY OF 24 MONTHS AND FOR COUNT 2 TO BE SERVED CONCURRENTLY WITH SENTENCE IMPOSED IN COUNT 1. (AA 32-33)

MR. O'MARA FILED A TIMELY DIRECT APPEAL OF THE JUDGMENT (AA 90-93) AFTER FILING THE WRONG APPEAL ("FAST-TRACK") THE CORRECT APPEAL WAS FILED ON NOVEMBER 19, 2008.

ON MAY 8, 2009, THE NEVADA SUPREME COURT ENTERED AN ORDER OF AFFIRMANCE OF THE JUDGMENT, AND FILED IT REMITTITUR ON JUNE 9, 2009.

STATEMENTS OF FACT:

BY APRIL 16, 2007, THE STATE HAD CHARGED DUNCKLEY WITH FIVE SEX CRIMES THAT CARRIED LIFE SENTENCES AND THREE OF WHICH WERE TO HAVE OCCURRED SEVEN TO NINE YEARS EARLIER. (AA 1-4) AT THE TIME OF HIS APPOINTMENT ON MAY 7, 2007, MR. O'MARA HAD ONLY HANDLED "THREE TO FOUR SEX CRIMES" (AA 293) MR. O'MARA WAS PAID A "FLAT FEE" OF $500 BY THE JACK ALAIN GROUP FOR THE LEGAL WORK HE WAS APPOINTED TO DO FOR MR. DUNCKLEY.

(AA 293 & 320) ACCORDING TO MR O'MARA HE WAS TO BE PAID $500, WHETHER HE WORKED ONE HOUR OR 1,000 HOURS ON PETITIONER'S CASE (AA 319-320) MR. O'MARA HAD THE AUTHORITY TO HIRE AN INVESTIGATOR, BUT EVEN WITH HIS CLIENT FACING MULTIPLE LIFE SENTENCES, MR. O'MARA NEGLECTED TO DO SO. IN FACT HIS REASON WAS "HE WOULD INVESTIGATE THE CASE HIMSELF." (AA 320) WHICH HE DID NOT DO, IN ADDITION, MR. O'MARA BY HIS OWN ADMISSION FAILED TO INTERVIEW ANYONE IN THIS CASE. (AA 320) (BANKS V. REYNOLDS, 54 F. 3d 1508 (10TH CIR. 1995))

ON THEIR FIRST MEETING, MR. DUNCKLEY INFORMED MR. O'MARA THAT HE HAD NOT COMMITTED THE ALLEGED CRIMES, (AA 253) IN ADDITION MR. DUNCKLEY PROVIDED MR. O'MARA WITH DOCUMENTATION OF THE FACT THAT PETITIONER WAS NOT EVEN IN THE STATE OF NEVADA AT THE TIME MOST OF THE CRIMES ALLEGEDLY OCCURED (AA 252 - 254) MR. DUNCKLEY PROVIDED MR. O'MARA WITH DIVORCE DOCUMENTATION, SHOWING HIM TO BE IN CALIFORNIA, MR. DUNCKLEY PROVIDED MR. O'MARA WITH VEHICLE REGISTRATION DOCUMENTATION SHOWING THAT HE DID NOT EVEN OWN THE "SCENE OF THE CRIME" (AA 316) THAT ONE OF THE CRIMES WAS ALLEGED TO HAVE OCCURED IN UNTIL AFTER THE ALLEGED CRIMINAL WINDOW OF OFFENSE. MR. DUNCKLEY PROVIDED MR O'MARA TAX DOCUMENTATION, SHOWING HE LIVED IN ANOTHER STATE DURING THE ENTIRE TIME FRAME OF THE ALLEGED COUNT 1. (AA 255-56) FINALLY PETITIONER DUNCKLEY PROVIDED O'MARA WITH SCHOOL TRANSCRIPTS SHOWING DUNCKLEY WAS LIVING IN HYDE PARK, NEW YORK UNTIL FEBRUARY 23, 1994, (AA 101) IF AS THE STATE ALLEGES THE VICTIM WAS "12" (DOB 8/14/82) (AA. 10; 45; 46; 49; 50; 68; 69; 70.) THESE DOCUMENTS ALL SHOW IT WAS IMPOSSIBLE FOR THE PETITIONER TO HAVE COMMITTED THE CRIME FOR COUNT 1. MR. DUNCKLEY HAD ASKED O'MARA TO CONDUCT AND VERIFY HIS ALIBI EVIDENCE. (AA 253) HE FAILED TO DO SO, AND FAILED TO INTRODUCE IT TO THE COURTS, DIRECTLY OR IN A MOTION TO DISMISS. (AA 314-315) HE CONTINUED TO 'IGNORE' THIS EVIDENCE BY NOT INTRODUCING IT IN THE DIRECT APPEAL. (AA 90-93) (EX "3-7")

SUMMARY OF ARGUMENT:

THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL, BY HIS COUNSEL'S INEFFECTIVE ASSISTANCE, AS HE 1) FAILED TO PRESENT THE ALIBI EVIDENCE TO THE COURT AT ANY STAGE A) PRIOR TO GUILTY PLEA BEING DRAFTED, B) AT ENTERANCE OF PLEA, AT "CANVASS," C) AT SENTENCING, OR D) DIRECT APPEAL. THERE IS NO RECORD OF MR. O'MARA EVER STATING (PRIOR TO THE EVIDENTARY HEARING) "MY CLIENT WAS NOT HERE FOR COUNT 1, HERE IS THE PROOF." (AA 315) WHEN HE WAS REQUIRED TO BRING TO THE COURTS ATTENTION, AS HIS CLIENT'S ADVOCATE, HE VIOLATED THE PETITIONER'S RIGHT TO COUNSEL BY NOT PUTTING THE STATE'S CASE TO ANY ADVESARIAL TESTING. HIS ACTIONS AND LACK OF ANY ACTUAL ACTION TRIGGERED HIS CONFLICT OF INTEREST. 2) COUNSEL O'MARA FAILED TO OBJECT TO THE JOINING OF TWO CHARGES ON THE SAME INFORMATION OVER SEVEN YEARS APART, CAUSING UNDO PREJUDICE AGAINST HIS CLIENT. 3) COUNSEL O'MARA AND HIS ADVESARY ADA VILORIA'S PARTNERSHIP TO COMMIT FRAUD ON THE COURT.

FOR THE DISTRICT COURT TO RENDER ITS DECISION THAT COUNSEL WAS NOT INEFFECTIVE AND THAT NO PREJUDICE OCCURED, AND AFFIRMED BY THE NEVADA SUPREME COURT IN LIGHT OF ALL THE EVIDENCE IS "CONTRARY TO... CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES" OR IN THE LEAST, "INVOLVED AN UNREASONABLE APPLICATION... OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES." (Williams v. Taylor, 529 US 362, 120 S.CT. 1495 (2000) & Perez v. Rosario, 459 F.3d 954 (9th CIR. 2006) (US CONST. AM. SIXTH & FOURTEENTH)

COUNSEL PREJUDICED HIS CLIENT BY ALLOWING COUNT 1 & COUNT 2, CURRENTLY UNDER ATTACK, TO BE PRESENTED UNDER THE SAME INFORMATION, SAME CASE NUMBER AND ULTIMATELY UNDER THE SAME GUILTY PLEA. (AA 5-8)(AA 16-31) COMPETENT COUNSEL TRULY ACTING AS AN ADVOCATE WOULD HAVE FILED A MOTION TO BIFURCATE THE CHARGES, AS THEY, A) ARE NINE YEARS APART, AND B) NOT CONNECTED BY THE SAME TRANSACTION, NOR THE SAME 'COMMON PLAN OR SCHEME'. (NRS. 173.115) (US. CONST. AM. FIFTH, SIXTH & FOURTEENTH.)

PETITIONER FURTHER ARGUES THAT HE WAS DENIED AND DEPRIVED OF HIS DUE PROCE:

RIGHTS, EQUAL PROTECTION RIGHTS, AND RIGHT TO A FAIR PROCEEDING. BY THE ACTIONS AND CONDUCT OF THE COURT OFFICERS (INCL. PROSECUTING ATTORNIES AND COUNSEL O'MARA). BY: A) HAVING INSUFFICENT EVIDENCE TO CONVICT PETITIONER; B) HAVING DOCUMENTS THAT SHOWED DEFENDANT WAS NOT IN NEVADA, DURING THE ENTIRE TIME FRAME FOR COUNT 1; C) ARGUED FOR THE MAXIMUM CONVICTION OF A CITIZEN THE ADA'S KNEW WAS INNOCENT (OR SERIOUS REASONABLE DOUBT OF GUILT EXISTED.) AND THUS INSURED SAID CITIZEN RECEIVED THE CURRENT 10-LIFE. (AA 44-51); D) VIOLATED PETITIONER'S RIGHT TO DUE PROCESS, BY NOT BRINGING TO THE COURT'S ATTENTION THAT THE PREVIOUSLY, THOUGHT TO BE EXISTING PROBABLE CAUSE, IN FACT DOES NOT EXIST; E) UNETHICALLY, FRAUDULENTLY, AND UNCONSTITUTIONALLY ALLOWED THE PETITIONER AND THE COURT TO BELIEVE THAT ALL THE ELEMENTS OF THE CRIMES CHARGED IN THE GUILTY PLEA MEMORANDUM EXIST, WHEN IN FACT, COUNT 1, HAS NO EXISTING ELEMENTS THAT A CRIME EVEN OCCURED, OR EVIDENCE OF ONE. (U.S. CONST. AM. FIFTH, SIXTH & FOURTEENTH.)

FINALLY PETITIONER ARGUES THAT AMPLE UNDISPUTED ALIBI DOCUMENTS HAVE BEEN KNOWN BY BOTH THE STATE AND BY MR. O'MARA THAT CASTS SERIOUS DOUBT THAT IF A JUROR WAS PRESENTED THIS EVIDENCE HE/SHE WOULD BE ABLE TO FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT. AT THE CLAIM OF ACTUAL INNOCENCE IS SUPPORTED BY: A) UNDISPUTED DOCUMENTS; B) SAID DOCUMENTS WERE IN THE POSSESION OF ADA VILORIA. (AA 315) NON-DISCLOSURE OF THIS ALIBI (ACTUAL INNOCENCE) EVIDENCE WAS A CLEAR, INTENTIONAL VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS, HIS EQUAL PROTECTION UNDER THE LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND IN PART, SINCE ADA VILORIA KNEW IT WAS MORE LIKELY THAN NOT PETITIONER WAS ACTUALLY INNOCENT OF COUNT 1, HER SUCCESSFUL ARGUING FOR A LIFE SENTENCE OF AN ACTUALLY INNOCENT MAN IS A VIOLATION OF CRUEL AND UNUSUAL PUNISHMENT. SUCH CONDUCT IN LIGHT OF THE EVIDENCE CAN NEVER BE VIEWED AS HARMLESS. (U.S. CONST. AM. FIFTH, SIXTH, EIGHTH & FOURTEENTH.)

ALL OF THE FOLLOWING CLAIMS HAVE BEEN SUBMITTED TO THE NEVADA STATE

COURTS, AND DENIED. STATE REMIDY HAS BEEN EXHAUSTED. THUS THIS PETITIONER FILES AND SUBMITS THIS ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS, PURSUANT TO 28 U.S.C. § 2254, BY A PERSON IN STATE CUSTODY.

NO OTHER PETITIONS, APPLICATIONS, MOTIONS OR APPEALS ARE CURRENTLY PENDING IN THIS MATER UNDER NEVADA CASE NUMBERS, CR07P1729, CR07-1720 OR 5C258.

THIS PETITION WAS PLACED INTO THE HANDS OF NEVADA DEPARTMENT OF CORRECTIONS STAFF, THROUGH THE LEGAL MAIL SYSTEM IN THE LAW LIBRARY AT LOVELOCK CORRECTIONAL CENTER ("L.C.C.") 1200 PRISON ROAD, LOVELOCK, NEVADA, 89419, ON May 31st 2013.

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GROUNDS FOR RELIEF:

GROUND ONE:

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. STATEMENT OF EXHAUSTION:

THIS CLAIM WAS PRESENTED TO THE NEVADA SUPREME COURT IN PETITIONER'S APPEAL OF THE DENIAL OF HIS STATE POST-CONVICTION PROCEEDINGS. (EX 1) IT WAS REVIEWED BY BOTH THE SECOND JUDICIAL DISTRICT COURT AND THE NEVADA SUPREME COURT ON ITS MERITS.

B. STATEMENT IN SUPPORT OF CLAIM:

THE SIXTH AMENDMENT PROVIDES THAT "IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL." IN STRICKLAND V. WASHINGTON, 466 US 668, 685, (1984), THE SUPREME COURT HELD THAT IN ORDER FOR A DEFENDANT TO PREVAIL ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, HE OR SHE MUST 1) SHOW DEFICIENT PERFORMANCE BY COUNSEL, SUCH PERFORMANCE MUST FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS THAT ATTORNIES HOLD THEMSELVES TO, AND 2) PREJUDICE TO THE DEFENDANT. SINCE THIS INSTANT PETITION DEALS WITH A GUILTY PLEA THE STANDARD "PRONG" OF PREJUDICE IS SLIGHTLY DIFFERENT FROM STRICKLAND, IN THIS CASE HILL V. LOCKHART, 474 US 52, 106 S.CT. 366 (1985) IS THE STANDARD. "TO ESTABLISH THE ELEMENT OF PREJUDICE, PETITIONER MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, HE WOULD HAVE NOT PLEAD GUILTY AND WOULD HAVE INSISTED ON GOING TO TRIAL. (AA 260, 261-62).

AS STATED PRIOR, PETITIONER WAS REPRESENTED BY CONFLICT COUNSEL DAVID C. O'MARA THROUGH ALL STAGES OF HIS PROCEEDINGS, UP TO AND INCLUDING HIS DIRECT APPEAL. PETITIONER HAS A CONSTITUTIONAL RIGHT TO COMPETENT COUNSEL. COUNSEL'S LACK OF EFFECTIVE REPRESENTATION SUBSTANTIALLY AND INJURIOUSLY AFFECTED THE PROCESS TO SUCH AN EXTENT AS TO RENDER PETITIONER'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNCONSTITUTIONAL. NO STRATEGIC OR TACTICAL REASON EXISTED FOR COUNSELS FAILURE TO

ADDRESS, INVESTIGATE OR STATE ON THE RECORD THESE SIGNIFICANT AND OBVIOUS ISSUES DURING PETITIONER'S PROCEEDINGS. TO STAND BY SILENT, TO DISREGARD HIS DUTY AS HIS CLIENT'S ADVOCATE IS A BLATENT VIOLATION OF THE RIGHT PETITIONER IS ENTITLED TO.

COUNSEL'S REPRESENTATION OF THE PETITIONER FELL BELOW EVEN THE BARE MINIMUM STANDARD OF REASONABLE REPRESENTATION BY COMPETENT COUNSEL ON THE BASIS OF THE FOLLOWING GROUNDS:

A) TRIAL COUNSEL WAS REPRESENTING PETITIONER UNDER A CONFLICT OF INTEREST

THROUGHOUT THE DISTRICT COURT AND NEVADA SUPREME COURT'S DENIAL OF THE ORIGINAL WRIT OF HABEAS CORPUS A FEW ISSUES OF DENIAL WERE RAISED. ONE SUCH REASON WAS THE COURT BELIEVED THAT COUNSEL O'MARA HAD TESTICIED CREDIBLY THAT HE ADVISED HIS CLIENT NOT TO ACCEPT THE GUILTY PLEA, BUT HAD INSISTED HE INTENDED ON GOING TO TRIAL SECOND IS THAT THE PETITIONER HAD TESTIFIED TO THE EXACT OPPOSITE, BUT THE COURT DEEMED O'MARA'S ENTIRE TESTIMONY TO BE MORE CREDIBLE, AND THE PETITIONER'S NOT CREDIBLE. (AA 363-365.) IN THE DECISION THE COURT STATED: "GIVEN THE TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING, THE COURT FINDS MR. O'MARA'S TESTIMONY TO BE CREDIBLE" (AA 363)

WHILE BEING QUESTIONED BY ADA HATLESTAD, "DOCUMENTS WERE DISCUSSED THAT PLACED PETITIONER IN NEW YORK AND CALIFORNIA DURING THE ENTIRE "WINDOW OF OFFENSE" FOR COUNT 1. THIS IS THAT "CREDIBLE TESTIMONY,":

"Q: DID YOU CONDUCT ANY KIND OF INVESTIGATION TO AUTHENTICATE THE DOCUMENTS THAT MR. DUNCKLEY EVENTUALLY GAVE YOU?

"A: THE DOCUMENTS WERE PROVIDED TO THE DISTRICT ATTORNEY'S OFFICE ... AND THIS WAS ALSO -- THOSE DOCUMENTS WERE PROVIDED TO MS. VILORIA, WHICH I THINK NECESSITATED ANOTHER -- BECAUSE MY DISCUSSION WITH HER WAS: LOOK, YOU HAVE NOTHING ON COUNT 1. MY CLIENT WASN'T HERE. HERE IS THE PROOF." (AA 314-15)(EMPHASIS ADDED)

EVEN IF AS COUNSEL HAD TESTIFIED 'CREDIBLY' PETITIONER HAD INSISTED ON PLEADING GUILTY, "A TRUE ADVOCATE WOULD HAVE ATTEMPTED TO CONVINCE THE STATE TO ALLOW

[PETITIONER] TO WITHDRAW HIS PLEA BEFORE SENTENCING." OSBORN V. SHILLINGER, 861 F.2d 612 (10TH CIR. 1988)(NRS. 176.165) BY COUNSEL'S 'CREDIBLE TESTIMONY' CITED ABOVE, MR. O'MARA HERE, SHOWED A KEY EXAMPLE HOW HE FAILED TO ACT AS HIS CLIENT'S ADVOCATE. HE TESTIFIED THAT HE PUT THE STATE ON NOTICE THAT IT "HAD NOTHING ON COUNT 1. MY CLIENT WASN'T HERE." NECESSITATING IF NOT WARRANTING THE DISMISAL OF THE COUNT. IF NOT BY THE STATE, THEN CERTAINLY A COMPETENT ADVOCATE WOULD HAVE FILED THE PROPER MOTION.

COUNSEL NOT ONLY FAILED TO FILE A MOTION TO DISMISS ONCE HE SAW THAT THE STATE INTENDED ON VIOLATING HIS CLIENT'S CONSTITUTIONAL RIGHTS, BUT TOOK ABSOLUTELY NO ACTION. (SEE US V. BAGLEY, 473 US 667, 105 S.CT. 3375 (1985).) NOT ONLY DID COUNSEL TAKE NO ACTION, BUT FAILED TO BRING TO THE COURTS ATTENTION ON THE RECORD THAT A MISCARRIAGE OF JUSTICE WILL OCCUR IF THE COURT ACCEPTS A GUILTY PLEA THAT IS NOT SUPPORTED BY ANY EVIDENCE OF GUILT, BUT EVIDENCE SUPPORTING INNOCENCE. HE HAD A CONSTITUTIONAL DUTY AS HIS CLIENT'S ADVOCATE, "GUIDING HAND". A CONSTITUTIONAL DUTY TO BRING TO THE COURTS ATTENTION THE EXISTANCE OF ALIBI EVIDENCE, EXCEPT THE RECORD SHOWS NO SUCH ACTION WAS TAKEN. HE STOOD SILENT ON THIS MATTER. TO STAND SILENT OR "STAND-BY" AND ALLOW HIS CLIENT TO ADMIT GUILT, HE SHIFTED HIS LOYALTY. THE ACTIONS OF COUNSEL ALLOWED A DUE PROCESS VIOLATION TO BLOSSOM INTO A MISCARRIAGE OF JUSTICE.

A DEFENSE ATTORNEY WHO ABANDONS HIS DUTY OF LOYALTY TO HIS CLIENT AND EFFECTIVELY JOINS THE STATE IN AN EFFORT TO OBTAIN A CONVICTION SUFFERS FROM AN OBVIOUS CONFLICT OF INTEREST. "THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS THUS THE RIGHT OF THE ACCUSED TO REQUIRE THE PROSECUTION'S CASE TO SURVIVE THE CRUCIBLE OF MEANINGFUL ADVESARIAL TESTING... IF THE PROCESS LOSES ITS CHARACTER AS A CONFRONTATION BETWEEN ADVESARIES, THE CONSTITUTIONAL GUARANTEE IS VIOLATED" US V. CRONIC, 466 US 657, 104 S.CT. 2039 (1984).

IT CAN BE SAID THAT PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL ON CLEAR EVIDENCE (AND O'MARA'S 'CREDIBLE TESTIMONY') THAT THE PROCESS BY WHICH HE PLEAD

GUILTY AND WAS SENTENCED TO A LIFE SENTENCE WAS NOT ADVERSARIAL, AND THEREFORE UNRELIABLE. COUNSEL DID NOT SIMPLY MAKE POOR STRATEGIC CHOICES. (ALCALA V. WOODFORD, 334 F.3d 862 (9th Cir. 2003).) HE ACTED WITH RECKLESS DISREGARD FOR HIS CLIENT'S BEST INTEREST. IN STRICKLAND, THE COURT HELD THAT A NEW TRIAL MUST BE GRANTED WHEN EVIDENCE IS NOT INTRODUCED BECAUSE OF THE INCOMPETENCE OF COUNSEL ONLY IF "THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULTS OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT." IN PARTICULAR, THE COURT EXPLAINED: "WHEN A DEFENDANT CHALLENGES A CONVICTION, THE QUESTION IS WHETHER THERE IS A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS OF COUNSEL, THE FACTFINDER WOULD HAVE HAD A REASONABLE DOUBT AS TO GUILT." (10 466 US AT 695) (SEE ALSO: PEREZ V. ROSARIO, 449 F.3d 956 (9th Cir. 2006); CHERRY V. BRENTON, 258 F.3d 250 (4th Cir. 2001).) PETITIONER WAS PREJUDICED WHEN HIS ATTORNEY WHOLLY FAILED TO INVESTIGATE, VERIFY OR TO PRESENT TO THE COURT EVIDENCE THAT HE WAS NOT IN THE STATE FOR THE TIME FRAME OF COUNT 1. HABEAS RELIEF IS WARRANTED. (LUNA V. CAMBRA, 306 F.3d 954 (9th Cir. 2002); TUCKER V. RENICO, 317 F. SUPP. 2d 766 (2006).) FAILURE TO ARGUE ON THE RECORD THE EXISTANCE OF THE ALIBI EVIDENCE CONSTITUTES A CLEAR VIOLATION OF BOTH PRONGS OF THE CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. (SEE: GRIMMA V. SOLEM, 923 F.2d 88 (8th Cir. 1991).)

SUCH LACK OF ANY ADVERSARIAL TESTING, BLATENT CONFLICT OF INTEREST, DUE PROCESS VIOLATION, ESTABLISHES THAT THE PREJUDICE IS PRESUMED. COUNSEL'S CONDUCT WAS FAR BELOW EVEN THE LOWEST BAR ATTORNIES HOLD THEMSELVES TO, NO COMPETENT ATTORNEY WOULD EVER "IGNORE" EVIDENCE EXONERATING HIS CLIENT. THERE IS ABSOLUTELY NO COUNTER-ARGUMENT TO THE FACT THAT PETITIONER WAS DEPRIVED THE RIGHT TO COUNSEL AND DENIED A FAIR PROCEEDING. U.S. V. SWANSON, 943 F.2d 1070 (9th Cir. 1991); U.S. V. TUCKER, 716 F.2d 576 (9th Cir. 1983). IN TOMMEY V. BUNELL, 898 F.2d 741 (9th Cir. 1990) "LACK OF ADVERSARIAL TESTING GIVES RISE TO PER SE PRESUMPTION OF PREJUDICE." (EX. "3-7" - ALIBI DOCUMENTS. NOTE: THE ALTENATE NUMBERS CONSIDE WITH NUMBERING OF PAGES FILED IN JULY 21, 2009 WRIT.)

6) COUNSEL PREJUDICED PETITIONER BY ALLOWING TWO CHARGES (NINE YEARS APART) TO REMAIN ON THE SAME INFORMATION, GUILTY PLEA MEMORANDUM, SENTENCE. (AA107)

NEVADA REVISED STATUTE (NRS 173.115) STATES: "TWO OR MORE OFFENSES MAY BE CHARGED IN THE SAME INDICTMENT OR INFORMATION IN A SEPERATE COUNT FOR EACH OFFENSE IF THE OFFENSES CHARGED, WHETHER FELONIES OR MISDEMENORS OR BOTH ARE: 1) BASED ON THE SAME ACT OR TRANSACTION; OR 2) BASED ON TWO OR MORE ACTS OR TRANSACTIONS CONNECTED TOGETHER OR CONSTITUTING PARTS OF A COMMON SCHEME OR PLAN."

IN Nester v. State, 75 NEV. 41, 334 P.2d 524, "TAKING TWO WOMAN DANCING AND LATER ATTEMPTING INTERCOURSE [45 DAYS APART] CANNOT BE CONSIDERED PART OF A COMMON PLAN JUST BECAUSE THE WOMAN WERE TAKEN INPART TO THE SAME BAR."

NRS 173.115 DOES NOT ALLOW AN INFORMATION TO BE FILED FOR CHARGES BEING 45 DAYS APART, AS THE SEPERATE INCIDENTS WERE NOT PART OF THE SAME TRANSACTION, NOR PART OF A COMMON SCHEME OR PLAN. YET PETITIONER WAS CHARGED ON A SINGLE INFORMATION (AA1-6) UNDER CR07-1726 FOR CRIMES BETWEEN AUGUST 14, 1998 AND MARCH 10, 2007, FOR COUNTS 1 & 2 RESPECTFULLY, IF 45 DAYS IS NOT ACCEPTABLE, HOW CAN 3,126 DAYS BE ACCEPTABLE

IT WAS A CONSTITUTIONAL VIOLATION OF EFFECTIVE ASSISTANCE SINCE A COMPETENT ADVOCATE WOULD HAVE KNOWN THE LAW AND WOULD HAVE FILED A MOTION TO SEVER. TRUE, A DEFENSE ATTORNEY'S CONDUCT MUST BE VIEWED AS IT WAS AT THE TIME OF THE ALLEGATION OF 'MISREPRESENTATION' NOT IN HINDSIGHT; AS IS ANOTHER GROUND (ISSUE) IN THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THIS ISSUE STRADDLES BOTH THE ACTIONS OF O'MARA AND THE PROSECUTOR'S. SO IT CAN BE SAID ALL OFFICERS OF THE COURT ASSISTED IN THIS INACCURATE ENACTMENT OF A CLEARLY ESTABLISHED LAW. FOR THE STATE TO FILE AN ORIGINAL SINGLE INFORMATION FOR TWO COUNTS SEPERATED BY NINE YEARS (3,126 DAYS) WITH NO CONNECTION, NOT PART OF A COMMON PLAN OR SCHEME, NOR THE SAME TRANSACTION, VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS. FOR O'MARA THE "GUIDING HAND" TO TAKE NO ACTION, BUT ALLOW IT TO STAND, VIOLATED THE PETITIONER'S RIGHT TO COUNSEL.

COMBINING TWO WEAK, NON-EXISTING CHARGES IN ORDER TO COMPENSATE FOR

THE LACK OF ANY EVIDENCE IS A CLEAR VIOLATION OF THE RIGHT TO DUE PROCESS AND THE RIGHT TO A FAIR PROCEEDING. (US. CONST. AM. FIFTH, SIXTH AND FOURTEENTH.) A COURT OF LAW IS NO PLACE FOR A DISPLAY OF PRESTADIGITATION. TO ALLOW THESE CHARGES TO REMAIN BOUND WOULD BE RENDERING AN OBVIOUSLY AND FUNDAMENTALLY UNFAIR RESULT. (TRIBBITT V. WAINWRIGHT, 430 US 910, 97 S.CT. 1184 (1977))

AS THIS IS A CONTINUAL ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL'S TOTAL FAILURE TO ACT AS PETITIONER'S ADVOCATE, AND THE OBVIOUS DUE PROCESS VIOLATION, RELIEF IS WARRANTED AND HUMBLY REQUESTED TO ALLOW PETITIONER TO WITHDRAW HIS GUILTY PLEA.

C) COUNSEL DENIED EFFECTIVE ASSISTANCE TO HIS CLIENT BY NOT INTENDING ON GOING TO TRIAL, FAILING TO CONDUCT ANY INVESTIGATION, AND HAVING NO DEFENSE STRATEGY.

SINCE ALL THE NEVADA COURTS USED O'MARA'S "CREDIBLE TESTIMONY" TO RENDER THEIR DECISIONS, AND ONLY THE TESTIMONY. THIS GROUND IS SUPPORTED BY O'MARA'S OWN WORDS. TO BEGIN AT THE EVIDENTARY HEARING WHILE UNDER OATH O'MARA TESTIFIED THAT "THERE WAS NO QUESTION IN MY MIND WE WERE GOING TO TRIAL." (AA 298) IN HIS ENTIRE TESTIMONY HIS "INVESTIGATION" CONSISTED OF SIMPLY REVIEWING THE STATES DOCUMENTS AND TRANSCRIPTS OF THE PRELIMINARY HEARING. (AA 320) AS A MATTER OF FACT THE ADA QUESTIONING O'MARA WAS LEADING AND TESTIFYING AS TO O'MARA'S INVESTIGATION. (AA 298, 313) TO O'MARA HE WAS OBLIGATED TO GIVE HIS CLIENT THE OFFER, BUT INSISTS HE ADVISED HIM NOT TO TAKE IT. VASQUEZ V. HILLERY, 474 US 254, 260, 106 S.CT. 617 (1986) SAYS 'ALTHOUGH A HABERS PETITIONER WILL BE ALLOWED TO PRESENT 'BITS OF EVIDENCE,' TO A FEDERAL COURT THAT WERE NOT PRESENTED TO THE STATE COURT, PROVIDED THE NEW BITS OF EVIDENCE DOES NOT PLACE THE CLAIMS IN A SIGNIFICANTLY DIFFERENT LEGAL POSTURE." WITH THIS IN MIND, SINCE HIS TESTIMONY IS VIEWED AS "CREDIBLE", HE SHOWED HE DID NO INVESTIGATION WHATSOEVER, CONDUCTED NO INTERVIEWS, ESTABLISHED ABSOLUTELY NO DEFENSE STRATEGY, NOR DID HE TESTIFY TO ANY TALKS, NOR DID HE PROVIDE A SOUND REASONABLE EXPLANATION FOR HIS LACK OF ANY EFFORT. SUCH LACK OF ANY

EFFECTIVE ASSISTANCE CAN LEAD TO ONLY ONE PLAN, TO OBTAIN A DEAL AND FACILITATE THE CONVICTION OF HIS CLIENT. A LETTER DATED JANUARY 2, 2008 FROM O'MARA TO HIS CLIENT GOES INTO HIS MINDSET AND CONTRADICTS HIS "STRATEGY TO GO TO TRIAL". THIS LETTER WAS REFERED TO BY O'MARA AT AA315, IT SAYS IN PART:

"FURTHER, I WILL CONTACT THE DISTRICT ATTORNEY AND OPEN UP INFORMAL DISCUSSION REGARDING A PLEA DEAL IN THIS CASE. IF THE DISTRICT ATTORNEY MAKES AN OFFER, I WILL NOTIFY YOU OF THE TERMS." (EMPHASIS ADDED) (EX. 'B')

THE 'CREDIBILITY' IS SERIOUSLY SHAKEN BY THIS LETTER, ESPECIALLY IN CONTENT OF THE RECORD. AT AA323-324 WHILE BEING QUESTIONED BY ROBERT STURM, O'MARA STATED:

"Q: DID YOU APPROACH KELLI ANN VILORIA, OR DID SHE APPROACH YOU ABOUT A PLEA DEAL?

"A: SHE APPROACHED ME ABOUT THE PLEA DEALS, BOTH OF THEM. IT WAS MY UNDERSTANDING THAT WE WERE GOING TO TRIAL. THE ONLY WAY -- THE ONLY WAY I WOULD APPROACH A DA FOR A PLEA DEAL IS IF MY CLIENT SAID: 'LET ME PROBATION.'

COUNSEL O'MARA MAY TESTIFY HE INTENDED ON GOING TO TRIAL, BUT HIS OBVIOUS LACK OF EFFECTIVE ASSISTANCE, AND THE EVIDENCE CLEARLY SHOWS HE HAD NO INTENTION ON GOING TO TRIAL. IN ALL ACTUALITY HAD HE MOVED HIS CHAIR TO THE OTHER SIDE OF THE AISLE, IT WOULD HAVE BEEN A MORE HONEST REFLECTION OF HOW ALONE THE PETITIONER REALLY WAS. AS A MATTER OF FACT THE GUILTY PLEA MEMORANDUM'S ACCEPTANCE WAS AN UNINTENTIONAL "GODSEND", BECAUSE HAD HE 'GONE TO TRIAL' FOURTEEN DAYS LATER, IT WOULD HAVE BEEN AN EVEN BIGGER MOCKERY OF JUSTICE AND FARCE. MR. O'MARA HAD THE CASE FOR SEVENTEEN MONTHS AND AS PREPARED AS HE WAS A TRIAL WITH NO INTERVIEWS, NO INVESTIGATION, NO DEFENSE WHATSOEVER, WOULD HAVE BEEN MORE OF A SHOW OF THE CONSCIENCE OF THIS COURT, THAN HIS SHAM OF "REPRESENTATION" ALREADY SHOWS.

D) PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL BEING MISTAKEN AS TO THE LAW AND RIGHT TO ALLOW DEFENDANT TO WITHDRAW HIS GUILTY PLEA.

"Q: Now, once he pleaded guilty and you talked to him about withdrawal of the pleas, did you have an assessment as whether or not the Judge would allow you to withdraw his pleas?

"A: Yeah, I felt the Judge would not allow him to." (AA 326)

If Counsel did not feel the Defendant could withdraw his plea, then the client had but one choice, to be sentenced to crimes he was innocent of. Counsel stated "My client wasn't here, here is the proof" (AA 315) What better reason to allow withdrawal than innocence or jurisdictional issues. O'Mara continued to show his inexperience and ineptitude when he did not object to the comments made by Her Honor on March 6, 2008, The State had a duty to speak also

"Court: Do you understand this is a permanent entry of plea?

"Defendant: I Do Your Honor.

"Court: You can't tell me in a week or two that you don't understand what is happening, You have to tell me now.

"Defendant: I Do Your Honor

"Court: And you won't be able to change your mind with regard to these pleas of guilt.

"Defendant: I do". (AA 26-27)

Counsel was misinformed, or uninformed that NRS 176.165 allows the withdrawal of a guilty plea prior to sentencing for any fair and just reason (innocence). O'Mara did nothing, the State stood silent, so how could the Defendant know he was being denied a Federal right. Such error of the canvass (and court officers) was serious enough that it violated Petitioner's constitutional right to a fair proceeding. It removed his choice, which he had the right to up until sentencing. This can not be deemed harmless, violating Fifth, Sixth and Fourteenth Amendments (Fed. Rules Crim. Proc. 11(d)(1); 11(d)(2)(b) & 11(h)(2).)

This misunderstanding of O'Mara continues to show his ongoing incompetence, or infidelity or ineffectiveness or all three." Williams v. Reid, 354 F.2d. 689.

E) Petitioner's Due Process Rights of the U.S. Constitutional Amendments of the Sixth and Fourteenth by both Counsel, O'Mara and Ada Viloria's Fraud on the Court

This is a 'bridge' claim between Grounds 1 and 2 as it deals with a constitutional violation of both O'Mara and Ada Viloria. This claim was presented to the State Courts as a ground to withdraw guilty plea. (AA 212-214) It is the same legal premise, just presented in a different approach. (Vs. Dunn., 564 F.2d 348 (9th Cir. 1977).)

As the Record and this Petition has shown, O'Mara had testified as to a conversation with Ada Viloria about his client not being in Nevada. (AA 315) But in addition the Record shows O'Mara 1) Failed to file a motion to dismiss the charge he had presented alibi evidence to Viloria for; 2) Made no statements or efforts to bring to the court's attention this evidence. It was not until the evidentiary hearing when his conduct as "an officer of the court" was under challenge, he did so.

For Ada Viloria to fight for and be "free to argue" for the conviction of a citizen she knew could more likely than not be actually innocent can NEVER be viewed as a harmless error. Her statements at sentencing in regards to Count 1, were not supported by any evidence but were a blatent attempt to bolster her weak, non-existing case in the eyes of her Honor. An aggrevating, egregious constitutional error. Judge Steinheimer had a right to know that the probable cause no longer existed or that the defendant was not in her jurisdiction at any time during Count 1's time frame. Having the defendant allocute to the "factual basis" of the faulty, fraudulent unsupported charges does not make the plea valid or constitutional.

By O'Mara not objecting to her comments, he confirmed his conflict of interest. Ada Viloria's actions (with O'Mara's blessing) can not be viewed as "accidental". Together they allowed the court to believe a material fact, that did not exist. They made a conscience effort to accomplish the desired unlawful objective, this petitioner's incarceration. To draw a connection or parallel between these "officers of the court" may be inferred by circumstantial evidence, and their recorded conduct.

(15)

GROUND TWO:

PETITIONER WAS DENIED HIS RIGHT TO A FAIR PROCEEDING IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BY THE CONDUCT AND ACTIONS OF THE PROSECUTING ATTORNIES.

A. Statement of Exhaustion:

THIS CLAIM WAS PRESENTED AS PART OF THE ENTIRE RECORD TO BOTH THE DISTRICT COURT AND NEVADA SUPREME COURT. AS PART I & II OF THE JULY 21, 2008 FILING IN CR07P 1728. (AA 187-201) IT WAS REVIEWED ON ITS MERITS BY THE NEVADA SUPREME COURT, IN PART, (AA 121-128).

B. Statement in Support of Claim:

"A PROSECUTOR HAS A DUTY TO BRING TO THE ATTENTION OF THE COURTS OR OF THE PROPER OFFICIALS ALL SIGNIFICANT EVIDENCE SUGGESTIVE OF INNOCENCE OR MITIGATION. AT TRIAL THIS DUTY IS ENFORCED BY THE REQUIREMENT OF DUE PROCESS, BUT AFTER A CONVICTION THE PROSECUTOR IS ALSO BOUND BY THE ETHICS OF HIS OFFICE TO INFORM THE APPROPRIATE AUTHORITY OF AFTER-ACQUIRED OR OTHER INFORMATION THAT CASTS DOUBT UPON THE CORRECTNESS OR VALIDITY OF A CONVICTION." (STATE V. BENNETT, 81 P.3d 1, 119 NEV. 589 (2003 QUOTING: IMBLER V. PACHTMAN, 424 US 667, 105 S.CT. 3375 (1985)

AS PART OF THE RECORD, D.A. GAMMICK, BY WAY OF ADA KELLI ANN VILORIA, WAS CLEARLY IN POSSESSION OF DOCUMENTS THAT PUT THE PETITIONER IN NEW YORK STATE UNTIL FEBRUARY 23, 1999, AND IN CALIFORNIA AS A RESIDENT UP TO AT LEAST AUGUST 16, 1999 (AA 314-315). IN ADDITION, AS PART OF THE ORIGINAL WRIT, TWO LETTERS WERE SENT, TO RICHARD GAMMICK ON APRIL 19, 2009, AND ADA HAILESTAD ON JUNE 15, 2009. THESE LETTERS WENT INTO DETAIL THE ALIBI EVIDENCE, COMPARED TO THE STATE'S CASE FOR COUNT 1. THE DOCUMENTS WERE ATTACHED TO EACH LETTER. (EX. "2".) SINCE MS. VILORIA HAD THE DOCUMENTS PRIOR TO SENTENCING, IN FACT EVEN PRIOR TO DRAFTING THE GUILTY PLEA MEMORANDUM IT TRIGGERED THE DUE PROCESS REQUIREMENTS OF PART ONE IN BENNETT & IMBLER, TO BRING THIS EVIDENCE TO THE COURTS ATTENTION. FURTHER, THE LETTERS, SENT PRIOR TO THE FILING OF THE PETITIONER'S ORIGINAL

WRIT OF HABEAS CORPUS, FILED ON JULY 21, 2009, TRIGGERED PART TWO OF BENNETT & IMBLER, TO BRING TO THE COURT'S ATTENTION THAT A REASONABLE DOUBT MAY HAVE COME TO LIGHT, THAT DID NOT PREVIOUSLY EXIST ON THE RECORD. SINCE SUCH A DECISION TO ACCEPT OR DENY A GUILTY PLEA IS ULTIMATELY THE COURTS POWER, JUDGE STEINHEIMER HAD AND CONTINUES TO HAVE THE RIGHT TO KNOW OF THIS EVIDENCE, BECAUSE A GUILTY PLEA WAIVES NUMEROUS CONSTITUTIONAL RIGHTS, THE RECORD MUST BE CLEAR OF ANY IMPROPRIETIES.

NOW FOR THE PURPOSE OF RULES REQUIRING THAT THERE BE A FACTUAL BASIS FOR A GUILTY PLEA, ALTHOUGH THE FACTS NEED NOT SHOW GUILT BEYOND A REASONABLE DOUBT, THERE MUST BE STRONG EVIDENCE OF GUILT. (SEE: STATE V. McVAY, 641 P.2A 857 (ARIZ. 1982)) "FACTUAL BASIS EXISTS FOR A PLEA, WHERE THE PROSECUTION PRESENTS EVIDENCE TO THE COURT AND SUCH EVIDENCE SHOWS THAT ALL THE ELEMENTS OF THE CRIME ARE PRESENT. STATE V. ROSE, 809 P.2d 553.

THE ALLEGATION FOR COUNT 1, AS THE STATE CLAIMS IS: THAT WHILE THE 'VICTIM WAS 12 YEARS OLD' (DOB. 8/4/86) (AA,10; AA45, AA46, AA,49, AA,50, AA,68, AA,69, AA,70) SHE SPENT THE NIGHT AT THE PETITIONER'S HOME IN RENO, NEVADA, A NUMBER OF TIMES, AND ONE MORNING WHILE DRIVING HER HOME, THEY STOPPED ON THE SIDE OF LONGLEY LANE, AND PROCEEDED TO HAVE SEXUAL INTERCOURSE IN THE BACK SEAT OF THE PETITIONER'S FORD TAURUS.

SO A PROPER ANALYSIS OF THE ALLEGATIONS IN COUNT 1, CURRENTLY UNDER ATTACK WOULD BE 1) THE AGE OF THE VICTIM IS A CRUCIAL ELEMENT IN THIS CHARGE; "IN A CASE WHERE AGE OF VICTIM OF CRIME IS AN ISSUE (ELEMENT) COMPETENT PROOF OF AGE IS ESSENTIAL." GAY V. SHERIFF, CLARK COUNTY, 508 P.2A 1, 89 NEV. 118 (NEV. 1973).

BECAUSE THE "VICTIM" TESTIFIED AT THE PRELIMINARY HEARING THAT SHE WAS POSITIVE SHE WAS 12 YEARS OLD, PETITIONER CONCEDES AS TO THIS ELEMENT. AGE CONFIRMED AND PROVED BY ADA VICORIA AS BEING "12 YEARS OLD". THAT PUTS THE TIME OF OFFENSE OR "WINDOW" TO BE BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999.

ELEMENT 2) THAT A CRIME OCCURED IN RENO, NEVADA IN A FORD TAURUS OWNED BY THE PETITIONER ON LONGLEY LANE, BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999, WITH THE TAURUS

BEING DESCRIBED AS FOLLOWS BY ADA GLEN HATLESTAD: "THE TAURUS IS A CRIME SCENE FOR ASHLEY." (AA 316)

THE "DOCUMENTED ALIBI EVIDENCE" DISCUSSED AT THE EVIDENTARY HEARING HAVE BEEN A PART OF THE OFFICIAL RECORD SINCE JULY 21, 2009. DATES ON SOME OF THE DOCUMENTS SHOW THE STATE KNEW AS EARLY AS APRIL 19, 2007, THREE MONTHS BEFORE EVEN THE PRELIMINARY HEARING, ON JULY 2, 2007. AT NO TIME HAVE THESE DOCUMENTS AUTHENTICITY BEEN QUESTIONED OR CHALLENGED. BUT ALL THE LOWER COURTS HAVE MADE THEIR DECISIONS AS IF THESE DOCUMENTS DON'T EXIST. SUCH EVIDENCE VIEWED IN LIGHT MOST FAVORABLE TO THE PROSECUTION CAN STILL NOT OVERCOME THE LACK OF A CRIME. THE FOLLOWING DETAILING OF THESE DOCUMENTS ONCE AGAIN SHOW HOW BOTH ELEMENTS OF THE CRIME UNDER ATTACK ARE DESTROYED. FOR THE PURPOSE OF THIS GROUND THIS EVIDENCE ATTACKS ALL THE CRIMES ORIGINALLY ALLEGED/CHARGED IN REGARDS ASHLEY BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999. (ALTERNATE NUMBERING COINCIDES WITH PART IX OF ORIGINAL WRIT OF HABEAS CORPUS)

1) DMV DOCUMENTS REFERED TO ON THE STAND BY O'MARA (AA 316) AND LETTER (EX "B") STATES THAT THE FORD TAURUS AKA: "CRIME SCENE FOR ASHLEY.":

"THE RECORDS OF THE DEPARTMENT OF MOTOR VEHICLES INDICATE THAT THE ABOVE REFERENCED [VIN: 1FALP52U4PG247860, YEAR/MAKE 1993 FORD TAURUS, GL, 4DR, SEDAN] WAS REGISTERED IN NEVADA STATE. WE SHOW THIS VEHICLE HAS BEEN REGISTERED FROM 06-06-00 TO 06-05-01 UNDER THE NAME OF BRENDAN DUNCKLEY." (EX "3")

2) TRANSCRIPTS OF ENROLLMENT AT THE CULINARY INSTITUTE OF AMERICA LOCATED AT "1946 CAMPUS DRIVE, HYDE PARK, N.Y. 12538-1499", WHICH HAS PETITIONER IN COLLEGE BETWEEN" 11/11/96 - 2/23/98 THIS DOCUMENT WAS "INTRODUCED" AS EXISTING, AS PART OF THE RECORD, BUT NEVER REVIEWED FOR IT'S MERIT. (AA 314) (EX. "4")

3) IRS HISTORY REPORT: PLACING THE PETITIONER IN NEW YORK STATE AND CALIFORNIA UNTIL 2000 WHEN PETITIONER MOVED TO RENO, NEVADA. (NOTE: P.S.I. HAVE PETITIONER MOVING TO RENO, NV. IN 2000 (AA 65)) THIS REPORT CONFIRMS PRESIDENCY OF PETITIONER BETWEEN 1997-2000, AND CONTAIN SPECIFIC DATA THAT CAN ONLY COME FROM THE I.R.S. (TAX ID NUMBER SOC. EMPLOYER) (EX. "5").

4) A FAX WAS SENT FROM THE MADERA COUNTY SHERIFF DEPARTMENT ON APRIL 18, 2007, TO RENO POLICE DEPARTMENT DETECTIVE Tom BROOME (LEAD/ONLY 'INVESTIGATOR TO ALL OF THE CHARGES UNDER ATTACK) THE SUBJECT: "1999-10667, BRENDAN DUNCKLEY, DOB, 7/4/76;" "DATE OF REPORT: 07-19-99, DISPATCHED TO: 44782 SILVER SPUR TRAIL IN AHWAHNEE" (MADERA COUNTY CALIFORNIA) AND: "I TRANSPORTED BRENDAN TO THE OAKHURST SUB-STATION." (DISPATCH ADDRESS IS THE SAME LISTED ON IRS FORMS AS PETITIONER'S RESIDENCY.) (EX."6")

5) ON AUGUST 16, 1999 PETITIONER WAS SERVED IN PERSON A "SUMMONS OF FAMILY LAW" FILED IN THE MADERA SUPERIOR COURT IN CASE NUMBER: CV03749: AT "HOME: 1) DATE: 8/16/99; 2) TIME: 2:45 PM; 3) ADDRESS: 955 E. NEES, #267, FRESNO, CA." (EX"7")

THE IMPORTANCE OF THESE DOCUMENTS IS CLEAR THAT THEY ALL SHOW THAT EVIDENCE EXISTED THAT NEGATED BOTH THE ELEMENTS TO COUNT 1. AS THIS PETITIONER HAS ALREADY ESTABLISHED THE ELEMENTS ARE: 1) OCCURED BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999; AND 2) "SCENE OF THE CRIME" WAS PETITIONER'S Ford TAURUS.

BUT THE COLLEGE TRANSCRIPTS (AND PSI) PUT PETITIONER IN NEW YORK ATTENDING THE CULINARY INSTITUTE OF AMERICA UNTIL FEBRUARY 23, 1999. (SO THE "WINDOW" WOULD BE FEBRUARY 23, 1999 TO AUGUST 13, 1999)

THEN WE HAVE THE MADERA COUNTY SHERIFF REPORT FAXED TO RENO POLICE DEPARTMENT, ON APRIL 18, 2007, THAT PLACES PETITIONER'S RESIDENCY TO BE "44782 SILVER SPUR TRAIL, AHWAHNEE, CALIFORNIA" AS OF THE ORIGINAL RESPONSE REPORT DATED: "7-19-1999". (THAT WOULD PLACE THE "WINDOW" BETWEEN JULY 19, 1999 AND AUGUST 13, 1999)

EXCEPT THIS COURT CAN NOT OVERLOOK THE MADERA SUPERIOR COURT FILING OF THE "SUMMONS OF FAMILY LAW." IN THE "SUMMONS OF SERVICE" IT SHOWS PERSONAL SERVICE TO BRENDAN DUNCKLEY AT HIS HOME, LOCATED: 955 E. NEES, #257, FRESNO, CALIFORNIA, AT 2:45 P.M. ON AUGUST 16, 1999. (SO THIS COURT DOCUMENT HAS PETITIONER IN FRESNO, CA. PAST THE CLOSING DATE OF AUGUST 13, 1999, SO THE PROVERBIAL "WINDOW" IS SHUT.) THIS DOCUMENTS ALSO EXIST TO CONFIRM THE PETITIONER'S RESIDENCY AND DO NOT PLACE HIM IN RENO, NEVADA (WASHOE COUNTY DISTRICT ATTORNEY JURISDICTION) UNTIL 2000.

THESE ALIBI DOCUMENTS HAVE BEEN PROPERLY PRESENTED TO ALL STATE COURTS, BUT THEY WERE ERRONEOUSLY IGNORED. FOR THE STATE TO HAVE THESE DOCUMENTS AND NOT INTRODUCE THEM WHEN THEY HAD A CONSTITUTIONAL DUTY TO DO SO IS INEXCUSABLE. THE STATE KNEW THROUGH "DILIGENT" POLICE WORK THAT DEFENDANT WAS NOT IN NEVADA. HOW ELSE WOULD THE PRO. KNOW TO CONTACT MADERA COUNTY SHERIFF DEPARTMENT. THIS IS RELEVANT SINCE IT PROVES THE ELEMENT(S) FOR COUNT 2 (AGE) IS NOT PRESENT. HOW CAN THE PETITIONER DRIVE THE "VICTIM" HOME WHEN HE WAS NOT EVEN IN NEVADA. DMV REGISTRATION HISTORY DOCUMENTS SHOW THAT THE "SCENE OF THE CRIME" WAS NOT EVEN OWNED/REGISTERED BY THE PETITIONER UNTIL 06-05-00. SO IF PETITIONER DID NOT HAVE "SCENE OF THE CRIME" UNTIL JUNE 5, 2000, HOW COULD HE AND THE "VICTIM" HAVE HAD SEX IN IT BETWEEN THE TIME FRAME ALLEGED BY THE "VICTIM" AND ADA VICORIA. THE STATE HAD ALL THESE DOCUMENTS, THERE IS ABSOLUTLY NO DISAGREEMENT WITH THIS FACT. NOR IS THE FACT THAT THEY CONTINUED TO ALLOW AN INDIVIDUAL (PETITIONER) TO 1) BE CHARGED; 2) BE CONVICTED; AND 3) FIGHT FOR THE INDIVIDUAL TO REMAIN CONVICTED FOR A CHARGE THAT IS DEVOID OF ANY EVIDENCE. SUCH CONDUCT, BEHAVIOR, AND ACTIONS CONSTITUTE A MISCARRIAGE OF JUSTICE.

"A PROSECUTOR, WHETHER HE BE STATE, COUNTY OR FEDERAL, IS A REPRESENTATIVE OF NOT AN ORDINARY PARTY TO THE CONTROVERSY, BUT TO A SOVEREIGNTY WHOSE OBLIGATION TO GOVERN IMPARTIALLY IS AS COMPELLING AS ITS OBLIGATION TO GOVERN AT ALL, AND WHOSE INTERESTS, THEREFORE IN A CRIMINAL PROCEEDING IS NOT THAT IT SHOULD WIN A CASE, BUT THAT JUSTICE SHALL BE DONE. AS SUCH HE IS IN A PECULIAR AND VERY DEFINITE STATE, SINCE AS THE SERVENT OF THE LAW, THE TWO-FOLD AIM OF WHICH IS THAT THE GUILTY SHOULD NOT ESCAPE, OR INNOCENT SUFFER. HE MAY PROSECUTE WITH EARNESTNESS AND VIGOR - INDEED HE SHOULD DO SO. BUT WHILE HE MAY STRIKE HARD BLOWS, HE IS NOT AT LIBERTY TO STRIKE FOUL ONES, TO OBTAIN A CONVICTION AT ALL COSTS." Berger v. U.S., 295 US 78, 55 S.CT. 629 (1935) & U.S. v. Agurs, 427 US 97 AT 111, 96 S.CT. 2392, (1976).

SINCE THE STATE CAN PRODUCE ABSOLUTLY NO EVIDENCE THAT A CRIME EVEN OCCURED IN CONNECTION TO COUNT 1, AND THE DOCUMENTED EVIDENCE HAS SHOWN THE "VICTIM'S" TESTIMONY TO BE IMPOSSIBLE, THE STATE NEVER HAD 'JURISDICTION', AND AS SUCH THE CONVICTION IS A VIOLATION OF NUMEROUS CONSTITUTIONAL RIGHTS. IN FACT THE STATES ENTIRE CASE FOR ASHLEY, ITS ENTIRE "INVESTIGATION" IS A SINGLE PARAGRAPH OF A CONVERSATION BETWEEN DETECTIVE TOM BROOME AND THE 'VICTIM' ASHLEY WHILE SHE WAS INCARCERATED FOR DRUG CHARGES. AN INTERESTING NOTE IS THE TESTIMONY OF O'MARA AT AA330:

"Q: HAVE YOU EVER SEEN A WRITTEN REPORT OF THE ALLEGATIONS FOR ASHLEY?

"A: I HAVE NO IDEA. IS THERE A REPORT IN THE DISCOVERY?

"Q: APPARENTLY NOT."

SO THE QUESTION OF FACT AND LAW ARISES, IF NO 'WRITTEN REPORT' WAS FILED BY THE 'VICTIM' (NRS 171.083) AND NO EVIDENCE EXISTS THAT ANY INVESTIGATION WAS DONE BY DETECTIVE BROOME, DID THE STATE EVER RECEIVE JURISDICTION IF NO ACTUAL POLICE REPORT (INVESTIGATION) EVER OCCURED BEFORE THE STATUTE OF LIMITATION EXPIRED. (NRS 171.095) THE ONLY REPORT IS A SUPPLEMENTAL ("DRAFT") FOR 05-34027 (A DISMISSED CASE) NUMBER '6', WITH A SINGLE PARAGRAPH OF A CONVERSATION BETWEEN BROOME AND ASHLEY. THIS NARRATIVE IS ALL THE STATE HAS, NO PHYSICAL RECORDING OF THE CONVERSATION, NO TRANSCRIPTS, NO PROOF IT HAPPENED EXCEPT THIS "NARRATIVE". ASHLEY IS NOT EVEN LISTED AS A VICTIM, AND NO POLICE REPORT INVESTIGATION WAS EVER GENERATED. AT THE BEST THE CASE IS HEARSAY WHICH CAN NOT OVERCOME THE ALIBI EVIDENCE, ESPECIALLY WITH NO ACTUAL PHYSICAL EVIDENCE OF ANY CRIME. (EX "9")

2) <u>PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS BY THE STATE PRESENTING A CONTRACT UNDER FALSE PRETENSE WITH THE INTENT TO DECEIVE AND DEFRAUD</u>

A GUILTY PLEA STANDS AND FALLS AS A WHOLE, IF A PART IS DEFECTIVE THE WHOLE IS DEFECTIVE, AND IS CONSTITUTIONALLY VALID ONLY TO THE EXTENT THAT IT IS 'VOLUNTARY AND INTELLIGENT.' BRADY V. US, 427 US 742, 748, 90 S.CT. 1463 (1970). A GUILTY PLEA THAT IS CONTRARY TO THIS WOULD VIOLATE A DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENTS OF

THE UNITED STATES CONSTITUTION.

THE COURTS HAVE LONG HELD THAT A PLEA DOES NOT QUALIFY AS INTELLIGENT UNLESS A CRIMINAL DEFENDANT FIRST RECEIVES "REAL NOTICE OF THE TRUE NATURE OF THE CHARGES AGAINST HIM, THE FIRST AND MOST UNIVERSALLY RECOGNIZED REQUIREMENT OF DUE PROCESS." Smith v. O'Grady, 312 US 329, 334, 61 S.CT. 572 (1941)(EMPHASIS ADDED). THE STATE WILL CLAIM AS ADA HATLESTAD'S ARGUMENT AT THE EVIDENTIARY HEARING WAS, THE PETITIONER WAS CANVASSED, PRESENTED WITH THE INFORMATION OR CHARGING DOCUMENT, PRIOR TO PLEADING GUILTY. ALSO THAT HIS ATTORNEY HAD ADVISED HIM EFFECTIVELY. (THAT HAS BEEN SHOWN TO BE INACCURATE) WITH THIS "ARGUMENT" THE STATE COULD ARGUE THAT THE GUILTY PLEA WAS ALLEGUTED TO BY THE DEFENDANT AND IS THEREFORE INTELLIGENTLY AND VOLUNTARILY ENTERED INTO.

SUCH CIRCUMSTANCES, STANDING ALONE WOULD HOLD MERIT, IF IN FACT THE ASSUMED FACTUAL BASIS EXISTED TO 1) PROVE STATE HAD SUBJECT MATTER JURISDICTION OVER PETITIONER; 2) CONSTITUTIONALLY CHARGE THE DEFENDANT TO COUNT 1; AND 3) FOR THE STATE TO HAVE THE CONSTITUTIONALLY SUPPORTED FACTUAL BASIS TO PRESENT THE GUILTY PLEA MEMORANDUM. (SEE: Henderson v. Morgan, 426 US 637, 647, 96 S.CT. 2253 (1976). (AA.09-15).

PETITIONER NONETHELESS MAINTAINS THAT HIS GUILTY PLEA WAS UNINTELLIGENTLY ENTERED BECAUSE THE DISTRICT ATTORNEY FRAUDULENTLY AND INTENTIONALLY FAILED TO INFORM THE DEFENDANT AND THE COURT THAT THE ESSENTIAL ELEMENTS OF THE CRIME(S) FOR WHICH HE WAS CHARGED DOES NOT ACTUALLY EXIST. TO BE MORE SPECIFIC UNDER CONTRACT LAW SUCH CONDUCT COULD BE 'GENERATING/DRAFTING A CONTRACT UNDER FALSE PRETENSES WITH THE INTENT TO DECEIVE OR DEFRAUD.'

BY DRAFTING THE "DEAL" KNOWING IT TO BE FALSE IS FRAUDULENT CONDUCT. THE FOLLOWING EXERT WAS WRITTEN BY ADA VILORIA, AROUND THE TIME OF HER CONVERSATION WITH O'MARA:

> "4. I UNDERSTAND THE CHARGE(S) AGAINST ME AND THE ELEMENTS OF THE OFFENSE(S) WHICH THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT AT TRIAL." (AA10) (EMPHASIS ADDED).

"5. I UNDERSTAND THAT I ADMIT TO THE FACTS WHICH SUPPORT ALL THE ELEMENTS OF THE OFFENSE(S) BY PLEADING GUILTY. I ADMIT THAT THE STATE POSSESSES SUFFICIENT EVIDENCE THAT WOULD RESULT IN MY CONVICTION." (AA 11) (EMPHASIS ADDED)

BY THE STATE DRAFTING THE DOCUMENT CITED ABOVE, KNOWING IT 1) WOULD NOT BE ABLE TO OBTAIN A CONVICTION OF GUILTY BEYOND A REASONABLE DOUBT, AT TRIAL, AND 2) NONE OF THE "ELEMENTS" EXISTED, IT CREATED A FRAUDULENT CONTRACT. HAVING THE PETITIONER PLEAD INTO THE RECORD A FALSE STATEMENT, DOES NOT MAKE IT TRUE. SIMULAR TO WRITING "THE SKY IS PURPLE" DOES NOT MAKE IT SO.

IN CORPUS JURIS SECUNDUM ("CJS") UNDER 'CONTRACTS' §160 A RELEVANT FACT COMES TO LIGHT;

"AS A GENERAL RULE, ANY FALSE MISREPRESENTATION OF A MATERIAL FACT, MADE WITH KNOWLEDGE OF ITS FALSITY AND WITH THE INTENT THAT IT SHALL BE ACTED ON BY ANOTHER IN ENTERING INTO A CONTRACT, AND WHICH IS ACTED ON, CONSTITUTES FRAUD AND WILL ENTITLE THE PARTY DELEIVED THEREBY TO AVOID THE CONTRACT."

"HE WHO SIGNS A DOCUMENT REASONABLY BELEIVING IT TO BE SOMETHING QUITE DIFFERENT THAN IT IS CANNOT BE BOUND BY THE TERMS OF THE DOCUMENT." Operating Eng. Pension Trust v. Gilliam, 737 F.2d 1501, 1504 (9th Cir. 1984). THE STATE HAD NO EVIDENCE AND NO 'ELEMENTS' FOR COUNT 1, SO THEIR "SUPPRESSION OF THE TRUTH BY ONE OF TWO CONTRACTING PARTIES IS AS AFFIRMATIVE A FRAUD AS A FALSE STATEMENT OF FACT, SINCE IT PREVENTS THE MINDS OF THE PARTIES FROM MEETING ON THE ACTUAL TERMS OF THE CONTRACT." Morris v. McGough, 230 S.W. 1092 (CJS §161). SUPPRESSION OF TRUTH OR SILENCE TO THE TRUTH IS AN ACTIONABLE FRAUD WHEN THERE IS A DUTY TO SPEAK. SUCH AS DUE PROCESS. (SEE Bennett & Imbruce.)

TO SATISFY CONSTITUTIONAL STANDARDS, PROSECUTORS (VICARI) MUST CREATE A GUILTY PLEA DESIGNED TO NOT ONLY BE VOLUNTARY, BUT IT MUST NOT BE THE PRODUCT OF MISREPRESENTATION OR OTHER IMPERMISSIBLE CONDUCT BY STATE AGENTS. WHERE MISCONDUCT BY THE STATE KEEPS THE DEFENDANT AND [COURT] UNAWARE OF CIRCUMSTANCES TENDING TO NEGATE DEFENDANT'S GUILT GUILTY PLEAS IN IGNORANCE OF THOSE FACTS MAY NOT BE KNOWING AND INTELLIGENT THOUGH IT IS

OTHERWISE VOLUNTARY. (SEE: STATE V. GARDNER, 885 P.2d 1144 (IDAHO 1994).)

UNDER BOTH NEVADA AND FEDERAL LAW, LAWYERS, AS OFFICERS OF THE COURT, MUST CONDUCT THEMSELVES IN WAYS THAT DO NOT IMPEDE WORK (DESCRIPTION) OF THE COURTS AND GIVE GENUINE, AND NOT FALSE SERVICE TO THEIR CLIENTS. THE PETITIONER WAS ENTITLED TO SUCH CONDUCT AS THE STATE'S "CLIENT." SPECIFICALLY ADA VILORIA VIOLATED NEVADA RULES OF PROFESSIONAL CONDUCT RULE 3.8 (ABA MODEL RULE 3.8; SUP. CT. RULES, RULE 181, SUB. 8): SPECIAL RESPONSIBILITY OF A PROSECUTOR: THE PROSECUTOR IN A CRIMINAL CASE SHALL: (A) REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE." IN ADDITION TO RULE 3.3 (ABA MODEL RULE 3.3; SUP. CT. RULES, RULE 172, 172(1)(A,D)) "CANDOR TOWARD THE TRIBUNAL. (A) A LAWYER SHALL NOT KNOWINGLY: 1) MAKE A FALSE STATEMENT OF FACT OR LAW TO A TRIBUNAL OR FAIL TO CORRECT A FALSE STATEMENT OF MATERIAL FACT OR LAW PREVIOUSLY MADE TO THE TRIBUNAL BY A LAWYER."

THE FRAUDULENT CONDUCT OF ADA VILORIA DRAFTING THIS FAULTY, FRAUDULENT "CONTRACT" AND HER FALSE STATEMENTS AT SENTENCING, CERTAINLY CONSTITUTES THAT THIS PETITIONER'S PLEA WOULD BE VIEWED AS CONSTITUTIONALLY INVALID. AS STATED PRIOR IF PART OF THE 'DEAL' IS A VOIDABLE ISSUE THE ENTIRE DOCUMENT IS VOIDABLE.

THERE CAN BE NO DOUBT, THAT SUCH CIRCUMSTANCES INHERENTLY RESULTED IN A COMPLETE MISCARRIAGE OF JUSTICE, AND PRESENTS EXCEPTIONAL CIRCUMSTANCES THAT JUSTIFY COLLATERAL RELIEF UNDER 28 U.S.C. §2254.

AS THE RECORD IN THIS CASE HAS ALREADY UNAMBIGUOUSLY DEMONSTRATED THAT PETITIONER'S PLEA TO THESE CHARGES ARE INVALID AS A MATTER OF CONSTITUTIONAL LAW, PETITIONER HUMBLY REQUESTS THAT HIS CONVICTION BE VACATED, AND ALLOW HIM TO PLEAD ANEW. "GIVEN THE FACT THAT THE RECORD [REVIEWING ALIBI DOCUMENTS, FINALLY] NOW ESTABLISHES THAT THE PLEA OF GUILTY TO THE CHARGE(S) WAS CONSTITUTIONALLY INVALID, THE PETITIONER [SHOULD BE] VIEWED AS PRESUMPTIVELY INNOCENT OF THOSE OFFENSES, ACCORDINGLY UNLESS HE AGAIN PLEADS GUILTY (HOWEVER UNLIKELY) THE BURDEN IS ON THE GOVERNMENT TO PROVE GUILT BEYOND A REASONABLE DOUBT." BOUSLEY V US, 523 US 614, 118 S.Ct. 1604.

GROUND THREE:

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE CLAIM OF ACTUAL INNOCENCE AS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. STATEMENT OF EXHAUSTION:

THIS CLAIM WAS ORIGINALLY PRESENTED TO HER HONOR CONNIE J. STEINHEIMER IN THE PETITIONER'S ORIGINAL WRIT OF HABEAS CORPUS, AND AS PART OF THE RECORD ON APPEAL TO THE NEVADA SUPREME COURT. (AA 159-164.)

B. STATEMENT IN SUPPORT OF CLAIM:

THE CASES THE COURTS USE PRIMARILY ARE THE SAME 'STANDARD' THIS PETITIONER USES TO BUILD AND PRESENT HIS CLAIM OF ACTUAL (FACTUAL) INNOCENCE. "TO ESTABLISH ACTUAL INNOCENCE PETITIONER MUST DEMONSTRATE THAT IN LIGHT OF ALL THE EVIDENCE, IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM." SCHLUP V. DELO, 513 US 298, 327-328, 115 S.CT. 851, 867, 868 (1995) (EMPHASIS ADDED). AS THIS PETITIONER HAS ESTABLISHED, THIS ENTIRE PETITION HAS SHOWN, AND AS THE ACTUAL EVIDENCE PROVES, HIS PLEA OF GUILTY, HIS PLEA CANVASS, AND HIS PLEA COLLOQUY "HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." MURRAY V. CARRIER, 477 US 496, 106 S. CT. 2639 (1986) & BOUSLEY.

UNDER AN ACTUAL INNOCENCE CLAIM THE PETITIONER MUST PRESENT EVIDENCE TO SUPPORT THE CLAIM. TO SUPPORT THE CONSTITUTIONAL ERROR ALLEGATION THE "NEW EVIDENCE" CAN BE EXCULPATORY SCIENTIFIC EVIDENCE, CREDIBLE DOCUMENTS, TRUSTWORTHY EYEWITNESS ACCOUNT, OR CRITICAL PHYSICAL EVIDENCE, THAT WAS NOT PRESENTED AT TRIAL. "NEW EVIDENCE DOES NOT NECESSARILY MEAN NEWLY DISCOVERED EVIDENCE. ALSO INCLUDED IS EVIDENCE AVAILABLE BUT NOT PRESENTED AT TRIAL, OR IMPROPERLY EXCLUDED FROM THE RECORD. "WHERE AN ITEM CONSTITUTES RELIABLE NEW EVIDENCE, IT MUST BE VIEWED [REVIEWED] IN THE CONTEXT OF THE ENTIRE RECORD AS A WHOLE." LEE V. LAMBERT, 607 F. SUPP. 2d 1164 (2009) (EMPHASIS ADDED)

A MISCARRIAGE OF JUSTICE HAS BEEN DEFINED AS A CONSTITUTIONAL VIOLATION THAT HAS

PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY-INNOCENT. (HOUSTON V. ALLEN, 370 F.3d 75, 81 (1st Cir. 2004.)

NUMEROUS COURTS HAVE STAYED CLEAR AND FOCUSED WITH PRECIDENTS THAT WOULD MAKE THE PETITIONER'S CONVICTION AND CONTINUED INCARCERATION ON THESE CHARGES A VIOLATION OF DUE PROCESS. AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FORBIDS THE STATE TO CONVICT A PERSON OF A CRIME WITHOUT PROVING THAT THE ELEMENTS OF THE CRIME EXIST. FLORE V. WHITE, 531 US 225, 121 S.CT. 712 (2001); JACKSON V. VIRGINIA, 443 U.S 311 99 S.CT. 2781 (1979) & IN RE WINSHIP, 397 U.S 358, 364, 90 S.CT. 1068 (1970.)

AS THE INSTANT CASE AT BAR HAS SHOWN SUBSTANTIAL DOCUMENTATION HAS BEEN PROVIDED TO SUPPORT THIS CLAIM OF ACTUAL INNOCENCE TO COUNT 1: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (NRS 201.230), AS WELL AS THE ORIGINAL CHARGE OF SEXUAL ASSAULT ON A CHILD UNDER FOURTEEN YEARS OLD. (NRS 200.366) A SPECIAL NOTE SHOULD BE GIVEN THAT IN REGARDS TO COUNT 2 THERE EXISTS A DOCUMENT, TO BE SPECIFIC EXCULPATORY SCIENTIFIC EVIDENCE "CRITICAL" PHYSICAL EVIDENCE, THAT WAS NOT PRESENTED TO THE DISTRICT COURT PRIOR TO THE ACCEPTANCE OF THE GUILTY PLEA. UNFORTUNATLY THERE IS A DISAGREEMENT AS TO THE TIME FRAME THIS PETITIONER BECAME AWARE OF ITS EXISTANCE, BUT THERE IS NO QUESTION THAT THIS MATERIAL FACT WAS WITHHELD FROM HER HONOR JUDGE STEINHEIMER. SHE CERTAINLY HAD A RIGHT TO KNOW OF A DNA TEST THAT CLEARED THE DEFENDANT OF THE CHARGE OF SEXUAL ASSAULT.

THIS SCIENTIFIC TEST RESULT SHOWS A FEW UNDISPUTED ITEMS: 1) THE DNA TEST (WHICH WAS CONDUCTED WITHIN TEN MINUTES OF THE ALLEGED "ATTACK") SHOWED "NO FOREIGN DNA TO SOURCE, BRENDAN DUNCKLEY, WAS OBTAINED FROM GENITAL SWABS". 2) DNA TEST RESULT WAS COMPLETED ON MAY 21, 2007 (PRELIMINARY HEARING WAS JULY 2, 2007) BUT THE RECORD SHOWS THAT THE STATE DID NOT PRESENT THIS EVIDENCE (COLLECTED ON SCENE) TO THE JUSTICE COURT, DURING THE 'VICTIMS' TESTIMONY THAT SOMEONE ATTACKED HER BY HAVING HER PREFORM ORAL SEX ON HIM, SHE STATES SHE BIT HIM HARD ENOUGH TO DRAW BLOOD. 3) THE D.A BY WAY OF VILORIA, FINALLY GAVE THIS REPORT TO O'MARA ON FEBRUARY 7, 2008. (EX. "10") (AA 255-258)

THE STATE HAS ARGUED THAT PETITIONER KNEW AND HAD THE REPORT, BUT STILL INSISTED ON PLEADING GUILTY TO A CHARGE THE SCIENTIFIC EVIDENCE CLEARED HIM OF. THE DNA REPORT WAS INCLUDED IN THE ORIGINAL WRIT. AS THE PETITIONER TESTIFIED AT THE EVIDENTIARY HEARING HE FIRST SAW THE REPORT WHEN OMARA TRANSFERED HIS FILE IN JULY 2009. SINCE THERE IS NO MENTION OF THIS EXONERATING EVIDENCE IN EITHER OF THE LETTERS SENT TO D.A. GAMMICK OR ADA HATLESTAD (EX"2") AND SELF-PRESERVATION WOULD DICTATE NO 'SANE' PERSON WOULD IGNORE DNA THAT CLEARS HIM. COMMON SENSE WOULD BE THAT IT IS MORE LIKELY THAN NOT THAT THE PETITIONER DID NOT KNOW OF THE ACTUAL TEST RESULT.

THE DNA TEST RESULT IN COMPARISON TO THE "TESTIMONY" (WHICH IS THE ONLY EVIDENCE) IS FOR A JURY TO DECIDE. BUT IT DOES RAISE THE QUESTION IF THE STATE COULD NOT PROVE SEXUAL ASSAULT, BECAUSE EVIDENCE ELIMINATES PENETRATION (NO GENETIC TRANSFER), HOW DID THE PETITIONER BENEFIT BY THE STATE SHIFTING ITS BURDEN OF PROVING GUILT, TO A CHARGE IT KNEW IT HAD EVIDENCE TO THE CONTRARY TO. (BOUSLEY & WILBERS), IT GIVES RISE TO A MISCARRIAGE OF JUSTICE OR MANIFEST INJUSTICE.

FOR THIS REPORT TO NOT BE 'ON THE RECORD' UNTIL JUNE 3, 2011, AND TECHNICALLY NOT EVEN THEN, AS THIS REPORT WAS DISCUSSED, BUT NEVER REVIEWED BY ANY STATE COURT IN THEIR DECISIONS, EVEN THOUGH IT WAS A PART OF THE RECORD SINCE JULY 21, 2009. ALL THE DOCUMENTS REFERED TO, THOUGH NEVER REVIEWED, IN THE EVIDENTIARY PROCEEDINGS HAVE CLEARLY ESTABLISHED A MANIFEST INJUSTICE AND MISCARRIAGE OF JUSTICE. IN THE LEAST THEY SHOW THAT DURING THE ENTIRE TIME OF THE OFFENSE OR 'WINDOW' (AUGUST 14, 1998 - AUGUST 13, 1999) THAT THE PETITIONER WAS AT ANOTHER PLACE SO FAR AWAY, THAT UNDER SUCH CIRCUMSTANCES THAT HE COULD NOT, WITH NORMAL EXERTION, HAVE REACHED THE PLACE WHERE THE CRIME WAS ALLEGED TO HAVE BEEN COMMITTED, SO AS TO HAVE PARTICIPATED IN THE COMMISSION OF THE CRIME. ASHLEY CLAIMS TO HAVE SPENT THE NIGHT AT THE PETITIONER'S HOME NUMEROUS TIMES IN RENO, WHEN SHE WAS TWELVE (12). BUT THE DOCUMENTS HAVE HIM RESIDING IN HYDE PARK, NY. UNTIL FEBRUARY 23, 1999 (EX"4") AND AHWAHNEE, CALIFORNIA UNTIL JULY 19, 1999 (EX"6") FRESNO, CALIFORNIA AS OF AUGUST 16, 1999 (EX"7"), SO HE DID NOT LIVE IN RENO UNTIL 2000. (EX"5") ALSO HE DID NOT EVEN PURCHASE THE "SCENE OF THE CRIME" UNTIL JUNE 5, 2002. (EX."3")

THE STATE HAS ABSOLUTELY NO EVIDENCE THAT A CRIME EVEN occured. THE TESTIMONY OF ASHLEY IS QUESTIONABLE AT BEST. SHE COULD GIVE NO SPECIFIC DATES, EXCEPT "I WAS 12", THERE IS NO WRITTEN REPORT BY ASHLEY TO LAW ENFORCEMENT. (NRS 171.083(1) NRS 171.095) THERE ARE NO WITNESSES TO THIS CRIME, THE STATE HAS NEVER PRESENTED EVEN A SCINTILLA OF PHYSICAL EVIDENCE OF ANY CRIME, LET ALONE SEXUAL ASSAULT ON A CHILD, OR LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS OF AGE. AS STATED PRIOR ON PAGE 21 OF THIS INSTANT PETITION, THE FACT THAT NO ACTUAL POLICE REPORT WAS GENERATED OR INVESTIGATION (CASE) NUMBER OPENED FOR THIS ALLEGATION CAN NOT BE OVERLOOKED.

IN FACT AS THE EXHIBIT "9" SHOWS, WHILE DETECTIVE BROOME WAS INVESTIGATING 07-4446 (COUNT 2) HE NOTICED PETITIONERS NAME AND CONNECTED IT TO 05-34627 (DISMISSED BY JUSTICE COURT) AND THE 2005 "VICTIM" LURA, WHO MENTIONED HE SHOULD SPEAK TO MICHELLE (DISMISSED CHARGE BY JUSTICE COURT) WHO SUGGESTED ASHLEY AS A POSSIBLE VICTIM. SO THIS ENTIRE CONVICTION OF LIFE IS BASED ON A FOURTH PAGE PARAGRAPH OF THE SIXTH SUPPLEMENTAL, WHICH WAS NOT EVEN A FINAL REPORT BUT A "DRAFT". SHE (ASHLEY) IS NOT EVEN LISTED AS A VICTIM ON THE "DRAFT". AS STATED PRIOR, THERE IS NO COLLABERATING EVIDENCE TO CONFIRM THIS IS NOT SIMPLY THE CREATION OF AN OVERLY ZEALOUS, VINDICTIVE DETECTIVE. HE WAS AFTER ALL THE ONLY INVESTIGATOR, AND HE HAD ALL THE EVIDENCE INCLUDING THE DNA REPORT. (EX "9") (EX "6") (EX "10").

IN THIS CLAIM OF ACTUAL EVIDENCE, O'MARA'S TESTIMONY IS ONCE AGAIN RELEVANT, WHEN HE TESTIFIED THAT HE PROVIDED THE ALIBI DOCUMENTS TO ADA VILORIA, AND AS THE "STATE AGENCIES (EX "3";"5","6","5","9","10") (DMV, MADERA COUNTY, IRS, MADERA SHERIFF, R.P.D., DMV) DOCUMENTS SHOW THAT AN EXPERIENCED DETECTIVE CERTAINLY KNEW OF ALL THESE DOCUMENTS, AND IN MOST CASES, THE RECORD SHOWS HE HAD THEM. BUT INSTEAD OF THE PROPER COURSE OF ACTION, DISMISSAL (NOT DRAFT) SINCE THE DOCUMENTS SHOWED 1) PETITIONER DID NOT LIVE IN RENO UNTIL 2000, 2) PETITIONER DID NOT OWN FORD TAURUS UNTIL JUNE 5, 2000, AND 3) DNA SHOWED NO DNA TRANSFER FROM JESSICA ON PETITIONER'S PENIS, DETECTIVE BROOME FAILED TO DO ANYTHING WITH THIS EVIDENCE, AND ASSISTED THE STATE IN CONVICTING A MAN WHO IS MOST

LIKELY INNOCENT.

CERTAINLY ENOUGH EVIDENCE EXISTED, EVEN BEFORE THE PRELIMINARY HEARING, TO RAISE SERIOUS DOUBT TO WHETHER THE STATE HAD EVEN THE SLIGHTEST CHANCE OF HAVING THESE CHARGES BOUND OVER, HAD ALL THE EVIDENCE BEEN INTRODUCED TO THE COURT, AS IT LEGALLY SHOULD HAVE BEEN. BECAUSE THERE IS NO QUESTION THAT THE STATE HAD THIS ACTUAL INNOCENCE, ALIBI EVIDENCE PRIOR TO THE PRELIMINARY HEARING, AND NEVER BROUGHT IT TO THE COURTS ATTENTION, THEY CERTAINLY VIOLATED THIS PETITIONER'S DUE PROCESS RIGHTS. SINCE ALL THIS EVIDENCE WAS 1) KNOWN AND 2) CREDIBLE, THERE IS A STRONG REASONABLE POSSIBILITY THAT AN INNOCENT MAN MAY HAVE BEEN CONVICTED. DEFINETLY ENOUGH EVIDENCE EXISTED, THAT HAD THIS BEEN PRESENTED TO THE COURTS, AT ANY STAGE, OR, IF THIS WENT TO TRIAL A REASONABLE JUROR WOULD HAVE REASONABLE DOUBT AS TO GUILT. (BENNETT & IMBLER)

IN THE LEAST, AS MULTIPLE DUE PROCESS VIOLATIONS HAVE MORE THAN LIKELY OCCURED, THERE CAN BE NO DOUBT THAT THE EVIDENCE VIEWED IN FAVOR OF THE STATE CAN NOT OVERCOME THE SERIOUS LACK OF CONFIDENCE THIS CONVICTION SHOWS. THIS PETITIONER COULD ASK FOR ALL CHARGES IN CONNECTION TO ASHLEY TO BE DISMISSED, AS IT IS CLEAR BY THE OVERWHELMING EVIDENCE THAT THE STATE SHOULD HAVE DONE THIS BACK IN 2007, SINCE IT IS IMPOSSIBLE FOR HIM TO HAVE COMMITTED THIS CRIME, AS ALLEGED. BUT SUCH A DECISION IS IN THIS COURT'S DISCRETION.

IT IS HOWEVER REQUESTED AND FULLY WARRENTED TO ALLOW THIS PETITIONER TO WITHDRAW HIS GUILTY PLEA. AS THIS ACTUAL INNOCENCE CLAIM IS SUPPORTED BY EVIDENCE THAT SHOW ALL THE CONSTITUTIONAL ERRORS (CUMULATIVELY) "HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." (SCHLUP, MURRAY & BOUSLEY, SUPRA) TO ALLOW THE PETITIONER TO BE SENT BACK TO THE SECOND JUDICIAL DISTRICT COURT, WITH THE INSTRUCTIONS TO ALLOW THE WITHDRAWAL OF GUILTY PLEA, AND BE ALLOWED TO PLEAD ANEW, AND IF DEEMED PROVEN AND WARRENTED, DISMISSAL OF COUNT 1 (ALL RELATED TO ASHLEY) ON GROUND OF STRONG EVIDENCE PROVING ACTUAL INNOCENCE.

CONCLUSION:

SINCE THE CONVICTION UNDER ATTACK IS BASED ON A GUILTY PLEA MEMORANDUM THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS REVIEWED UNDER A SIMILAR TWO PRONG TEST OF STRICKLAND, AS TO THE PERFORMANCE PRONG WHICH IS THE SAME, UNDER HILL V. LOCKHART, 474 US 52, 57, 106 S.CT. 366 (1985) THE PREJUDICE PRONG IS SLIGHTLY DIFFERENT. TO ESTABLISH THE ELEMENT OF PREJUDICE, THE PETITIONER MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, HE WOULD HAVE NOT PLEAD GUILTY, AND WOULD HAVE INSISTED ON GOING TO TRIAL. PETITIONER STATED SPECIFICALLY THAT AT THE EVIDENTIARY HEARING. (AA 260; 264; 265)

FOR THE VARIOUS "REASONS" AND CLAIMS SET FORTH ABOVE, IN FULL LIGHT OF ALL THE EVIDENCE UNDER A 'DEFERENTIAL' STANDARD OF REVIEW, THIS PETITIONER HAS SHOWN THAT HIS COUNSEL'S PREFORMANCE FELL BELOW AND OUTSIDE THE WIDE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE, AND THAT THERE IS "A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE PETITIONER WOULD HAVE INSISTED ON GOING TO TRIAL." (STRICKLAND & HILL)

MOREOVER PETITIONER HAS SHOWN BY THE RECORD, DEFENSE ATTORNEY O'MARA WAS GIVEN AMPLE OPPORTUNITY TO 1) PRESENT ANY TRIAL STRATEGY OR TACTIC, 2) STATE ON THE RECORD THAT EVIDENCE EXISTS THAT THE STATE IS AWARE OF, THAT SHOWS HIS CLIENT WAS NOT IN THE STATE FOR. BUT HE TESTIFIED TO NO STRATEGY, NO INVESTIGATION, NO GOOD REASON TO NOT INVESTIGATE, BUT INSISTS HIS CLIENT ADEMATLY INSISTED ON PLEADING GUILTY TO GET PROBATION. (AA 328) BUT AS CITED PRIOR IN CRONIC, (SUPRA) HE STILL HAD A DUTY TO SET THE RECORD STRAIGHT. A TRUE ADVOCATE MIGHT HAVE SAID SOMETHING ALONG THESE LINES AT THE ENTRANCE OF THE PLEA:

"YOUR HONOR, EVIDENCE EXISTS THAT PROVES MY CLIENT TO BE OUT OF THE STATE FOR THE ENTIRE TIME FRAME FOR COUNT 2, IN ADDITION DOCUMENTS EXIST TO SHOW MY CLIENT DID NOT EVEN OWN THE TAURUS, THE ALLEGED GUN OF THE CRIME FOR COUNT 1, UNTIL WELL AFTER THE SAME TIME FRAME EXPIRED. I HAD BROUGHT THIS TO THE STATE'S ATTENTION, BUT

THEY HAVE CONTINUED TO ACT IN BAD FAITH. I HAVE INSISTED THAT MY CLIENT NOT TAKE THIS DEAL, BUT HE IS UNDER THE BELIEF HE WILL GET PROBATION, I CAN NOT AS HIS ADVOCATE ~~ALLOW~~ THIS OBJECTION TO NOT BE MADE. THIS PLEA OF GUILTY IS BEING ENTERED AGAINST THE ADVICE OF COUNSEL. FURTHER, I WOULD ASK THE COURT TO DISMISS COUNT 1, AS THE STATE IS AWARE, MY CLIENT WAS NOT EVEN IN THE STATE OF NEVADA, AND THEREFORE NOT IN THIS COURT'S JURISDICTION, DURING THE ENTIRE WINDOW OF OFFENSE."

NOWHERE ON THE RECORD IS ANYTHING LIKE THIS STATED. NOR STRATEGY, OR TACTICS, OR ANY CLEAR EXAMPLE OF ANY "GUIDING HAND" (POWELL V. ALABAMA, 287 US 45, 69, 53 S.CT. 55) O'MARA'S WHOLESALE ABANDONMENT OF THE PETITIONER'S ALIBI DOCUMENTED EVIDENCE, FAILURE TO PERFORM EVEN A PRELIMINARY INVESTIGATION WITHOUT AN ADEQUATE EXPLANATION CONSTITUTED A CONSTITUTIONAL DEFICIENCY IN HIS REPRESENTATION. HIS FAILURE TO 1) TAKE OBVIOUS STEPS TO GET THIS EVIDENCE ADMITTED, 2) FAILURE TO SUBJECT THE STATE'S CASE TO ANY ADVERSARIAL TESTING, (CRONIC, SUPRA.) 3) TO RAISE THE INSUFFICIENCY OF EVIDENCE TO CONVICT (LET ALONE EVEN TO CHARGE) KNOWING NO REASONABLE JURY COULD FIND GUILT BEYOND A REASONABLE DOUBT. (JACKSON V. VIRGINIA, 433 US 307, 99 S.CT. 2781 (1979)) CONSTITUTES DEFICIENT ASSISTANCE OF COUNSEL. SINCE AS THE RECORD CLEARLY SHOWS, THE ALIBI DOCUMENTS WERE KNOWN BY VILORIA AND O'MARA, BUT AT NO POINT, WAS THIS EVIDENCE ADMITTED PRIOR TO THE ORIGINAL PETITION FILED JULY 21, 2009.

GIVEN THE FACTS OF THIS CASE, THE STATE COURT'S DECISION TO DENY PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WITHOUT CONSIDERING THE RELEVANT ALIBI EVIDENCE, IN COMPARISON TO THE STATE'S CASE AND THE RECORD WAS ERRONEOUS, AS JACKSON WOULD BE RELEVANT. TO STATE THAT COUNSEL WAS EFFECTIVE AND THAT NO PREJUDICE WAS SHOWN, WAS AN 'UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES' (28 U.S.C. § 2254 (d)(1) (STRICKLAND V. HILL) THE DECISION TO DENY WAS UNCONSTITUTIONAL BECAUSE IT STATED THE PETITIONER FAILED TO SHOW HOW HE WAS PREJUDICED.

AS THIS COURT IS AWARE THE PETITIONER HAS THE BURDEN TO SHOW WHAT THE FAILED INVESTIGATION, AND FAILED INTRODUCTION OF THE DOCUMENTED EVIDENCE WOULD HAVE YIELDED. ONE WAY TO VIEW

THE CONDUCT OF O'MARA IN VIEW OF PREJUDICE OF HIS CLIENT, IS THIS: IS THERE A LIKELIHOOD THAT HER HONOR WOULD NOT HAVE ACCEPTED THE ENTERANCE OF THE PLEA, HAD THE COURT KNOWN OF OR BEEN AWARE OF THE EXISTANCE OF THE HIDDEN ALIBI EVIDENCE KNOWN BY BOTH O'MARA AND VILORIA? IF THERE IS A REMOTE POSSIBILITY THAT SHE WOULD NOT HAVE ACCEPTED THE PLEA, THEN PETITIONER HAS SHOWN "REASONABLE PROBABILITY". CLEAR PREJUDICE, DUE TO COUNSEL'S CONSTITUTIONAL DEFICIENCIES, BUT ALSO PREJUDICE OCCURED BY ADA VILORIA.

VILORIA SEEMS TO HAVE FORGOTTEN A BASIC FUNDAMENTAL CONSTITUTIONAL RIGHT, THAT THE STATE MAY NOT BRING CRIMINAL CHARGES AGAINST AN INDIVIDUAL UNLESS SUPPORTED BY PROBABLE CAUSE, AND ONCE CHARGES ARE INSTITUTED, MUST REVEAL TO THE COURT ANY INFORMATION WHICH NEGATES THE EXISTANCE OF PROBABLE CAUSE. Berger v. U.S., 295 US 78, 79, 55 S.Ct. 629 (1935) & People v. Trevino, 704 P.2d 719, 39 Cal. 3d 667 (1985) (EMPHASIS ADDED). "THE PROSECUTOR MUST EXECUTE THE DUTIES OF THIS REPRESENTATIVE OFFICE DILIGENTLY AND FAIRLY, AVOIDING EVEN THE APPEARANCE OF IMPROPRIETY THAT MIGHT REFLECT POORLY ON THE STATE." (Trevino, supra at 682)

DOCUMENTED, UNDISPUTED ALIBI EVIDENCE WAS KNOWN TO THE STATE, AND THE COURT AT THE EVIDENTARY HEARING, BUT IN ITS DECISION JUDGE STEINHEIMER STATED:

"THERE WAS AN EVIDENTARY HEARING, BUT, DESPITE HAVING A FULL AND FAIR OPPORTUNITY TO DO SO, DUNCKLEY DID NOT PRESENT ANY EVIDENCE IN SUPPORT OF THE VAST MAJORITY OF THE PLEADED CLAIMS." (AA 342).

RELYING ONLY ON TESTIMONY (AA 363, 364, 364) "IF OMITTED EVIDENCE CREATES A REASONABLE DOUBT, THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED. THIS MEANS THE OMISSION MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD." US v. Agurs, 427 US 97 AT 112, 96 S.Ct. 2392 (1976) (28 U.S.C. §2254(d)(1)). Nunnes v. Mueller, 350 F. 3d 1045 (9th Cir)

FURTHER DELAY AND THE CONTINUED MISCARRIAGE OF JUSTICE, CAN ULTIMATELY RESULT IN THE INCREASE OF PREJUDICE OF A FAIR HEARING FOR BOTH THE STATE AND PETITIONER. AS THE RELIEF

SOUGHT BY THIS PETITIONER IS IN THE LEAST TO ALLOW THE WITHDRAWAL OF THE GUILTY PLEA MEMORANDUM, ALLOWING THE PETITIONER TO PROCEED TO TRIAL, AWARDING THE STATE THE OPPORTUNITY TO PRESENT ITS "CASE."

FOR THE STATE TO RESPOND TO THIS PETITION WITH AN ANSWER OTHER THAN SOMETHING ALONG THE LINES OF:

"SINCE WE CAN NOT SAY WITH ABSOLUTE CERTAINTY THAT NO CONSTITUTIONAL VIOLATIONS HAVE RESULTED IN THESE PROCEEDINGS, AND AS THE DOCUMENTED EVIDENCE 1) CREATES A REASONABLE DOUBT THAT DID NOT PREVIOUSLY EXIST, 2) HAS GONE BEYOND DEMONSTRATING DOUBT ABOUT HIS GUILT, AND SHOWN HE IS PROBABLY INNOCENT, AND 3) BRINGS TO LIGHT THAT THERE IS NO STRONG EVIDENCE OF ACTUAL GUILT. (STATE V. McVAY, 661 P.2d 867). IT WOULD BE APPROPRIATE TO ALLOW PETITIONER THE RIGHT TO WITHDRAW HIS GUILTY PLEA AND TO REMAND THIS CASE BACK TO THE DISTRICT COURT. FURTHER THE STATE REQUESTS THAT IT BE ALLOWED A REASONABLE AMOUNT OF TIME, NOT TO EXCEED FORTY-FIVE (45) DAYS, TO GATHER NEW EVIDENCE TO PLACE PETITIONER AS A RESIDENT IN RENO, NEVADA DURING THE WINDOW OF OPPORTUNITY FOR COUNT 1, OR THE STATE WILL FILE TO DISMISS WITH PREJUDICE.

WOULD BE TO CONTINUE THE FARCE OF CONSTITUTIONAL VIOLATIONS OF THE MOCKERY OF JUSTICE. AS THE CUMULATIVE ERRORS ARE CLEAR AND PREJUDICIAL ENOUGH TO REQUIRE OF, IN THE LEAST, WARRENT REVERSAL. (KILLIAN V. PEOPLE, 282 F.3d 1204, 1211 (9th cir. 2002).)

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PRAYER FOR RELIEF:

ACCORDINGLY, PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT:

1) ISSUE A WRIT OF HABEAS CORPUS TO HAVE PETITIONER TO BE ABLE TO WITHDRAW HIS GUILTY PLEA, AND BE DISCHARGED FROM HIS UNCONSTITUTIONAL CONFINEMENT;

2) REVIEW THE ALIBI DOCUMENT THAT HAVE BEEN OVERLOOKED IN ALL THE STATE COURTS EVEN THOUGH ALL THE DOCUMENTS WERE A PART OF THE ORIGINAL RECORD, REVIEWING THESE DOCUMENTS TO DETERMINE THE DECISION FOR THIS PETITION; (28 U.S.C. § 2254(d)(1).) (EX. "3-8, 10") (EX. 9 - NOT PART OF THE ORIGINAL RECORD)

3) RENDER A DECISION AS TO THE EVIDENCE TO DETERMINE IF IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, IF A MISCARRIAGE OF JUSTICE HAS OCCURED;

4) GRANT SUCH OTHER AND FURTHER RELIEF AS IN THE INTEREST OF JUSTICE, THAT THIS HONORABLE COURT MAY DEEM TO BE APPROPRIATE.

DATED THIS 31st DAY OF MAY, 2013.

Brendan Dunckley #1023236

BRENDAN DUNCKLEY #1023236

PETITIONER IN PRO PER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419

DATED THIS 26th DAY OF OCTOBER, 2016.

Brendan Dunckley

(19)

Certificate of Service

The undersigned does hereby certify that a true and correct copy of this Petition For Writ of Habeas Corpus to Exhaust State Claims, has been served upon the below addresses by way of U.S. mail on this the 28th day of October, 2016, by placing this petition into the hands of prison staff, NDOC L.C.C. Legal (mail) Library supervisor.

Washoe County District Attorney
Chris Hicks
P.O. Box 30083
Reno, Nevada 89520-3083

Clerk of the Court
Second Judicial District Court
P. O. Box 30083
Reno, Nevada 89520-3083

Brendan I Dunckley

Brendan Dunckley (#1023236)

Petitioner in Pro Se

Affirmation in Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceeding, Petition For Writ of Habeas Corpus to Exhaust State Claims, does not contain the social security number of any person, in relation to District Court case no. CR07-1728

Dated this 28th day of October, 2016.

Brendan I Dunckley

Brendan Dunckley (#1023236)

Petitioner in Pro Se

	EXHIBIT NAME	PAGES
3	EXHIBIT 1	
4	NEVADA SUPREME COURT (SEALED) FILE	58 PAGES
5	EXHIBIT 2	
6	LETTER TO DISTRICT ATTORNEY GAMMICK & ADA HASTEDT	18 PAGES
7	EXHIBIT 3	
8	DEPT. OF MOTOR VEHICLE REGISTRATION DOCUMENTS	3 PAGES
9	EXHIBIT 4	
10	CULINARY INSTITUTE OF AMERICA	1 PAGE
11	EXHIBIT 5	
12	INTERNAL REVENUE RECORDS	9 PAGES
13	EXHIBIT 6	
14	MODESTO COUNTY SHERIFF REPORT TO RENO VEHICLE DETECTIVE T. BLOOME	2 PAGES
15	EXHIBIT 7	
16	SUMMONS OF FAMILY LAW & PROOF OF SERVICE	2 PAGES
17	EXHIBIT 8	
18	LETTER TO BRENDAN DUNKLEY FROM DAVID C. O'MARA	1 PAGE
19	EXHIBIT 9	
20	R.P.D. "DRAFT" 05-03427, SUPP. NO. 6	5 PAGES
21	EXHIBIT 10	
22	DNA LAB RESULT (FAX FROM: ADA VILLALTA TO: DAVID O'MARA	2 PAGES
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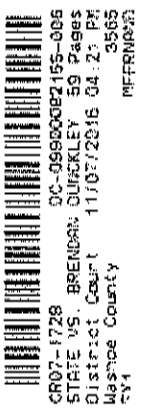

EXHIBIT 1

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

Electronically Filed
Jun 25 2012 11:25 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 59958

APPELLANT BRENDAN DUNCKLEY'S OPENING BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
Second Judicial District

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Docket 59958 Document 2012-19852

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I. STATEMENT OF JURISDICTION

On June 3, 2011, the District Court conducted an evidentiary hearing. (AA 226-346.) On December 29, 2011, the District Court entered its Order Denying Motion to Withdraw Guilty Pleas and Findings of Fact, Conclusions of Law, and Judgment. (AA 353-367.) On December 30, 2011, Mr. Dunckely timely filed his Notice of Appeal. (AA 348-368.) Pursuant to NRS 34.575(1), this Court has jurisdiction over Mr. Dunckely's appeals.

II. STATEMENT OF ISSUES

Whether The District Court Erred In Failing To Find That The State Breached The Plea Bargain.

Whether The District Court Erred In Failing To Find That Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

Whether The District Court Erred In Denying Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

III. STATEMENT OF THE CASE

On July 12, 2007, the State filed in The Second Judicial District Court an Information against Mr. Dunckley charging him with Count I Sexual Assault on a Child, Count II Lewdness With a Child Under the Age of Fourteen Years, Count III Statutory Sexual Seduction, and Count IV Sexual Assault. (AA 1-4.) On February 28, 2008, the State filed against Mr. Dunckley in the District Court

an Amended Information charging with Count I Lewdness with a Child Under the Age of Fourteen Years and Count II Attempted Sexual Assault. (AA 5-8.)

On March 6, 2008, Mr. Dunckley pleaded guilty to both counts in the Amended Information, pursuant to a Guilty Plea Memorandum. (AA 16-31.) District Judge Connie J. Steinheimer accepted Mr. Dunckley's guilty pleas and set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. *Id.*

On August 11, 2008, the District Judge entered Judgment against Mr. Dunckley as follows: Count I, Lewdness with a Child Under the Age of Fourteen, NRS 200.230 – imprisonment in the Nevada Department of Prisons for the maximum term of Life with the minimum parole eligibility of 10 years; Count II, Attempted Sexual Assault, NRS 193.330 and NRS 200.366 – imprisonment in the Nevada Department of Prisons for the maximum term of One Hundred Twenty Months with the minimum parole eligibility of 24 months for Count II to be served concurrently with sentence imposed in Count I with credit for four days' time served. (AA 32-33.)

Mr. Dunckely timely appealed the judgment. (AA 90-93.) On May 8, 2009, the Nevada Supreme Court entered an Order of Affirmance of the Judgment. *Id.*

On July 21, 2009, Mr. Dunckley filed a Petition for Writ of Habeas Corpus (Post Conviction). (AA 94-170.) On March 3, 2010, Mr. Dunckely filed a Motion to Withdraw Guilty Plea. (AA 187-201.) On March 23, 2010, Mr. Dunckely filed a Supplemental Petition for Writ of Habeas Corpus. (AA 219-225.) On June 3, 2011, the District Court conducted oral argument on the Motion to Withdraw Guilty Plea and an evidentiary hearing on the Petition and Supplemental Petition for Writ of Habeas Corpus. (AA 226-346.) On December 29, 2011, the District Court entered its Order Denying Motion to Withdraw Guilty Pleas and Findings of Fact, Conclusions of Law, and Judgment. (AA 353-367.)

On December 30, 2011, Mr. Dunckely filed his Notices of Appeal. (AA 348-368.)

IV. STATEMENT OF FACTS

By April 16, 2007, the State had charged Mr. Dunckley with four sex crimes which carried life sentences and three of which were alleged to have occurred seven to nine years earlier. (AA 1-4.) At the same time, the rape and murder of Brianna Denison had received a great deal of notoriety in Reno because her body had just been found. (AA 262 & 318.) On May 7, 2007 Reno Justice Court appointed David O'Mara from the Jack Alain conflict group to represent Mr. Dunckley. (AA 320.) At the time of his appointment, Mr. O'Mara

had only handled "three to four sex cases." (AA 293.) Mr. O'Mara was paid a "flat fee" of $500.00 by the Jack Alain group for the legal work he was appointed to do for Mr. Dunckley. (AA 293 & 320.) Accordingly, Mr. O'Mara was to be paid the same $500.00 whether he worked one hour or 1,000 hours on Mr. Dunckley's case. (AA 319-320.) Mr. O'Mara had the authority to hire an investigator, but even with his client facing multiple life sentences, Mr. O'Mara neglected to do so. (AA 320.) In addition, Mr. O'Mara, by his own admission, failed to even interview the victims, two of whom were alleged to have been less than 14 years old at the time of the alleged crimes. *Id.*

On their very first meeting, Mr. Dunckley informed Mr. O'Mara that he had not committed the alleged crimes. (AA-253.) In addition, Mr. Dunckley provided Mr. O'Mara with documentation of the fact that Mr. Dunckley was not even in the State of Nevada at the time most of the crimes allegedly occurred. (AA 252-254.) Mr. Dunckley provided Mr. O'Mara with divorce documentation, showing him to be in California. *Id.* Mr. Dunckley provided Mr. O'Mara with car registration documentation, showing that he did not even own the automobile that one of the crimes was alleged to have occurred in until after the alleged crime occurred. *Id.* If the alleged crime were to have occurred in Mr. Dunckley's automobile, the documentation demonstrated that the alleged victim was over the age of 14 at the time of the crime, and the statute of

limitations had long ago run. (AA 255-256.) Mr. Dunckley provided tax documentation, showing he lived in another state at the time of some of the alleged crimes. (AA 254.) Finally, Mr. Dunckley provided Mr. O'Mara with school transcripts, showing Mr. Dunckley to be living in New York State at the time of some of the alleged crimes. (AA-101.) Mr. Dunckley then asked Mr. O'Mara to conduct an investigation into his alibi evidence. (AA-253.)

One of the crimes charged that Mr. Dunckley forced one of the alleged victims to perform oral sex on him. (AA 3.) The victim of that alleged crime had a blood-alcohol content of .226% at the time of the alleged crime. (AA 67.) The victim claimed she bit Mr. Dunckley's penis forcefully four times. (AA 67 & 281.) Yet, an examination of Mr. Dunckley's penis immediately after the alleged crime showed no bit marks; and a DNA test of Mr. Dunckley's penis taken immediately after the alleged crime showed no DNA from the alleged victim. *Id.* Unfortunately for Mr. Dunckley, although Mr. O'Mara claims he did, Mr. O'Mara failed to share the DNA results with Mr. Dunckely until after Mr. Dunckely had pleaded guilty and had been sentenced. (AA 256 & 297.)

Mr. Dunckely had an alibi defense to the three older sex crimes because he was not even in the State at the time they had allegedly been committed. (AA 252-254.) In addition, the charge by the alleged victim of the forced oral sex was without merit – she had a .226% BA at the time and her allegations of

forceful bites and oral sex were contradicted by lack of bite marks and lack of her DNA. (AA 67 & 281.) Indeed, Mr. Dunckely testified that had he seen the DNA report before he pleaded to this crime, he would not have pleaded. (AA 257-258.) Mr. O'Mara had the DNA report on February 7, 2008, but Mr. Dunckely did not plead guilty to this crime until March 6, 2008. (AA 258-259.)

On February 28, 2008, the State filed against Mr. Dunckley in the District Court an Amended Information charging him with Count I Lewdness with a Child Under the Age of Fourteen Years and Count II Attempted Sexual Assault. (AA 5-8.)

On March 6, 2008, Mr. Dunckley pleaded guilty to both counts in the Amended Information. (AA 16-31.) The District Court accepted Mr. Dunckley's guilty pleas. *Id.* Both Mr. O'Mara and the State informed the District Court as follows:

> **Mr. O'Mara**: Your honor, there's been negotiations with the district attorney's office to set this out five to six months so that Mr. Dunckley can get sexual offender therapy during that period of time. And basically the D.A. is giving him every opportunity to try to qualify for probation and to do the things that will be beneficial for him to present to you at sentencing. So she's allowed for a five- to six-month extension so that he can get those type of therapy classes, and so we'd ask for that type of time before sentencing.
>
> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-27-28.) The District Court set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. (AA 29.)

Mr. Dunckely complied in all respects with his end of the plea agreement – he attended all counseling sessions and obtained the Psychosexual Evaluation/Risk Assessment which found that Mr. Dunckely "DOES NOT REPRESENT A HIGH RISK TO REOFFEND SEXUALLY...." (AA 75-89; *capitalization in original* at p. 85.) Moreover, during the many months that he was on bail, Mr. Dunckely complied with all conditions of his bail and followed the law. (AA 33-89.)

Despite her placing her agreement on the record that

> Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

and despite the fact that Mr. Dunckely had complied in all respects with the plea agreement, the conditions of his bail, and all laws, Ms. Viloria vigorously, inappropriately, and in violation of the spirit of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. (AA 44-51.) The District Court accepted Ms. Viloria's arguments and sentenced Mr. Dunckely to imprisonment in the

Nevada Department of Prisons for Life with the minimum parole eligibility of 10 years and a concurrent 120 to 24 months.

V. SUMMARY OF ARGUMENT

The State deprived Mr. Dunckely of both due process and equal protection under the law when the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation after Mr. Dunckely had complied in all respects with the Guilty Plea Memorandum, the conditions of bail, and all laws.

Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

The District Court Denied Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

VI. ARGUMENT

A. The State Breached The Plea Bargain.

1. Standard of Review:

This Court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State*, 102 Nev.

241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.*

2. Argument:

The State knowingly and intentionally offered Mr. Dunckley an illusory Guilty Plea Memorandum which required Mr. Dunckley to spend months obtaining a psychosexual evaluation in accordance with NRS 176.139. Indeed, during the guilty plea hearing counsel for both the defense and the State informed the District Court as follows:

> **Mr. O'Mara**: Your honor, there's been negotiations with the district attorney's office to set this out five to six months so that Mr. Dunckley can get sexual offender therapy during that period of time. And basically the D.A. is giving him every opportunity to try to qualify for probation and to do the things that will be beneficial for him to present to you at sentencing. So she's allowed for a five- to six-month extension so that he can get those type of therapy classes, and so we'd ask for that type of time before sentencing.
>
> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-27-28; *underlining added.*)

Mr. Dunckley complied in all respects with the terms of the Guilty Plea Memorandum – Mr. Dunckley attended all required classes and appointments and obtained the appropriate psychosexual evaluation in accordance with NRS

176.139 that would have allowed him probation. (AA-75-89.) Moreover, Mr. Dunckely complied in all respects with the conditions of his bail and complied with all laws. (AA 33-89.)

Yet the State deprived Mr. Dunckely of the benefit of his bargain. The State vigorously, inappropriately, and in violation of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. The State used charges it could not prove during a time of heightened anxiety because of the Brianna Dennison rape and murder investigation to con an inexperienced, ineffective, and inadequately paid attorney with a plea offer the State had no intention of fulfilling. The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation. Indeed, the State expressly stated on the record as an officer of the court:

> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

(AA- 28.) However, the State deprived Mr. Dunckley of the benefit of probation by acting in bad faith thereby depriving Mr. Dunckley of the sole benefit to him of the Guilty Plea Memorandum. The State had no intention of allowing Mr. Dunckley probation and proved its intention to deprive Mr. Dunckley of the benefit of his bargain through its inappropriate sentencing

arguments. Mr. Dunckely's conduct for the entire time he was on bail was exemplary – he complied in all respects with the guilty plea memorandum, the conditions of his bail and all laws. Despite her representations to the District Court that "I want to see what he does between now and then," Ms. Viloria vigorously argued, not only for no probation, but argued for a sentence well in excess of that recommended by the Division of Parole and Probation in the Presentence Investigation Report. A plea agreement includes an implied obligation of good faith and fair dealing. *U.S. v. Jones*, 58 F.3^{d} 688 (D.C. Cir. 1995); and the State breached the Guilty Plea Memorandum by acting in bad faith. Notwithstanding the State's bad faith, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. *Santobello v. New York*, 404 U.S. 257 (1971).

As this Court held in *Citti v. State*, 107 Nev. 89, 91, 807 P.2^{d} 724, 726 (1991) (*quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2^{d} 1215, 1216 (1986)).

> When the State enters a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' ... The violation of the terms or 'the spirit' of the plea bargain requires reversal."

The Due Process and Equal Protection Clauses of the Fourteenth Amendment mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *accord, Bryant v. Smith*, 102 Nev.

268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State*, 110 Nev. 1009, 879 P.2d 60 (1994).

Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation. Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

B. Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

1. Standard of Review:

This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

2. Argument:

The State charged Mr. Dunckley with counts of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. To defend himself, Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, divorce records, and IRS records,

to corroborate his alibi that he was not in the State of Nevada at the time some of the crimes were alleged to have occurred and provided his attorney with alibi witnesses that could corroborate his whereabouts. Mr. Dunckley's attorney failed to seek funds to conduct an investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

In addition, there was no corroborating evidence in support of the alleged crimes of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. In fact, there was a stunning lack of evidence – there was no DNA; there were no bite marks, as the victim alleged; and there were no physical or psychological examinations conducted on any of the victims. Moreover, there was no police report for the lewdness charges, and therefore, a plausible, if not meritorious statute of limitations argument because both women were over 21 years old. To make matters worse, one of the victims had a blood alcohol content of 0.226% at the time of one of the alleged crimes. Finally, some of the crimes were alleged to have occurred years prior to the State bringing charges against Mr. Dunckley. Accordingly, the evidence in support of the alleged crimes consisted of the testimony of the alleged victims; and that testimony was highly suspect, but crucial for a conviction at trial. Mr. Dunckley's attorney failed to independently

interview any of the victims.

In *Warner v. State of Nevada*, 102 Nev. 635, 729 P.2d 1359 (1986), this Court held that trial counsel who failed to conduct a pretrial investigation and failed to interview victims in a case involving charges of lewdness with a child under the age of fourteen years and sexual assault denied his client his Sixth Amendment right to the effective assistance of counsel, left his client without a defense, and was so deficient as to render the trial result unreliable – exactly the case here.

Significantly, Mr. O'Mara failed to provide Mr. Dunckely with the DNA results until after Mr. Dunckely had pleaded guilty and had been sentenced. Mr. Dunckely discovered the DNA results in the file he received from Mr. O'Mara while in the Lovelock Correctional Center. (AA 255-256.) In comparing the time Mr. O'Mara received the plea offer from the State and the time Mr. O'Mara received the DNA results from the State, Mr. Dunckely discovered for the first time that Mr. O'Mara received the DNA results after he received the plea offer, but before Mr. Dunckely entered into the Guilty Plea Memorandum. *Id.* Mr. Dunckely believed that the DNA exonerated him from the crimes of sexual assault and attempted sexual assault. *Id.* Had Mr. Dunckely known of the DNA results, Mr. Dunckely would not have entered into the Guilty Plea Memorandum. *Id.*

For his part, Mr. O'Mara does not recall whether or not actually showed the DNA test to Mr. Dunckely, but states that he discussed the DNA results with Mr. Dunckely. (AA 297.) However, Mr. O'Mara is not credible. First, Mr. O'Mara testified that "Mr. Dunckely was moving me towards that position of trial." (AA 298.) If Mr. Dunckely was attempting to persuade Mr. O'Mara to try his case, it makes no sense whatsoever that Mr. Dunckely would decide to plead guilty after receiving evidence that he believed would exonerate him. Second, Mr. O'Mara had every incentive not to try the case – he had little experience in sexual assault cases and he was being paid a flat fee of $500.00. He had already conducted a preliminary hearing and numerous court appearances in this case. Mr. O'Mara had zero incentive to try Mr. Dunckely's case and failed to inform Mr. Dunckely of the DNA results.

Mr. Dunckley's attorney failed to conduct a pretrial investigation into the alleged underlying crimes or into any potential mitigating circumstances or defenses, failed to interview any of the victims whose credibility was crucial for a conviction, and failed to inform Mr. Dunckely of the DNA evidence. Mr. Dunckley's attorney's performance was deficient to the point that he deprived Mr. Dunckley of any defense and provided the District Court and Mr. Dunckley with a completely unreliable outcome and that deficient performance prejudiced Mr. Dunckley. Competent counsel would have sought a court-ordered

investigator, had that investigator explore with his client the facts surrounding the underlying crime and any mitigating circumstances and Mr. Dunckley's alibi defense. Competent counsel would have interviewed the witnesses. After all, that is a requirement that this Court felt so strongly about this Court embodied that requirement into published case law. *Warner, supra.* Finally, competent counsel would have provided Mr. Dunckely with the DNA evidence.

There is no reasonable trial and/or sentencing strategy designed to effectuate Mr. Dunckley's best interest that would have justified his attorney's failures in this regard. Moreover, the independent investigation would have shown Mr. Dunckley's alibi defense was true and that Mr. Dunckley was innocent. The independent investigation and interview of the victims would have also shown that the alleged victims lacked sufficient credibility because of alcohol impairment, age, and/or the length of time between the alleged crime and the trial to support a conviction. Any decision that Mr. Dunckley's attorney may have made not to conduct a pretrial investigation could not have been informed and could not have constituted a reasonable professional judgment. Had Mr. Dunckley's attorney conducted a pretrial investigation and interview of the victims, Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault.

Accordingly, this Court should allow Mr. Dunckely to withdraw his

guilty plea.

C. The District Court Denied Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

1. Standard of Review:

This Court evaluates claims of improper sentencing by the abuse of discretion standard. *Martinez v. State*, 114 Nev. 735, 961 P.2d 143 (1998)

2. Argument:

During sentencing, District Court made the following statement about Mr. Dunckley's request for probation as provided in his Guilty Plea Memorandum:

> The Court: .... I know you plead to something that allows for a lesser offense, but it does not allow for probation.

(AA 60.) The District Court deprived Mr. Dunckley of the benefit of the Guilty Plea Memorandum through an ex post facto application of NRS 176A.110. According to the terms of the Amended Information, Mr. Dunckley allegedly committed Count I, Lewdness with a Child under the Age of Fourteen Years, a violation of NRS 201.230, "on or between the 14th day of August A.D. A.D., 1998, and the 13th day of August A.D. A.D., 2000, or thereabout...." (AA 5, lines 23 – 25.)

At the time the alleged crime occurred, NRS 176A.110(1) and (3)(j) permitted probation for a person convicted of "Lewdness with a child pursuant

to NRS 201.230." At the time of sentencing, however, the Nevada Legislature had amended NRS 176A.110 to eliminate probation for a person who had committed lewdness with a child pursuant to NRS 201.230. The District Court applied the later version of NRS 176A.110 ex post facto to Mr. Dunckley. The Ex Post Facto Clause of the United States Constitution prohibits laws which make more burdensome the punishment for a crime, after its commission. The Ex Post Facto Clause prohibits, inter alia, laws which "make more burdensome the punishment for a crime, after its commission." *Collins v. Youngblood*, 497 U.S. 37, 52 (1990); *Flemming v. Oregon Board of Parole*, 998 F.2^{d} 721, 723 (9th Cir. 1993). "[T]o fall within the ex post facto prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. 423, 430 (1987) (*quoting Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

Mr. Dunckley was deprived of both due process and equal protection under the law and subjected to improperly harsher sentencing because the District Court applied the later version of NRS 176A.110 ex post facto to Mr. Dunckley. Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request for post-conviction habeas relief and remand with instruction to allow him to withdraw his guilty plea.

VIII. 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 in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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.

I hereby certify that pursuant to NRS 239B.030, no social security numbers are contained within this document.

DATED: June 25, 2012.

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IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 25, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

/s/Barbara A. Ancina
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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 24 2012 03:59 p.m.
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Clerk of Supreme Court

BRENDAN DUNCKLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 59958

RESPONDENT'S ANSWERING BRIEF

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Docket 59958 Document 2012-26904

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY, No. 59958

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

I. Statement of the Issue

Did the district court err in denying Dunckley's post-conviction habeas claim that his counsel was ineffective for failing to develop certain defenses, which forced him to plead guilty, where Dunckley did not present evidence of his defenses at the habeas hearing, and where Dunckley's counsel testified he investigated all of Dunckley's defenses and counseled Dunckley to go to trial, but Dunckley rejected that advice and pleaded guilty?

Did the prosecutor breach the plea agreement by arguing for a prison sentence where the plea agreement provided that the State retained the right to argue for an appropriate sentence?

Does this Court's ruling on direct appeal that the district court used the correct sentencing statute bar Dunckley's argument that the district court sentenced him under the incorrect sentencing statute?

II. Summary of the Argument

This is an appeal from the district court's order denying Dunckley's post-conviction petition for a writ of habeas corpus. Dunckley alleges that because

his counsel failed to investigate certain defenses, he lost faith in his counsel and consequently pleaded guilty to lewdness with a child under the age of 14 years and attempted sexual assault. Absent his counsel's deficient representation, Dunckley maintains he would have proceeded to trial. Dunckley also asserts the State breached the plea agreement because the State offered him the opportunity of probation through a plea agreement, but then argued against probation at the sentencing hearing. Dunckley finally argues the district court improperly applied the sentencing scheme that existed at the time of sentencing, which did not permit probation, as opposed to the sentencing statute that existed at the time Dunckley committed his crimes, which permitted probation.

At the habeas hearing, Dunckley's counsel testified he investigated all of Dunckley's defenses, and counseled Dunckley that he should go to trial. Dunckley rejected his counsel's advice, and pleaded guilty because he believed he would receive probation. The district court ruled that counsel was credible and Dunckley was not.

Dunckley failed to present the evidence at the habeas hearing he claims his counsel should have acquired and used at a trial. Thus, Dunckley failed to establish that his counsel was deficient or that Dunckley was prejudiced by the alleged deficiency. Accordingly, the district court correctly denied the petition.

Dunckley's claim that the prosecutor breached the plea agreement is barred because it could have been, but was not, raised on direct appeal, and because it is not based on an allegation that his plea was unknowing or involuntary or entered without the effective assistance of counsel. The district court also properly denied the claim because the State and Dunckley never

agreed that the State would recommend probation or not object to it.

Dunckley's argument that the district court erroneously used the sentencing statute that existed at the time of sentencing as opposed to the one that existed at the time of the offense is barred by the law of the case where this Court held on direct appeal that the district court applied the statute that existed at the time of the offense.

III. Argument

A. The District Court's Ruling That Dunckley Failed to Prove His Counsel Did Not Investigate Certain Defenses, Which Forced Dunckley to Plead Guilty, Is Supported by Substantial Evidence Where Counsel Testified He Investigated All of Dunckley's Defenses, Found Them to Be Meritorious, and Counseled Dunckley to Proceed to Trial, but Dunckley Rejected That Advice and Pleaded Guilty Because He Believed He Would Receive Probation.

1. Standard of Review

When reviewing the district court's resolution of ineffective-assistance claims, the Court gives deference to the district court's factual findings if they are supported by substantial evidence and not clearly erroneous but reviews the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

2. Discussion

To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102,

1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Here, Dunckley testified he provided his counsel with certain defenses, but that his counsel failed to investigate those defenses and told Dunckley he would be convicted if he went to trial (Appellant's Appendix, Volume 2, 252-54, 265). He also testified his counsel failed to give him a DNA report that exculpated him. *Id.* at 254-59. As a result, Dunckley lost faith in his counsel and simply pleaded guilty. *Id.* at 265.

Dunckley's counsel, on the other hand, testified he investigated all of Dunckley's defenses, believed that some of them had merit, and told Dunckley about the favorable DNA report. *Id.* at 296-98, 300-01, 306-16. Accordingly, counsel advised Dunckley that he should proceed to trial. *Id.* at 297-98. Dunckley, however, rejected counsel's advice, because he believed he would receive probation if he pleaded guilty. *Id.* at 297, 306. Counsel did not believe Dunckley would receive probation if he pleaded guilty; accordingly, he advised Dunckley not to accept the State's plea offer. *Id.* at 304.

The district court found Dunckley's counsel credible, and thus rejected Dunckley's contrary testimony. *Id.* at 363, 364. Since the district court's finding is based on substantial evidence and is not clearly wrong, this Court should affirm the district court's finding that Dunckley's counsel provided effective assistance of counsel.

Dunckley also failed to present the evidence he claims his counsel should have acquired and used at a trial. Thus, Dunckley failed to establish that his counsel was deficient or that Dunckley was prejudiced by the alleged deficiency. Accordingly, the district court correctly denied the petition for this additional reason as well.

B. The State Did Not Breach the Plea Agreement by Asking the District Court to Sentence Dunckley to Prison Where the Plea Agreement Permitted the State to Argue for an Appropriate Sentence.

1. Standard of Review

Courts generally review the failure to object to the breach of a plea bargain for plain error. *See In re Sealed Case*, 356 F.3d 313, 316-17 (C.A.D.C. 2004)("we join the substantial majority of circuits holding that when a defendant raises a claim of breached plea bargain for the first time on appeal, the reviewing court should apply a plain error standard of review consistent with Fed.R.Crim.P. 52(b).").

2. Discussion

Dunckley argues the State breached the plea agreement by arguing for a prison sentence, because the State stated at the plea hearing it did not object to continuing the sentencing hearing to permit Dunckley to obtain favorable evidence in support of an argument for probation.

Dunckley waived this issue by pleading guilty and failing to raise it on direct appeal, and it falls outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. *See* NRS 34.810(1)(a); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999).

Furthermore, there was no breach of the plea agreement. In exchange for Dunckley's guilty pleas, the State did not agree to any particular sentence. Dunckley and the State only agreed that the State would "be free to argue for

an appropriate sentence." (Appellant's Appendix, Volume 1, 12, 20).

Dunckley's argument is premised on the idea that the prosecutor "held out the hope of probation" by her comments *after* Dunckley pleaded guilty, because she stated she did not object to a continued sentenciug hearing to see if Dunckley might marshal some evidence in support of probation (Opening Brief, 12). Since the prosecutor made her comment after Dunckley pleaded guilty, it could not form the basis of an agreement to plead guilty between the parties. Further, the prosecutor's comment was merely an explanation as to why she did not object to continuing the sentencing hearing out for a longer time than usual. The prosecutor never told Dunckley or the district court anything related to the entry of the guilty plea that would lead a reasonable person to believe the prosecutor would not object to probation. Dunckley fails to show clear error; thus, this Court should affirm the district court order denying the claim.

C. The District Court Did Not Mistakenly Believe Probation Was Not an Available Sentence.

Finally, Dunckley argues the district court erroneously believed probation was not an available sentencing option because the district court applied the version of NRS 176A.110 as it existed at the sentencing hearing, and the statute did not permit probation at that time. This Court addressed that issue on direct appeal, and held that "[t]he record is therefore clear that not only was the district court aware that probation was a sentencing option for Dunckley, but that it properly exercised its discretion by imposing prison terms for the offenses." *Dunckley v. State*, No. 52383 (Order of Affirmance, May 8, 2009). The Court's ruling is the law of the case and prevents further litigation of this issue. *See Hall v. State*, 91 Nev. 314, 315–16, 535 P.2d 797,

798-99 (1975).

IV. Conclusion

For the foregoing reasons, the State respectfully requests the Court to affirm the district court order denying the post-conviction petition for a writ of habeas.

DATED: August 24, 2012.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

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 Corel WordPerfect X3 in 14 Georgia font.

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 does not exceed 30 pages.

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 appropriate references 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: August 24, 2012.

By: JOSEPH R. PLATER
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 24, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

Electronically Filed
Oct 24 2012 03:42 p.m.
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Clerk of Supreme Court

Case No. 59958

APPELLANT BRENDAN DUNCKLEY'S REPLY BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
Second Judicial District

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Docket 59958 Document 2012-33770

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A. The State Breached The Plea Bargain.

1. Standard of Review:

This court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.*

2. Argument:

The State knowingly and intentionally offered Mr. Dunckley an illusory Guilty Plea Memorandum which required Mr. Dunckley to spend months obtaining a psychosexual evaluation in accordance with NRS 176.139. Indeed, during the guilty plea hearing the State informed the District Court as follows:

> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-28: *underlining added.*)

Mr. Dunckley complied in all respects with the terms of the Guilty Plea Memorandum – Mr. Dunckley attended all required classes and appointments and obtained the appropriate psychosexual evaluation in accordance with NRS 176.139 that would have allowed him probation. (AA-75-89.) Moreover, Mr.

Dunckely complied in all respects with the conditions of his bail and complied with all laws. (AA 33-89.)

Yet the State deprived Mr. Dunckely of the benefit of his bargain. The State vigorously, inappropriately, and in violation of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. The State used charges it could not prove during a time of heightened anxiety because of the Brianna Dennison rape and murder investigation to con an inexperienced, ineffective, and inadequately paid attorney with a plea offer the State had no intention of fulfilling. The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation. However, the State deprived Mr. Dunckley of the benefit of probation by acting in bad faith thereby depriving Mr. Dunckley of the sole benefit to him of the Guilty Plea Memorandum. The State had no intention of allowing Mr. Dunckley probation and proved its intention to deprive Mr. Dunckley of the benefit of his bargain through its inappropriate sentencing arguments. Mr. Dunckely's conduct for the entire time he was on bail was exemplary – he complied in all respects with the guilty plea memorandum, the conditions of his bail and all laws. Despite her representations to the District Court that "I want to see what he does between now and then," Ms. Viloria vigorously argued, not only for no probation, but

argued for a sentence well in excess of that recommended by the Division of Parole and Probation in the Presentence Investigation Report. Her assertion that Mr. Dunckely constituted a risk to public safety is specious, if not frivolous. If Mr. Dunckely constituted a risk to public safety, the State would not have agreed to a many month extension of time for him to remain on bail while fulfilling his end of the plea agreement. Rather, it would have been against public policy for the State to agree to stipulate to leaving a risk to public safety on bail. *May v. Mulligan*, 36 F.Supp. 596 (W.D. Mich., 1939). Of course, Mr. Dunckely is and was no risk to public safety. A plea agreement includes an implied obligation of good faith and fair dealing. *U.S. v. Jones*, 58 F.3^{d} 688 (D.C. Cir. 1995); and the State breached the Guilty Plea Memorandum by acting in bad faith. Notwithstanding the State's bad faith, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. *Santobello v. New York*, 404 U.S. 257 (1971).

As this Court held in *Citti v. State*, 107 Nev. 89, 91, 807 P.2^{d} 724, 726 (1991) (*quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2^{d} 1215, 1216 (1986)):

> When the State enters a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' ... The violation of the terms or 'the spirit' of the plea bargain requires reversal."

The Due Process and Equal Protection Clauses of the Fourteenth

Amendment mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *accord, Bryant v. Smith*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State*, 110 Nev. 1009, 879 P.2d 60 (1994). Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation.

In its Answering Brief, the State argues first that Mr. Dunckley failed to raise this issue on direct appeal and second that the State was free to argue for "any particular sentence" and therefore did not breach the plea agreement. (Answering Brief, page 5.) The State is incorrect on both counts. As this court held in *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995), this court will consider in a habeas corpus matter issues not raised on appeal where "cause for doing so is related to his ineffective assistance of counsel allegations." This issue was not raised on appeal because of the ineffective assistance of his trial/appellate counsel. Mr. Dunckely specifically raised this very issue in his original Petition for Writ of Habeas Corpus: "Counsel failed to raise any issues on appeal that Petitioner had voiced a concern for in a letter to counsel dated February 5, 2008." (AA000115-116.) Since his trial/appellate attorney was ineffective for not raising this issue on appeal which is part of the

very habeas corpus matter before this court, Mr. Dunckely is entitled to litigate this issue through his Petition for Writ of Habeas Corpus. Second, the fact that the State used the term "free to argue" did not entitle the State to entice Mr. Dunckely into an illusory plea agreement.

This court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.* This court should allow Mr. Dunckely to withdraw his guilty plea.

B. Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

1. Standard of Review:

This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

2. Argument:

In its Answering Brief, the State argues that the district court was correct in believing Mr. Dunckely's attorney and rejecting "Dunckely's contrary testimony." (Answering Brief, page 4.) The State is again incorrect. To defend

himself against the charges, Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, divorce records, and IRS records, to corroborate his alibi that he was not in the State of Nevada at the time some of the crimes were alleged to have occurred and provided his attorney with alibi witnesses that could corroborate his whereabouts. Mr. Dunckley's attorney failed to seek funds to conduct an investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

In addition, there was no corroborating evidence in support of the alleged crimes of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. In fact, there was a stunning lack of evidence – there was no DNA; there were no bite marks, as the victim alleged; and there were no physical or psychological examinations conducted of any of the victims. Moreover, there was never any police report for the lewdness charges, and therefore, a meritorious statute of limitations argument because both women were over 21 years old. NRS 171.083 (Statute of limitations tolled where police report timely filed.) To make matters worse, one of the victims had a blood alcohol content of 0.226% at the time of one of the alleged crimes. Finally, some of the crimes were alleged to have occurred years prior to the State bringing charges against Mr. Dunckley. Accordingly,

the evidence in support of the alleged crimes consisted of the testimony of the alleged victims; and that testimony was highly suspect, but crucial for a conviction at trial. Mr. Dunckley's attorney failed to independently interview any of the victims.

Given the fact that Mr. Dunckely consistently insisted that he had not committed the alleged crimes and had provided his attorney with proof that he was not even in Nevada at the time most of the alleged crimes occurred, it is impossible to believe that he would now plead guilty after the lack of DNA evidence exonerated him. Mr. Dunckely was and is actually innocent of these alleged crimes; and no reasonable juror would have found him guilty. *Schlup v. Delo*, 513 U.S. 298 (1995).

There is no reasonable trial and/or sentencing strategy designed to effectuate Mr. Dunckley's best interest that would have justified his attorney's failures in this regard. Moreover, that the independent investigation would have shown Mr. Dunckley's alibi defense was true and that Mr. Dunckley was innocent. The independent investigation and interview of the victims would have also shown that the alleged victims lacked sufficient credibility because of alcohol impairment, age, and/or the length of time between the alleged crime and the trial to support a conviction. Any decision that Mr. Dunckley's attorney may have made not to conduct a pretrial investigation could not have been

informed and could not have constituted a reasonable professional judgment. Had Mr. Dunckley's attorney conducted a pretrial investigation and interview of the victims, Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault.

Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request for post-conviction habeas relief and remand with instruction to allow him to withdraw his guilty plea.

VIII. 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 in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

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.

I hereby certify that pursuant to NRS 239B.030, no social security numbers are contained within this document.

DATED: October 24, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story .

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IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 24, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

/s/Barbara A. Ancina
BARBARA A. ANCINA
Story Law Group

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59958

FILED

JAN 16 2013

TRACIE K. LINDEMAN
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DEPUTY CLERK

CR09P1728
D4

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Brendan Dunckley raises multiple arguments on appeal, including claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to conduct an investigation into his alibi defense and that, but for counsel's errors, he would not have pleaded guilty. Dunckley asserts that he was not in the state at the time of the alleged acts and that he provided counsel with evidence supporting this claim. The district court denied Dunckley relief on this ground because it found credible counsel's testimony that he investigated Dunckley's alibi defense yet Dunckley insisted on pleading guilty in an attempt to receive probation. Because the district court's factual findings are supported by substantial evidence and are not clearly wrong, Dunckley failed to demonstrate that counsel's performance was deficient. In addition, because Dunckley did not demonstrate what an investigation could have revealed that would have caused him to insist on going to trial rather than plead guilty, especially considering that Dunckley informed counsel of his alibi defense, he also failed to demonstrate prejudice. Accordingly, we conclude that he is not entitled to relief on this claim. Kirksey, 112 Nev. at 994, 923 P.2d at 1111.

Second, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to fully investigate his case, including interviewing the sexual assault victims. We disagree. The district court concluded that Dunckley had not presented any evidence that the victims would have spoken to counsel or what, if anything, they would have said that would have made Dunckley to insist on going to trial rather than pleading guilty. In addition,

Dunckley did not demonstrate what an investigation would have revealed. Thus, Dunckley failed to establish that counsel's performance fell below objective standards of reasonableness and that he would have otherwise not pleaded guilty. Id.

Third, Dunckley argues that counsel was ineffective for failing to provide him with the results of a DNA test until after sentencing. Counsel testified that although he did not physically turn over the results of the DNA test to Dunckley, they did discuss it and its implications. The district court found that Dunckley's testimony to the contrary was not credible and denied his claim. Because the district court's factual findings are not clearly wrong, we conclude that Dunckley has failed to demonstrate that counsel's performance fell below objective standards of reasonableness and therefore he was not entitled to relief on this claim. Id.

Dunckley also argues that the district court mistakenly believed that probation was not an available sentence through an ex-post-facto application of NRS 176A.110. Because we have previously considered and rejected this claim on direct appeal, Dunckley v. State, No. 52383 (Order of Affirmance, May 8, 2009), and the record demonstratee that the district court applied the correct version of the statute, we

conclude that the law of the case bars further consideration of this claim. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).[1]

Having considered Dunckley's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

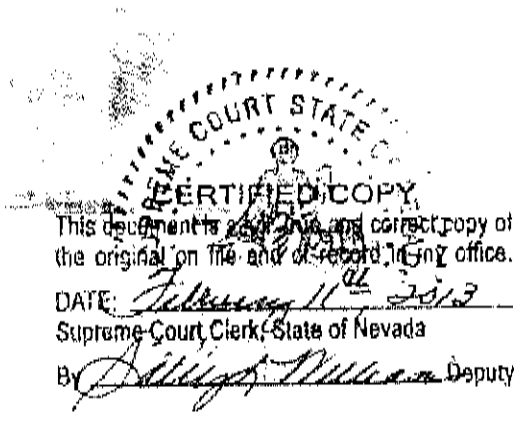
_____, J.
Douglas

_____, J.
Saitta

---

[1]Dunckley also argues that the State breached the spirit of the guilty plea agreement by allowing him to posture himself for probation and then arguing for incarceration. However, because this argument falls outside the scope of permissible claims related to a guilty plea that can be raised in a post-conviction petition, he is not entitled to relief. NRS 34.810(1)(a). To the extent that Dunckley now argues that counsel was ineffective for failing to raise this claim on direct appeal, he did not specifically raise the issue below and raises it for the first time in his reply brief. This is inappropriate, and therefore we do not consider the merits of this claim. NRAP 28(c).

cc: Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk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By Deputy

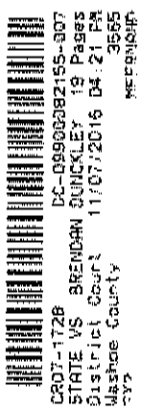


EXHIBIT 2

EXHIBIT 2

Dear District Attorney Yamokich,

In recent research I came across an interesting piece of information. With regards to the American Bar Association Model Rules and Standards. Namely Standard 3-2.5 entitled "Prosecutor's Handbook. Especially of intrest is subsection (b) second sentence "This handbook" should be available to the public, except for subject matters declared "confidential;...."

You see I would be greatly interested in obtaining a copy of that handbook. If needed I will make sure it is promptly returned.

You may even be able to shed some light on the very reason that I wish to view the handbook that as subsection (a) states "The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law."

I find it of real importance that the ABA used the term discretion in this paragraph. Webster's dictionary defines discretion as being "Tactful; Prudent." So maybe you can help me understand why it was felt to be tactful or prudent to allow release of a criminal complaint directly pertaining to a case that at the time of release had not yet been before a court, to render its decision as to guilt. Therefore hindering the accused the right of presumption of innocence until proven guilty.

That is a serious fundimental right everyone accused of a crime is automatically granted just for being an American Citizen. Just the simple mistake of accidentally releasing such information in itself could be rendered a "shoulder error" not to be considered a intentional violation of the accused Sixth Amendment right to a "fair and just trial"

But unfortunately that is not the case here. The fact that a Detective working the case in which the criminal complaints were pertained to intentionally released the material to a third party attorney dealing with a Civil matter. The release of that evidence and entering it into a Civil Matter now made all the complaints that of Public Record. Being that the detective who released the confidential paperwork was a member of the Reno Police Department and the Lead detective in the same referenced Criminal Matter he is considered a member of the prosecutorial investigation team, And subsequentially all his actions have direct bearing on your office.

I also am curious as to what would warrant a detective to intentionally violate the accused right of innocence and release the said documents to the accused ex-wife's attorney. who at the time was in a nine year custody battle. That would under normal scrutiny constitute in the least malice intent on hindering the constitutional rights of the accused to a fair and just trial. Having such confidential information in the public I am sure you could agree would definitely prejudice the accused.

Also, knowing your impeccable reputation and that of your colleagues in your charge for striving to ensure that justice is done. I am sure you are familiar with the Standard set forth by the American Bar Association 4-4.1 which states "Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial." I understand the premise of this standard is geared towards the defense counsel, but it can and also does apply to you the State.

The reason for that line of reference is to bring up the fact that the "Prosecutions duty is rather to merely

Convict, but to see that justice is done by seeking truth of the matter, and to ensure that jury tries cases solely on basis of actual facts presented to them." (People v. Maestas)

The fact that the opinion states above used the words "seeking" and "actual facts" renders the fact that the prosecution investigated the charge, not simply taking the word of the complainant. That is the fact of severe relevance in the same case involving the forementioned detective and accused. In (State v Estes) it states "Prosecutor is expected to be diligent and leave no stone unturned, but nevertheless expected to be fair" (State v Estes 725 P.2d, 1128, 1131 10 Ariz. 123). That brings up the other reason to my letter. Which I would like to express my appreciation for your taking the time to read. But I digress.

In the referenced case that your office filed and subsequently obtained a plea deal or as referred to a Guilty Plea Memorandum. The case no is CR07-1728. Upon review you will notice that the record has change & happening in the time frame of August 14, 1998 to August 13, 2000. As you will notice From the transcripts in the Preliminary Hearing the "victim" in count 1 states she was sure it was when she was (12) twelve years old, as affirmed by your Ada Victoria in the Sentencing Transcript (Pg 13; 19-21). "But he calls Ashley 14 years old at the time ~~for the~~ when we All Know she was 12." She is the representation of the state and therefore making it the states contention to her age of the attack being 12 years old. (August 14, 1998 to August 13, 1999). Again supported by record of sentencing hearing (Pg 11; 24 - Pg 12; 1, Pg 16; 17, Pg 17; 17) The reason for bringing you this letter is this; Had your office and including the police department, as well as my own attorney appointed to me by your office done even the simplest basic investigation in the allegation you would have seen that in actuality I was not even a resident in the state of Nevada until 2000, and in 1998 at the time

the alleged incident occured I was attending college in New York at the Culinary Institute of America in Hyde Park, NY. From 11/11/96 until 2/23/99. The information is easily verified by the college. That would have surely come up in a residential history search. Then that leaves 2/23/99 until the "victim" thirteenth birthday 8/14/99. Well how amazed would you be to know that during that time frame I resided in Oakhurst, Ca with my former wife. And in August 1999 she files for divorce and I was served papers in Fresno Ca. Again extremly simple information to have obtained if a due diligent investigation was infact done. As the matter of the location of the alleged incident the said vehicle would have shown that I had not purchased and registered the said vehicle title 6/8/00. Therefore how could a crime have been committed by me in a state 3,000 miles away from my location in a vehicle I would purchase for two years. If any evidence was deemed relevent I think this would. Not to mention "relevent in the favor of the accused" as mentioned in Brady v. Maryland. Now if you did not actually know including all members of your team including the police in the least we have a warranted example of prosecutorial misconduct. But if your office actually did know and still attempted to prosecute the case would warrant a serious case of malicious prosecution, and Brady violation, due process violation, Sixth, Fourteenth Amendment violation to say the least.

But still pursuing a conviction the Ada proceeded to bring forward a deal that to my knowledge and belief was for probation as noted in the Guilty Plea Memorandum pg. 4:25 & 5:2 both sites with initials of myself, my counsel and Ada Valerio. But the fact that the state fought hard to obtain the max bears a problem in regards

the validity of the original plea bargin. Especially when your SDA stated in the sentencing hearing transcripts " We did craft this creative plea bargin so this defendent could have the right to posture himself to ask the Court for sentencing. That's what he required before he came to you and admitted his conduct and entered his plea of guilt." (Pg 12; 6-9 sentencing hearing transcript)

You see the problem is that plea bargins are in fact protected under contract law. In a basic breakdown the agreement should be of benefit to both parties involved. Example; a defendent looking at the death penalty for a capital crime signs a deal and it takes the death penalty off the table. All sides benefited the State gained a conviction and saved the taxpayers the expense and the accused was not to be put to death. In my case if I went to trial I would be facing 10 to life and 2 to 20 years. I got 30 to life and 2 to 10. But the state fought and argued to 2 to 20 (Pg Pg 17; 23-5) Therfore I gave up four protected rights 1) Remain silent 2) Bring witnesses on my own behalf. 3) Face my accusers and cross examine them 4) right to a trial by my peers. I gave it all up and I feel that had the attorneys involved on both sides of the isle been even slightly competent to have exercised due diligence in pre-trial investigation and entered the relevant evidence it would have seriously changed my mind in accepting the deal and had demanded going to trial.

You I am sure would agree that once you verify the information I have given you so as to meet the Giles standards could be considered substantial evidence. Black's dictionary defines Substantial evidence as "evidence that a reasonable person could accept as adequate and sufficient to support a conclusion of defendant's guilt or innocence beyond

a reasonable doubt."

All the information I have given to you as to the Giles Standards I had handed over to my appointed attorney of record. For that and all the information in this letter along with documented evidence viz: the released police complaints with R.P.D. detective Tom Browns signature on each in addition to the clerks stamp of Superior Court of California Madera County in reference to Donnelly v Donnelly, College transcripts, court documentation of the location of residency, & divorce paperwork, Department of motor Vehicles record of registration. Just think how I easily obtained all this information and documentation independently how much more so should all involved in this case have done so as well.

I will leave you with a final citation of due relevance to the point at hand: "Though the system of criminal justice is adversarial in nature and prosecutors have a duty and are expected to be diligent and leave no stone unturned, he is required to be fair and has a duty to avoid any misrepresentation of the facts and unnecessary inflamitory tactics." (State v. Griffiths 610 P.2d 522, 101 Idaho 163)

With my stating all that I wished, in order to help me process my next step in filing all this information by means of a Post Conviction Writ of Habeas Corpus. Which I have no reason to believe will be denied due to serious relevant evidence and dare I say, respectfully though your total lack of any physical evidence to the allegations, which I did not commit. I just wanted to allow you the opportunity to view this information which I truly believe you to feel is a gross miscarriage of justice that demands an immediate remedy of. Once again as I stated earlier I am respectfully appreciative of your taking the time to read my letter. I am a layman and I apologize if at any time I unknowingly bastardize the legal field of

references and records. Your response is greatly appreciated.

Cordially Yours.

Brendan Dunckley
Inmate # 1023236
L.C.C.
1200 Prison Road
Lovelock, Nevada. 89419

Case Reference NO: CV07-1728
Case Reference NO: 52383

P.S. Copies of this letter are as follows.

C.C: Brendan Dunckley
Morgan Dunckley
Nevada Supreme Court Clerk
David O'Mara Esq.
District Attorney Richard Gammick

Documents included:
C.I.A. transcripts
DMV. Registration information
RPD reports 09-19-07, 08/10/07 and 8/20/05 Evidence Stamped Bond Stamped 5/25/07 (RPD release)
Madeira Superior Court Minute Notes reports
Proof of Service of Summons Dated 8/16/07 At Residency in Fresno, CA.

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

* Sender: Please print your name, address, and ZIP+4 in this box *

Brendan Dunchley (1023236)
L.C.C.
1200 Prison Road
Lovelock, Nevada 89419

RECEIVED
APR 2 2 2009
Lovelock Correctional Center
Mailroom

4B
50B

72

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

MR. Richard GAmmick
Washoe County District Attorney
P.O. Box 30083
Reno, Nevada 89520

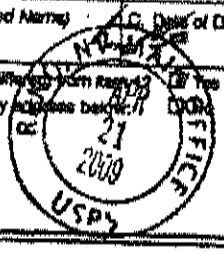
COMPLETE THIS SECTION ON DELIVERY

A. Signature

X ...ngs J. Frugo ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No



3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7007 0710 0005 2300 2620

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

74

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

7007 0710 0005 2300 2620

Postage	$ 76
Certified Fee	270
Return Receipt Fee (Endorsement Required)	220
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 566

Postmark Here: LOVELOCK NV 20 2009

Brendan Dinckley 1023236 -4B-508

Sent To: Richard Gammick W.C.DA

Street, Apt. No.; or PO Box No. P.O. Box 30083

City, State, ZIP+4 Reno, NV 89520

PS Form 3800, August 2006 — See Reverse for Instructions

June 15, 2009

Dear Mr. Hatlestad;

First of all allow me to congradulate you on your victory in having my conviction affirmed by the State Supreme Court. With that being respectfully and genuinly stated I feel that some information needs desperatly to be conveied to ya.

Ya see on April 21, 2009 a gentleman by the name of Thomas J. Trugoli accepted a certified letter from me. With Id number (7007-0710-0005-2300-2620). For your edification I have enclosed the letter (a copy that is) also the documents that originally were enclosed with the said letter.

As ya read the letter ya will see that in comparison to the alleged testimony of Ashley V. at the preliminary hearing she claims that the incident in Count 1 of the order of conviction occured when she was twelve years old. Specific windows of offense would place it August 14, 1998 until her thirteenth birthday of August 14, 1999. The State argued repeatedly (ADA Valoria) that the crime occured on a twelve year old little girl. (Sentencing Transcript Pg 12/Line 1; Pg 13/line 19(b) to 21; Pg 16/line 17; and again on Pg 17/line 17). No allegation or contention was ever made by the state that any other act occured except during her twelfth year of life.

Except there is a serious flaw and problem with that allegation. I have mentioned this to my attorney but he failed to fix it or use the evidence I presented him. Also unfortunate is the fact that the State too had in its possession evidence to show not only that the testimony of Ashley V. was perjured but that the State had evidence proving the absolute impossibility of the crime occuring.

For the record allow me to detail and break down the allegation to you. Ashley testified that after spending

the night at my house with my girlfriend/wife Morgan (in Reno) I drove her home the following morning. While driving her home on Longley Lane (Reno) I pulled over into a parking lot and she and I had consentual sex in the back seat of my Ford Taurus, then I drove her home.. The second incident occured (by her testimony) shortly afterward at the Atlantis Hotel & Casino (Reno) in an elevator.. When asked by Mr. David Clifton how old she was when these incidents occured, she responded she was twelve years old, asked if she is certain she answered in the affirmative. Meaning with a birth date of August 14, 1986 her twelfth year would consist of August 14, 1998 until August 13, 1999. With that being said here is where the problem lies and again I told this to my attorney and recently sent the enclosed letter and documents.

First you will see a letter/transcript from the Culinary Institute of America located in Hyde Park, New York.. There you will see the time I was in fact enrolled in college.. dates 11/11/96 - 12/23/1999. So there is documented proff up until February 23, 1999 I was in fact in Hyde Park, New York attending college. So that would rule out 8/14/98 until 2/28/99 by the rules of Giles. (Evidence that proves I could not have comitted the crime due to being in a location so far away that under normal circumstances I could not have been in the location of the crime.)

Next you will find a DMV print out dated December, 05, 2008 showing that the vehicle in the allegation my Ford Taurus was in fact not even purchased or registered until 6/5/00. So how did we have consentual sex in it in 1998-99 when I did not even own it until 2000.

1

Third, you will see that the State in fact knew that I was not even in the area of Reno when Ashley alleges that the incident occured. Enclosed you will find a Reno Police Department 'draft' dated 4/19/07. Created by Detective Tom Broome of RPD Sex crimes division. Please note the second page with the conversation between Detective Tom Broome and my ex-wife Jenny Dockley. She mentions we met in N.Y. then later moved to Madera California., our marriage broke up in July of 1999 while living in Oakhurst California. A allegation and investigation was done by Madera County Sheriff department with me. A copy of that Detective Broome obtained. So Detective Broome knew that I was in fact residing in Madera County California in 1999 at least until July with my wife Jenny. Not as alleged residing in Washoe County, Reno with Mason. Yet the State never corrected known perjured testimony and continued to allow it to go uncorrected all the way up to sentencing, and beyond. (letter 4/21/08) Also a note you will see a EXHIBIT 'D' stamp on the back of the report, that is because that was one of four criminal reports Detective Tom Broome released to my ex-wife attorney Kenneth Bolland in Oakhurst Ca. to use for an ongoing custody case. That was released 5/25/07. A full six weeks before my preliminary hearing proving the State had knowledge that I was in fact innocent of Counts alleged from Ashley. But Notably failed it not the State nor my attorney who also had the reports released by Detective Broome. (The hearing for the Exhibit was June 22, 2007, Prelim. Hearing was 7/2/07)

Finally enclosed in the original letter is a copy of a Summons & Family law & Proof & Service for divorce dated 8/16/99. Notice I was served at my residency at 2:45 pm at 255 East Nees #237, FRESNO, CALIFORNIA. Two days

after Ashley turned thirteen. Again proving beyond a reasonable doubt that I could not have committed the crime as testified by the "Victim". Since her testimony is in fact all the evidence the State has that these incidents ever occured and I proved by documented, verifiable evidence to the contrary, the conviction can not stand. It would continue to allow a manifest injustice to go uncorrected.

As an added area of interest I did not mention in the previous letter, Ashley testified that Morgan my girlfriend/wife was pregnant as was her friend Michelle Anthony. Yet Michelle daughter Brooklyn was born September 25, 2000 and our son Jacob was born February 12, 2001. Either they both had really long pregnancies or again the allegations could not have occured.

Please take notice that even Dr. Storey's report on page 3 second paragraph shows I did not move to Reno until 2000. And in the PSI report page 3 under education I graduated H.S. in 1994 and attended the Culinary Institute of America until 1998.

I hope that you see the gross manifest injustice, prosecutorial misconduct, Brady violations, and gross bad faith negligence that has occured here. I humbly request that the DA do their duty and set the record straight and request a reversal and vacation of Count I and allowing me to reverse and set aside my Guilty Plea Memorandum, and plea and to Count 2. I hope you realize I am going to include both letters in my writ of Habeas Corpus. I just felt it necessary to once again bring to the DA's attention so they can take it upon themselves to fix and correct this problem. Down the counstine

and in the intrest of justice.

Besides is it not the ultimate duty of the Prosecutor to not seek a conviction by any and all means but to see that justice is done and obtained. Is it not why the Prosecutors are held to a higher standard to be diligent and leave no stone unturned. After all you the DA represent the State and all its people.

So, Mr. Hattestad can you in good conscience and good faith simply ignore this information as David Clifton, Kelli Anne Villegas, and Thomas J. Frugoli not to mention also Detective Tom Broome have all done on repeated and numerous occasions. I included Detective Tom Broome because as you are I'm sure aware the misconducts by an investigating law enforcement agent is indistinguishable from misconduct by prosecuting attorneys.

Please know I truly respected your brief for the Supreme Court. I know you did not know about this information, because for my attorney to have added it in appeal would have meant admitting his ineffectiveness in acting as an advocate. But it does not excuse his actions or that of Mr Clifton and especially Mrs Villegas. As you are aware being the Chief Appellate Deputy it is the duty and obligation of a prosecuting attorney to obtain Brady evidence (evidence favorable to the defendant). Even if she is not in direct possession of said evidence, she should and still has a duty to learn of any favorable evidence known to other government agents, including the Police (i.e Det. Broome report 4/19/07) if those agents are involved in the investigation. Detective Broome was the lead detective.

I pray that you will do the right thing and allow an innocent man to return to his family. I again request that you vacate / dismiss and expunge Count I and allow the Guilty Plea to be reversed and allow

me to plead anew for Count 1. You can see that had my attorney done his job and investigated the crime, interviewed Ashley or Jessica, he would see it was impossible to committ count 1. Therefore he could not give adequate and accurate legal advise. So.. I plan on having the Gilty Plea reversed on that and numerous other grounds.

I just felt in the intrest of Justice you would do what is right and fix this SERIOUS SITUATION. This is the second letter bringing the evidence to light I am humbly requesting you set the record straight.

I Thank you for taking the time in reading my letter, and once again congratulations on a well written and ellegant Brief. Please note after reviewing my records the letter 4/21/08 was the second a first was mailed 1/16/08 regular first class mail w/ brass slip (Ndoc receipt) #1421887

Sincerly,

[signature]

BRENDAN DUNCKLEY #1023236
L.C.C.
1200 Prison Road
Lovelock, Nevada 89419.

Case No: CR07-1728

CC: Writ of Habeas Corpus
Personal copy.
Catherine Cortez Masto NV. ATTY.GEN.

Enclosed: C/A Transcript
DMV Printout.
RPD. Draft. 4/19/07
Summons of Family law
Proof of Service, 8/16/00
Letter to DA Gammick
Copy of Certf. Receipt
w/ Thomas J. Flugel: sig.

June 15, 2009

Continuation:

As an additional side note to help the courts and the taxpayers further court expense and time, I would like to make a humble request and possible solution. As of June 8, 2009 I represent myself pro per. Because I know that the overwhelming evidence I am in possession of will almost certainly in the least reverse my guilty plea memorandum, But prove blantant and obvious malicious disregards for my constitutional rights on the part of ADA Viloria as well as Detective Tom Browne. There is a total of 150-160 pages of documentation proving malice, prosecutorial misconduct, ineffective assistance of counsel, police harassment, miranda violations, inappropriately obtainms evidence, perjured testimony, Brady violations, and thats just with the few pages I have given to you in this letter. Any of which will grant reversal of the deal and prove actual innocence in regards to Cont 1.

So here as the chief appelate counsel you are aware that I only need to prove it with probable preponderance, except I can prove it all beyond a reasonable doubt. Or create enough reasonable doubt to a jury. So I propose the following deal for the States consideration: Guilty Plea reversed and set aside Cont 1 (NRS. 201.230) dismissed on grand of insufficient evidence and actual and factual innocence, Cont 2 (NRS 193.330) be amended to Assault (due to the fact the "Victim" Jessica has yet to come forward since the prelim. and her testimony is inconsistent from 3/20/07 to 7/2/07 lacking credibility), So Amend Cont 2 to Assault Gross Misdemeanor or at most a 'E' felony with credit for time served. I am released and allowed to leave Nevada (Reno) forever. In exchange I do not sue federally the County or D.A.'s office for the blatant Civil rights and Constitutional violations on the part of the DA's office.

If that deal is accepted as a binding agreement w/ the judges signature I will agree to sign it. Preventing your office from being flooded with appeals that ADA Viloria and Detective Tom Browne handled. Do

(Cont)

or in the alternative:

Reverse the Guilty plea Memorandum and dismiss count 1 on grounds of actual/factual innocence. Allowing me to plead anew for Count 2 and we proceed to trial. I would retain the right to file a lawsuit in regards to Count 1's violations. Did you know my seven year old is in therapy because of the sentence I was given for a charge the state knew I could not have committed. But I digress, back to the proposed deal:

#1 - Guilty Plea Memorandum Reversed, Count 1 dismissed on Grounds of insufficient evidence and Actual/Factual innocence. Count 2 (NRS 193.330) Amended to Assault. (GM. or 'E' Felony) with Credit for time served (as of 6/15/09 = 419 DAYS = 1yr 5M Days As Per AR 520 SMART calculation 10/30). Released and record is expunged for count 1. (NRS 201.230). In Exchange defendant (me) will Agree to obstain from suing the State, County and DA office, for Civil rights and constitutional violations. Binding Agreement with SENTENCE TO BE CREDIT TIME Served. (No Surprises).

(Or)

#2 Guilty Plea Memorandum reversed, Count 1 (NRS 201.230) dismissed on Grounds of insufficient evidence and actual/factual innocence. Count 2 Allowed to plead anew to (NRS. 193.330) And return to a not Guilty stage. Bail being allowed. And proceeding with trial -

I look foward to your response in this matter.

EXHIBIT 3

EXHIBIT 3

Jim Gibbons
Governor

DMV

Ginny Lewis
Director

555 Wright Way
Carson City, Nevada 89711-0900
Telephone (775) 684-4368
www.dmvnv.com

December 05, 2008

BRENDAN DUNCKLEY
1200 PRISON RD
LOVELOCK NV 89419

This is to certify that the records have been searched for the following:

VIN:	1FALP5244PG247860
Year/Make:	1993 FORD TAURUS GL 4 DR SEDAN
Plate:	631KWM

The records of the Dept of Motor Vehicles indicate that the above refereneed Was registered in Nevada State. We show this vehicle has been register from 06-05-2000 to 06-05-2001 under the name of Brendan Dunckley.

If you have any further questions regarding this request please feel free to contact me at the above listed phone number.

Sincerely,

Pam Mendoza
Record Section

88

STATE OF NEVADA
DEPARTMENT OF MOTOR VEHICLES
CENTRAL SERVICES - RECORDS DIVISION
555 Wright Way
Carson City, Nevada 89711-0250
(775)684-4590

REQUEST DATE : 12/05/2008 SUP.TRAN.ID : 45905961

BRENDAN DUNCHLEY
1200 PRISON RD
LOVELOCK NV 89419-5110

VEHICLE REGISTRATION DATA

I - VEHICLE DATA

YEAR : 1993 MAKE : FORD MODEL : TAG CYL : 06
VIN : 1FALP5244PG247860 VEHCL TYPE : VEH-SEDAN 4 DR

II - REGISTRATION INFORMATION

EXPIRATION DATE : 06/05/2001
PLATE NUMBER : 631KWM DECAL NUMBER : M39555

OWNER TYPE : REGISTERED COMBN TYPE : NONE
NAME : BRENDAN THOMAS DUNCKLEY
MAIL ADDRESS : 4458 HIGHPLAINS DR
CITY/STATE : RENO NV 89523-9176
PHYS ADDRESS : 4458 HIGHPLAINS DR
CITY/STATE : RENO NV 89523-9176

LAST TRANSACTION DATE:06/06/2001

NAME/ADDRESS AT THE TIME OF REGISTRATION

NAME : BRENDAN T DUNCKLEY
MAIL ADDRESS : 811 PLUMAS ST
CITY/STATE : RENO NV 89509-1739 END DT : 06/13/2002

****

PAGE NO: 1** LAST PAGE **

EXHIBIT 4

EXHIBIT 4

THE CULINARY INSTITUTE OF AMERICA
1946 Campus Drive, Hyde Park, NY 12538-1499 • Telephone: 845-451-1267 • Fax: 845-905-4032 • www.ciachef.edu

89

The Culinary Institute of America
1946 Campus Dr, Hyde Park, NY 12538-1499 Phone 845.451.1267 Fax 845.905.4032 www.ciachef.edu
UNOFFICIAL

CEEB Code: 003301

DUNCKLEY, BRENDAN, T
44782 SILVER SPUR CT
AHWAHNEE,CA 93601

Student ID: 36556
Birth Date: 07/04/1976
Date Issued: Dec 8, 2006

Major: Culinary Arts

Degree(s) Conferred:
Assoc. in Occupational Studies in Culinary Arts awarded Jan 22, 1999

Course Number	Section		Course Title	Cred Course	Cred Ernd	Grd	Rep	Abs
Semester 0 (11/11/1996 - 02/23/1999)								
A1D-2B	1A	-	CULINARY MATH	1.5	1.5	C-	0	
A1K-2B	0Q	-	INTRO. TO GASTRONOMY	1.5	1.5	C-	0	
B1C-2B	1B	-	CUL. FRENCH	0.0	0.0	B	0	
B1E-2B	17	-	FOOD PURCHASING	1.5	1.5	C-	1	
B1G-2B	0Q	-	SANITATION	1.5	1.5	B-	0	
C1A-2B	1D	-	MEAT FABRICATION	1.5	1.5	A-	0	
C1F-2B	0Q	-	MEAT IDENTIFICATION	1.5	1.5	B-	0	
B1F-2B	0Q	-	NUTRITION	1.5	1.5	B+	0	
D1A-2B	1D	-	SKILL DEV. I	3.0	3.0	B	0	
E1A-2B	1F	-	SKILL DEV. II	3.0	3.0	A-	0	
F2A-2B	1I	-	INTRO. HOT FOODS	3.0	3.0	C+	0	
F2B-2A	0V	-	SUPERVISORY DEV.	1.5	1.5	C	0	
G2B-2B	1L	-	AMERICAN CUISINE	1.5	1.5	D	0	
G2A-2B	1J	-	SEAFOOD COOKERY	1.5	1.5	C	0	
H2C-2B	0X	-	CHARCUTERIE	1.5	1.5	D	1	
H2B-2B	0X	-	ORIENTAL	1.5	1.5	B	0	
I2F-2B	0Y	-	LUNCH COOKERY	1.5	1.5	D	0	
I2E-2B	0X	-	BREAKFAST COOKERY	1.5	1.5	C-	0	
J2A-2B	1O	-	GARDE MANGER	3.0	3.0	C	0	
J2B-2B	0X	-	TERM II PRACTICAL	0.0	0.0	P	0	
00-2B	31	-	EXTERNSHIP	6.0	6.0	C	0	
L4G-A	1B	-	BREAD BAKING	1.5	1.5	B	0	
L4C-A	1J	-	COST CONTROL	1.5	1.5	D	1	
L4F-A	1B	-	PASTRY SKILLS DEV	1.5	1.5	B+	0	
M4A-A	24	-	PATISSERIE	3.0	3.0	B+	0	
N4D-A	1S	-	MENUS/FAC. PLANNING	1.5	1.5	B	0	
N4E-A	1R	-	MGMT.WINES&SPIRITS	3.0	3.0	D	0	
N4F-A	1J	-	RESTAURANT LAW	0.0	0.0	B+	0	
P4A-A	2B	-	INT'L COOKERY	1.5	1.5	B+	0	
P4D-A	1T	-	ADV. CUL. PRINCIPLES	1.5	1.5	C	0	
CA5Q01-A	04	-	CLAS BANQUET CUISINE	1.5	1.5	D	0	
CA5Q03-A	04	-	INTRO TO CATERING	0.0	0.0	B	0	
CA5Q02-A	04	-	INTRO TO TABLE SERV	1.5	1.5	A	0	
CA5R01-A	04	-	A' LA CARTE SERVICE	1.5	1.5	B-	0	
CA5R02-A	04	-	ST. ANDREW'S KITCHEN	1.5	1.5	C	0	
CA5S02-A	04	-	5TH SEM COSTING EXAM	0.0	0.0	P	0	
CA5S01-A	04	-	DE MEDICI KITCHEN	1.5	1.5	D	0	
CA5S04-A	04	-	5TH SEM COOKING EXAM	0.0	0.0	P	0	
CA5S03-A	04	-	TABLE D'HOTE SERVICE	1.5	1.5	C	0	
CA5T01-A	04	-	FORMAL SERVICE	1.5	1.5	C+	1	
CA5T02-A	04	-	ESCOFFIER KITCHEN	1.5	1.5	C-	1	
CA5U02-A	05	-	AM BOUNTY SERVICE	1.5	1.5	C	0	
CA5U01-A	06	-	AM BOUNTY KITCHEN	1.5	1.5	D	0	

EXHIBIT 5

EXHIBIT 5

0986054922200000000 *(TY2000)

PAGE 0005 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
800 GENTRY WAY, #10
RENO
STATE: NV ZIP: 89502-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 880402426
RENO HILTON RESORT INC
2500 E SECOND STREE
RENO NV 89595

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$6,828+
TX WITHELD.....$816+
FICA TX WH.....$423+
T FICA WAG.....$6,828+
MEDCARE WH.....$99+
MEDCARE WG.....$6,828+

********** TAXPAYER COPY **********

0986054922200000000 *(TY2000)

PAGE 0006 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
811 PLUMAS ST.
RENO
STATE: NV ZIP: 89509-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 952858475
SUPERSTORES OF AMERICA IN
60 8996 MIRAMAR RD STE
SAN DIEGO CA 92126

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$1,634+
TX WITHELD.....$84+
FICA TX WH.....$101+
T FICA WAG.....$1,634+
MEDCARE WH.....$23+
MEDCARE WG.....$1,634+

********** TAXPAYER COPY **********

09860549221999000000 *(TY1999)

PAGE 0001 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDON T DUNCKLEY
44782 SILVER SPUR CT.
AHWAHNEE
STATE: CA ZIP: 93601-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770039563 PENSION INDICATOR: UNANSWERED
ELDERBERRY HOUSE INC
P O BOX 2413
OAKHURST CA 93644

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$150+
FICA TX WH.....$9+
T FICA WAG.....$150+
MEDCARE WH.....$2+
MEDCARE WG.....$150+

********** TAXPAYER COPY **********

09860549221999000000 *(TY1999)

PAGE 0002 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
B DUNCKLEY

STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770160750 PENSION INDICATOR: UNANSWERED
CASTILLOS MEXICAN RESTAURANT

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$343+
TX WITHELD.....$10+
FICA TX WH.....$21+
T FICA WAG.....$343+
MEDCARE WH.....$4+
MEDCARE WG.....$343+

********** TAXPAYER COPY **********

09860549221999000000 *(TY1999)

PAGE 0005 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN DUNCKLEY
455 E NEES #112
FRESNO
STATE: CA ZIP: 93720-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 940481510
FORT WASHINGTON GOLF & COUNTRY
10272 N MILLBROOK
FRESNO CA 937203499

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$411+
FICA TX WH.....$25+
T FICA WAG.....$411+
MEDCARE WH.....$5+
MEDCARE WG.....$411+

********** TAXPAYER COPY **********

09860549221999000000 *(TY1999)

PAGE 0006 OF 0006

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
455 E. NESS APT. 112
FRESNO,
STATE: CA ZIP: 93720-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 941272509
HARRIS FARMS INC.
ROUTE 1 BOX 400
COALINGA CA 93210

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$415+
TX WITHELD.....$31+
FICA TX WH.....$25+
T FICA WAG.....$415+
MEDCARE WH.....$6+
MEDCARE WG.....$415+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0001 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
RR4 BOX 74
RED HOOK NY
STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 060653264
THE CULINARY INSTITUTE OF AMERICA
433 ALBANY POST RD
HYDE PARK NY 12538

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$229+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0002 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
RR4 BOX 73
RED HOOK
STATE: NY ZIP: 12571-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 141709328
GUIDO RESTAURANT CORP
RR 3 BOX 409M DBA MARINER S HARBOR
RED HOOK NY 12571

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$2,806+
TX WITHELD.....$20+
FICA TX WH.....$173+
T FICA WAG.....$2,806+
MEDCARE WH.....$40+
MEDCARE WG.....$2,806+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0003 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
44782 SILVER SPUR CT
AHWAHNEE
STATE: CA ZIP: 93601-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770039563
ELDERBERRY HOUSE INC
P O BOX 2413
OAKHURST CA 93644

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$983+
TX WITHELD.....$6+
FICA TX WH.....$60+
T FICA WAG.....$983+
MEDCARE WH.....$14+
MEDCARE WG.....$983+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0004 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
B T DUNCKLEY

STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770394564
YOGESHWAR INVESTMENT CORP

PENSION INDICATOR: UNCHK(UNRELIABLE)

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$1,162+
FICA TX WH.....$72+
T FICA WAG.....$1,162+
MEDCARE WH.....$16+
MEDCARE WG.....$1,162+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0005 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN DUNCKLEY

STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770403314 PENSION INDICATOR: UNCHK(UNRELIABLE)
OKA JAPANESE RESTAURANT
OAKHURST, CA.

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$768+
TX WITHELD.....$41+
FICA TX WH.....$47+
T FICA WAG.....$588+
T FICA TIP.....$180+
MEDCARE WH.....$11+
MEDCARE WG.....$768+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0006 OF 0007

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN DUNCKLEY
44782 SILVER SPUR CO
AHWAHNEE
STATE: CA ZIP: 93601-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770438661 PENSION INDICATOR: UNANSWERED
GOLD CREEK CHEVRON FOOD MART
P O BOX 997 P O BOX 997
COARSEGOLD CA 93614

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$786+
FICA TX WH.....$48+
T FICA WAG.....$786+
MEDCARE WH.....$11+
MEDCARE WG.....$786+

********** TAXPAYER COPY **********

09860549221998000000 *(TY1998)

PAGE 0007 OF 0007

DOCUMENT TYPE: 1098-T
PAYEE ENTITY DATA:
DUNCKLEY BRENDAN T
44782 SILVER SPUR CT
AHWAHNEE
STATE: CA ZIP: 93601-0000

GRTR THAN OR EQ TO HALF TIME STUDENT
NOT A GRADUATE STUDENT

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 06-0653264
THE CULINARY INSTITUTE OF AMERICA
433 ALBANY POST RD
HYDE PARK NY12538

********** TAXPAYER COPY **********

09860549221997000000 *(TY1997)

PAGE 0001 OF 0004

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
RR4 BOX 74
RED HOOK NY
STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 060653264
THE CULINARY INSTITUTE OF AMERICA
651 SOUTH ALBANY POST ROA
HYDE PARK NY 12538

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$585+
TX WITHELD.....$4+

********** TAXPAYER COPY **********

09860549221997000000 *(TY1997)

PAGE 0002 OF 0004

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
[redacted]
BRENDAN DUNCKLEY
RR4 BOX OLD RT 199
REDHOOK
STATE: NY ZIP: 12571-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 141766034
SUMMIT INNS OPERATING CORP.
DBA BEST WESTERN INN 679 SOUTH ROAD
POUGHKEEPSIE NY 12601

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$99+
TX WITHELD.....$7+
FICA TX WH.....$6+
T FICA WAG.....$99+
MEDCARE WH.....$1+
MEDCARE WG.....$99+

********** TAXPAYER COPY **********

09860549221997000000 *(TY1997)

PAGE 0003 OF 0004

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
[redacted]
BRENDAN T DUNCKLEY
RR4 BOX 73
RED HOOK NY
STATE: ** ZIP: 00000-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 363747040
GUINNESS HLDS MNCHSTR PRPTY C&P VT
PO BOX 46
MANCHESTER VILLAG VT 0525

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$1,817+
TX WITHELD.....$160+
FICA TX WH.....$112+
T FICA WAG.....$1,817+
MEDCARE WH.....$26+
MEDCARE WG.....$1,817+

********** TAXPAYER COPY **********

09860549221997000000 *(TY1997)

PAGE 0004 OF 0004

DOCUMENT TYPE: W-2
PAYEE ENTITY DATA:
BRENDAN T DUNCKLEY
44782 SILVER SPUR CT
AHWAHNEE
STATE: CA ZIP: 93601-0000

ACCOUNT NUMBER: N/A
PAYER ENTITY DATA: 770039563
ELDERBERRY HOUSE INC
P O BOX 2413
OAKHURST CA 93644

PENSION INDICATOR: UNANSWERED

STATUTORY EMPLOYEE IND: NO

TYPE OF EMPLOYMENT: ALL OTHERS
WAGES.....$3,708+
TX WITHELD.....$48+
FICA TX WH.....$229+
T FICA WAG.....$3,708+
MEDCARE WH.....$53+
MEDCARE WG.....$3,708+

********** TAXPAYER COPY **********

EXHIBIT 6

EXHIBIT 6

129

Reno Police Department

P.O. Box 1900
RENO, NV 89505
Sex Crimes/Child Abuse Unit
Phone 775-785-8605
Fax 775-785-8607

DATE: April 18, 2007

TO: Madera County Sheriff
Madera, CA

Fax: 559-675-7605

FROM: Mary Lou Mullins, Police Assistant for
Detective Tom Broome

SUBJECT: 1999-10667
Brendan Dunckley
dob 7/4/76

SS:

NUMBER OF PAGES SENT (Including cover sheet):

Rita

Detective Tom Broome is investigating a sexual assault case involving Brendan Dunckley

Understand there was a Fraud case investigated by your agency. Please forward a copy of your report 1999-10667 as soon as possible.

If you have any questions, please call.

Thank you for your assistance

Mary Lou Mullins

130

99010667

REPORT NUMBER

Madera County
Sheriff's Department
INCIDENT REPORT

NARRATIVE

REPORTED BY 9504

REPORT FILED

***** THE FOLLOWING NARRATIVE IS CONVERTED FROM A PREVIOUS AS400 CASE *****

DESCRIPTION: ORIGINAL NARRATIVE/H.WEAVER

Reporting Officer: HARDIN O. WEAVER #9504
Date of this Report: 07-19-99

ON THE ABOVE DATE AT APPROXIMATELY 2110 HOURS I WAS DISPATCHED TO 44782 SILVER SPUR TRAIL IN AHWAHNEE IN REGARDS TO A POSSIBLE CREDIT CARD FRAUD. WHEN I ARRIVED I CONTACTED THE R/P, LYNN HAYS, WHO TOLD ME THE FOLLOWING.

SHE HAD BEEN RECEIVING PHONE CALLS FROM PEOPLE WHO HAS STAYED AT HER BED AND BREAKFAST INN, TELL HER THAT THERE WERE CHARGES ON THEIR CREDIT CARDS THAT WERE NOT THEIRS. ONE OF THE CARD HOLDERS WAS DAVE KEVANE. HIS CREDIT CARD ACCOUNT WAS TURNED OVER TO CREDIT CARD SERVICES, 1-800-542-2255, FOR INVESTIGATION. AN INVESTIGATOR THERE WAS ABLE TO LINK A TRAIL OF CREDIT CARD NUMBERS AND PHONE NUMBERS BACK TO BRENDAN DUNCKLEY. LYNN SAID WHEN SHE CONFRONTED BRENDAN, BRENDAN ADMITTED TO UTILIZING THE FORMER CUSTOMER'S CREDIT CARD ACCOUNT NUMBERS WITHOUT THEIR KNOWLEDGE. HE CHARGED TO THESE ACCOUNTS SEVERAL DIFFERENT PAID PHONE SERVICES AND PAID INTERNET SERVICE SITES. NEXT I CONTACTED BRENDAN.

AFTER READING HIM HIS MIRANDA WARNING HE ADMITTED TO ME THAT HE OBTAINED AND USED THE CREDIT CARD ACCOUNT NUMBERS OF SEVERAL ACCOUNTS WITHOUT THE KNOWLEDGE OR PERMISSION OF THE CARD HOLDER. I TRANSPORTED BRENDAN TO THE OAKHURST SUB-STATION TO BE FURTHER INTERVIEWED. HE GAVE ME HIS E-MAIL ADDRESS, b_lewis42@hotmail.com and b_lewis43@hotmail.com WITH THE PASSWORDS OF allen and culinary. I REQUESTED THAT DEPUTY ADKINS ATTEMPT TO OBTAIN ANY INFORMATION FROM THESE E-MAIL ADDRESSES HE COULD. WITH THE PERMISSION OF BRENDAN DEPUTY ADKINS PRINTED THE MAIL FROM BOTH ADDRESSES. THE PRINTOUTS WERE OF INTERNET BILLING COMPANY RECEIPTS. NEXT I RECONTACTED THE R/P.

I ASKED LYNN TO PUT TOGETHER INFORMATION OF ALL THE CREDIT CARD ACCOUNT NUMBERS THAT WERE REPORTED TO HER AS BEING UTILIZED WITHOUT THE CARD HOLDERS PERMISSION. SHE SAID TOMORROW SHE WOULD BE ABLE TO SUPPLY ME WITH THE ACCOUNT NUMBERS, CARD HOLDER'S NAMES, ADDRESSES, AND PHONE NUMBERS. IN SOME CASES EVEN THE AMOUNT THAT WAS FRAUDULENTLY CHARGED.

AT THIS TIME I HAVE NOT SPOKEN WITH A CARD HOLDER OR A CREDIT CARD COMPANY TO SEE IF THEY WANT TO PURSUE CHARGES AGAINST BRENDAN. HARD COPIES OF THE INTERNET SERVICES RECEIPTS ARE BOOKED INTO PROPERTY AS POSSIBLE EVIDENCE AND PLACED INTO THE MAILBOX.

END OF NARRATIVE.

H.WEAVER #9504

EXHIBIT 7

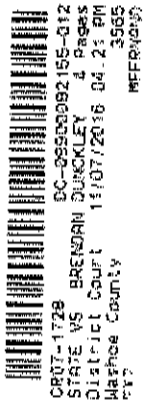


EXHIBIT 7

SUMMONS—FAMILY LAW

CITACION JUDICIAL—DERECHO DE FAMILIA

NOTICE TO RESPONDENT (Name): BRENDAN THOMAS DUNCKLEY
AVISO AL DEMANDADO (Nombre):

You are being sued. A usted le estan demandando.

PETITIONER'S NAME IS: JENNY ANN DUNCKLEY
EL NOMBRE DEL DEMANDANTE ES:

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
MADERA SUPERIOR COURT

AUG 18 1999

CLERK

DEPUTY

CASE NUMBER (Numero del Caso)
CV03749

You have **30 CALENDAR DAYS** after this Summons and Petition are served on you to file a Response (form 1282) at the court and serve a copy on the petitioner. A letter or phone call will not protect you.

If you do not file your Response on time, the court may make orders affecting your marriage, your property, and custody of your children. You may be ordered to pay support and attorney fees and costs. If you cannot pay the filing fee, ask the clerk for a fee waiver form.

If you want legal advice, contact a lawyer immediately.

Usted tiene **30 DIAS CALENDARIOS** *despues de recibir oficialmente esta citacion judicial y peticion, para completar y presentar su formulario de Respuesta (Response form 1282) ante la corte. Una carta o una llamada telefonica no le ofrecera proteccion.*

Si usted no presenta su Respuesta a tiempo, la corte puede expedir ordenes que afecten su matrimonio, su propiedad y que ordenen que usted pague mantencion, honorarios de abogado y las costas. Si no puede pagar las costas por la presentacion de la demanda, pida al actuario de la corte que le de un formulario de exoneracion de las mismas (Waiver of Court Fees and Costs).

Si desea obtener consejo legal, comuniquese de inmediato con un abogado.

NOTICE *The restraining orders on the back are effective against both husband and wife until the petition is dismissed, a judgment is entered, or the court makes further orders. These orders are enforceable anywhere in California by any law enforcement officer who has received or seen a copy of them.*

AVISO *Las prohibiciones judiciales que aparecen al reverso de esta citacion son efectivas para ambos conyuges, tanto el esposo como la esposa, hasta que la peticion sea rechazada, se dicte una decision final o la corte expida instrucciones adicionales. Dichas prohibiciones pueden hacerse cumplir en cualquier parte de California por cualquier agente del orden publico que las haya recibido o que haya visto una copia de ellas.*

1. The name and address of the court is: *(El nombre y direccion de la corte es)*
   Superior Court of California, County of Madera
   209 West Yosemite Ave.
   Madera, CA 93637

2. The name, address, and telephone number of petitioner's attorney, or petitioner without an attorney, is:
   (El nombre, la direccion y el numero de telefono del abogado del demandante, o del demandante que no tiene abogado, es)
   KENNETH R. BALLARD
   Attorney at Law
   40327 Stagecoach Road, #1
   Oakhurst, CA 93644
   559-683-2122

[SEAL]

Date *(Fecha)* AUG 16 1999 Clerk *(Actuario)*, by Janet M. Gallagher, Deputy

NOTICE TO THE PERSON SERVED: You are served
a. ☐ as an individual.
b. ☐ on behalf of respondent
   under: ☐ CCP 416.60 (minor) ☐ CCP 416.90 (individual)
   ☐ CCP 416.70 (ward or conservatee) ☐ other:
c. ☐ by personal delivery on *(date)*:

(Read the reverse for important information)
(Lea el reverso para obtener informacion de importancia)

Form Adopted by Rule 1283
Judicial Council of California
1283 [Rev. January 1, 1995]

SUMMONS
(Family Law)

Family Code, Procedure, §§ 232, 233, 2040, 7700
Calif. Rules of Court, rule 1216

WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property.

ADVERTENCIA: Para los efectos de la division de bienes al momento de una separacion legal o de la disolucion de un matrimonio, las leyes de California disponen que se presuman como bienes de la sociedad conyugal aquellos adquiridos en forma conjunta por las partes durante el matrimonio. Si cualquiera de las partes de esta accion muriese antes de que se dividan los bienes en tenencia conjunta de la sociedad conyugal, prevalecera el lenguaje relativo a la tenencia de los derechos de propiedad contenido en la escritura--como, por ejemplo, copropiedad con derechos de sucesion (joint tenancy), tenencia en comun (tenants in common) o bienes de la sociedad conyugal (community property)--y no la presuncion de que los bienes son de la sociedad conyugal. Usted debe consultar a su abogado o abogada si desea que la presuncion de que los bienes son de la sociedad conyugal se especifique en el titulo de propiedad inscrito.

STANDARD RESTRAINING ORDERS--FAMILY LAW
PROHIBICIONES JUDICIALES ESTANDARES--DERECHO DE FAMILIA

STANDARD FAMILY LAW RESTRAINING ORDERS

Starting immediately, you and your spouse are restrained from

1. removing the minor child or children of the parties, if any, from the state without the prior written consent of the other party or an order of the court;
2. cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability held for the benefit of the parties and their minor child or children; and
3. transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life.

You must notify each other of any proposed extraordinary expenditures at least five business days prior to incurring these extraordinary expenditures and account to the court for all extraordinary expenditures made after these restraining orders are effective. However, nothing in the restraining orders shall preclude you from using community property to pay reasonable attorney fees in order to retain legal counsel in the action.

PROHIBICIONES JUDICIALES ESTANDARES--DERECHO DE FAMILIA

A usted y a su conyuge se les prohibe

1. *que saquen del estado al hijo o hijos menores de las partes, si los hay, sin el consentimiento previo por escrito de la otra parte o sin una orden de la corte; y*
2. *que cobren en efectivo, usen como colateral para prestamos, cancelen, transfieran, descontinuen o cambien los beneficiarios de, cualquier poliza de seguro u otras coberturas de seguro, inclusive los de vida, salud, automovil e incapacidad mantenido para el beneficio de las partes y su hijo o hijos menores; y*
3. *que transfieran, graven, hipotequen, escondan o de cualquier otra manera enajenen cualquier propiedad mueble o inmueble, ya sean bienes de la sociedad conyugal, quasi conyugales o bienes propios de los conyuges, sin el consentimiento por escrito de la otra parte o sin una orden de la corte, excepto en el curso normal de los negocios o para atender a las necesidades de la vida.*

Ustedes deben notificarse entre si sobre cualquier gasto extraordinario propuesto, por lo menos con cinco dias de antelacion a la fecha en que se van a incurrir dichos gastos extrordinarios y responder ante la corte por todo gasto extraordinario hecho despues de que estas prohibiciones judiciales entren en vigor. Sin embargo, nada de lo contenido en las prohibiciones judiciales le impedira que use bienes de la sociedad conyugal para pagar honorarios razonables de abogados con el fin de obtener representacion legal durante el proceso.

MARRIAGE OF (last name, first name of pa...):	CASE NUMBER:
DUNCKLEY, Jenny and Brendan	CV03749

Serve a copy of the documents on the person to be served. Complete the proof of service. Attach it to the original documents. File them with the court.

PROOF OF SERVICE OF SUMMONS (Family Law)

1. I served the Summons with Standard Restraining Orders (Family Law), **blank Response**, and Petition (Family Law) on respondent *(name)*: BRENDAN THOMAS DUNCKLEY
   a. with (1) [ ] blank Confidential Counseling Statement
      (2) [ ] Order to Show Cause and Application
      (3) [X] blank Responsive Declaration
      (4) [X] completed and blank Income and Expense Declarations
      (5) [ ] completed and blank Property Declarations
      (6) [ ] Other *(specify)*:

   b. [ ] By leaving copies with *(name and title or relationship to person served)*:

   c. [X] By delivery at [X] home [ ] business
      (1) Date of: 8/16/99
      (2) Time of: 2:45 p.m.
      (3) Address: 455 E. Ness, #257 Fresno, CA

   d. [ ] By mailing (1) Date of:
      (2) Place of:

2. Manner of service: *(Check proper box)*
   a. [X] **Personal service.** By personally delivering copies to the person served. (CCP 415.10)
   b. [ ] **Substituted service on natural person, minor, incompetent.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) **(Attach separate declaration stating acts relied on to establish reasonable diligence in first attempting personal service.)**
   c. [ ] **Mail and acknowledge service.** By mailing (by first-class mail or airmail) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) **(Attach completed acknowledgment of receipt.)**
   d. [ ] **Certified or registered mail service.** By mailing to address outside California (by registered or certified airmail with return receipt requested) copies to the person served. (CCP 415.40) **(Attach signed return receipt or other evidence of actual delivery to the person served.)**
   e. [ ] Other *(specify code section)*:
      [ ] Additional page is attached.

3. The NOTICE TO THE PERSON SERVED on the summons was completed as follows (CCP 412.30, 415.10, and 474):
   a. [X] as an individual
   b. [ ] on behalf of Respondent
      under [ ] CCP 416.90 (Individual) [ ] CCP 416.70 (Ward or Conservatee) [ ] CCP 416.60 (Minor)
      [ ] Other (specify):
   c. [X] by personal delivery on *(date)*: 8/16/99

4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: $35.00
6. Person serving:
   a. [X] Not a registered California process server.
   b. [ ] Registered California process server.
   c. [ ] Employee or independent contractor of a registered California process server.
   d. [ ] Exempt from registration under Bus. & Prof. Code section 22350(b).
   e. [ ] California sheriff, marshall, or constable.
   f. Name, address, and telephone number and, if applicable, county of registration and number:
      40327 Stagecoach Road, #1
      Oakhurst, CA 93644

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: 8/16/99

W Irving Curtis
(SIGNATURE)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.
Date:

(SIGNATURE)

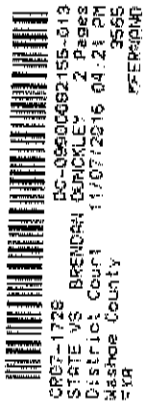


EXHIBIT 8

EXHIBIT 8

O'MARA
LAW FIRM, PC

P.O. Box 2270
311 E. Liberty Street
Reno, Nevada 89505
(Tel) 775-323-1321
(Fax) 775-323-4082

January 2, 2008

CLIENT PICK-UP

Mr. Brendan Dunckley
4456 Highplains Dr.
Reno, Nevada 89523

Re: State of Nevada v. Brendan Dunckley, Case No. CR07-1728

Dear Mr. Dunckley,

As we discussed today, January 2, 2008, I need the following information in order to prepare your case for trial. Please provide me with the following documents as soon as possible, but no later than Tuesday, January 8, 2008.

1. Information regarding the Ford Taurus you purchased, including any documents showing the date you purchased the vehicle and the date you sold the vehicle.

2. Information that would show you were living in New York or Fresno, California during the period in question. For example, any billing statements, time cards from work, or bank statements showing you lived outside of Reno Nevada during the periods of January 1, 1998 through the date you arrived in Reno.

Additionally, please review the transcript of your preliminary hearing as soon as possible. As you review the transcript, please take notes or make any comments you feel would be helpful in your defense.

Further, I will contact the District Attorney and open up informal discussion regarding a plea deal in this case. If the District Attorney makes an offer, I will notify you of the terms.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

David C. O'Mara

:do

Enclosures

EXHIBIT 9

EXHIBIT 9

46

Incident Report
RENO POLICE DEPARTMENT

Address
P.O. BOX 1900
Address
455 E 2ND ST
City State, Zip
Reno NV, 89505
Phone Number
775-334-2175
Fax Number

05-34027 Supplement No 0006

DRAFT

Reported Date 03/27/2007
Nature of Call SEXABSLT
Author BROOME, TOM

Administrative Information

Agency	OCA #	Supplement No	Reported Date	Reported Time	CAD Call No
RENO POLICE DEPARTMENT	05-34027	0006	03/27/2007	13:45	052321447

Status	Nature of Call	Crime/Inc Loc
REPORT TO FOLLOW	SEXUAL ASSAULT	4050 GARDELLA AV

City	Rep Dist	Area	Beat	From Date	From Time
RENO	J7I3	RN	44	08/20/2005	21:30

Emp #	Assignment
R1509/BROOME, TOM	Detectives - Days - Sex Crimes/Juv

Author	Assignment	Approving Officer
R1509	Detectives - Days - Sex Crimes/Juv	

Approval Date	Approval Time

ARRESTEE 1: DUNCKLEY,BRENDAN

Involvement	Seq #	Type	Name	MNI	Race	Sex
ARRESTEE	1	INDIVIDUAL	DUNCKLEY, BRENDAN	913249	WHITE	MALE

Date of Birth	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
07/04/1976	30	No	5'08"	178#	BROWN	HAZEL

Type	Address	City
HOME	4458 HIGHPLAINS DR	RENO

Phone Type	Phone No
HOME	(775)787-1961

Involvement	Arrest Type	Arrest Date	Arrest Time	Status	Dispo
ARRESTED	ARRESTED	03/30/2007	16:00:00	BOOKED	FELONY

Arrest Location	City
455 E. SECOND STREET	RENO

NRS/Charge	Level	Charge Literal
00114	F	SEXUAL ASSAULT

DETECTIVE 1: DETECTIVE TK BROOME

Involvement	Seq #	Type	Name
DETECTIVE	1	INDIVIDUAL	DETECTIVE TK BROOME

Work/School	Position/Grade
RENO POLICE SEX CRIMES UNIT	DETECTIVE

SUBJECT 1: ANTHONY MICHELLE

Involvement	Seq #	Type	Name	MNI	Race
SUBJECT	1	INDIVIDUAL	ANTHONY, MICHELLE	553376	WHITE

Sex	Date of Birth	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
FEMALE	10/26/1986	20	No	5'06"	120#	BLONDE/STRAWBERRY	BROWN

Type	Address	City	State
ADDITIONAL	SOUTHERN NEVADA WOMENS PRISON	NORTH LAS VEG	NEVADA

SUBJECT 2: BROTHWELL,AMANDA

Involvement	Seq #	Type	Name	MNI	Race
SUBJECT	2	INDIVIDUAL	BROTHWELL, AMANDA	954694	WHITE

Sex	Date of Birth	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
FEMALE	01/16/1982	25	No	5'04"	160#	BROWN	BROWN

Type	Address	City
HOME	1608 1ST ST	SPARKS

Phone Type	Phone No
BUSINESS	(775)550-5158

Work/School	Position/Grade
ESSENTIAL PARKING CONTROL	OWNER

45

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SUBJECT 3: VANDERBY ASHLEY

Involvement	Seq #	Type	Name	MNI	Race
SUBJECT	3	INDIVIDUAL	VANDERBY, ASHLEY	798178	WHITE

Sex	Date of Birth	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
FEMALE	08/14/1986	20	No	5'06"	165#	BLONDE/STRAWBERRY	BROWN

Type	Address	City	State
ADDITIONAL	SILVER SPRINGS CONSERVATION CAMP	SILVER SPRING	NEVADA

VICTIM 1: SEXTON, LURA

Involvement	Seq #	Type	Name	MNI	Race	Sex
VICTIM	1	INDIVIDUAL	SEXTON, LURA	900549	WHITE	FEMALE

Date of Birth	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
05/05/1987	19	No	5'08"	202#	BLACK	HAZEL

Modus Operandi

Crime Code(s)
SEX CRIMES

Narrative

REFERENCE CASE: 07-9446 Sexual Assault Arrest

On March 12,2007 I began an investigation into the above listed Sexual Assault, where the suspect was listed as Dunckley, Brendan. During that investigation I learned that many of the details in the 2007 case were similar to this case where Dunckley was also listed as a suspect. This case was suspended in 2005, the reasons are detailed in the investigation follow up. Dunckley was arrested on March 22, 2007 for the 2007 case, after which I began attempting to locate Lura Sexton the victim in this case. I learned that she was living in Yerington Nevada and I obtained a phone number. I contacted Lura on March 22, 07 and told her that I wanted to re-visit her case, explaining that there were similarities to a case that I was now investigating. Lura told me that she moved to Yerington partially because she feared the suspect. She has since moved on with her life and now has a child and is preparing to marry. Lura agreed to meet with me and assist in this investigation. She said that she was being truthful about what happened to her in 2005.

On March 27, 2005 I again contacted Lura and asked if she would participate in a taped phone interview. She agreed and was aware that the conversation was being recorded on audio tape.

PHONE INTERVIEW: Lura Sexton 3-27-07

I explained to Lura that I was investigating another case involving Brendan Dunckley. I asked if I could go over some of the points that caused difficulty in the previous case. I asked Lura to be honest with me about what occurred. I told Lura that in her case, Dunckley told me that he offered to use a condom during their "consensual" sexual encounter, however you told him that would not be necessary because you could not get pregnant. I told Lura that when we talked initially she told me that because of some miscarriages and illness that she could not get pregnant. I asked how that would come up in a conversation. Lura said that the night before her assault when she encountered Dunckley at the 7-11 they talked about him having another child. She said that she mentioned then that she could not get pregnant. Lura also said that Brendan was always talking to a mutual friend, Michelle Anthony. Lura explained that she met Brendan and his wife through Michelle when she was about 12 years old.

I told Lura that another thing that came up was that came up was that Brendan said that you said that the sex was great because you had not had sex for about a year. I told her that I believed that she also told me that it had been some time since she had sex and I thought that was also unusual to come up during a sexual assault. Lura said that she was dating someone at the time and she does not remember saying that.

I asked Lura if she had made previous reports of sexual assault involving other family members. Lura said that there was an allegation about her sister's boyfriend that was handled between the families. She said that she was also the victim of a Statutory Sexual Assault and the suspect went to prison. She said the suspect's name was Richard Rarick. I did locate a 2001 Sparks arrest of Richard Rarick for Statutory Sexual Assault.

I told Lura that Dunckley said that she had been treated for some mental issues. I asked if that was true. I asked Lura if she was treated for alcoholism. She said she drank but she was not an alcoholic.

I told Lura that I remembered that someone said that one of her friends make the comment as she drove away with Brendan was that they were going to have sex. Lura said that she does not remember that. I later found in

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Narrative

my investigative follow up, that Lura was the one who told me that she heard someone say that. She does not remember that now.

Lura said that after she was sexually assaulted by Dunckley shewas extremely depressed for some time. She has since had a child and is engaged to be married. I asked Lura if she gave Dunckley her phone number. She said that she gave it to him the night before at the 7-11 and that was more for his wife Morgan not him.

I asked Lura if she remembered oral sex with the suspect that night. She said that she does not remember that. I asked Lura where the suspect said he was going when she went with him. She said Dunckley was going to boot a car. She said that he drove directly to the dirt lot behind the complex and had no intention on going to boot a car. Lura said that she asked Dunckley what he was doing. She said that the suspect tried to kiss her and she pushed him off. She said that he grabbed her neck and his phone rang. Lura said that he let her go. When he finished the phone call he grabbed her again then went around to the other side of the car, pulled her belt off removed her from the car, pulled down her pants and sexually assaulted her. She said that after it happened Dunckley asked if it was good for her. Lura said that she told him no. She said that the suspect was calling her names like Slut and Whore and wanted her to call him daddy when he was sexually assaulting her.

I asked Lura about her My Space site at the time. She said that she has never had anything directly on her site about one night stands. She thought it might be a link but she does not have that on her site. Lura said that she remembers talking to the DA about that. She said that there was a story about her and her friend Ashley being in a mental institution. Lura said that this was a joke by a friend relating to a school project.

I asked Lura if she had been drinking that night. She said that she had. Lura said that she went to the hospital that night after she told her friend what happened. I asked Lura if she was drunk that night. She said that she was not drunk but had been drinking. I asked Lura why she thinks the suspect sexually assaulted her. Lura said that she has never told anyone, but when she was 13 she and her friend Michelle Anthony stayed at Brendan and Morgan's house and they woke to find Brendan trying to touch them. I asked what she meant by trying to touch them. Lura said that Dunckley was trying to put his hand down her pants and trying to dry hump her friend. Lura said that was the last time before the assault that she had anything to do with Dunckley. Lura said that Michelle is currently in prison in Las Vegas for drug problems. Lura said that when this happened with Dunckley she and Michelle were not friends and she thought at one time that Michelle might have put Dunckley up to the assault.

I asked Lura if she has heard of Dunckley touching anyone else. Lura said that Michelle's daughter who was 5 at the time disclosed that Brendan touched her. Lura said that Michelle told her that Brendan has some daughters that he has touched in the past as well. Lura said that Michelle would know much more. Lura said that she would cooperate any way she could, however she does not want Dunckley to know where she lives under any circumstances. I ended the interview shortly thereafter.

DETAILS CONTINUED:

I have subsequently removed Lura's current address from the Tiberon Entry and will retain that information in the case file and make it available to the District Attorney in person. On March 28, 07 I made arrangements with the Warden at the Women's Prison in North Las Vegas Nevada to interview Michelle via telephone. I was only allowed to talk to her briefly on March 28, 07 which continued on March 29, 07. Both interviews were recorded on audio tape.

WITNESS INTERVIEWS: Michelle Anthony 3-28,29-2007

I asked Michelle permission to audio tape the interview she agreed. I told Michelle that I was looking into Lura's 2005 Sexual Assault and told her that Lura gave me some information and asked her to confirm this. I told Michelle that Lura told me that when she was 12 or 13 she woke to find Brendan trying to touch her and you. Michelle said that she remembered that but thought they were 16 or 17. I asked Michelle if anything else ever happened between her and Brendan. Michelle said that when she was 12 she was sleeping with Brendan and his wife and Brendan fondled her vagina at night. She said that Branden told her not to tell. In a subsequent phone call with Michelle, she told me that she was lying next to Morgan and Dunckley reached over his wife to fondle her. I asked if anything else ever happened. Michelle said that her daughter told her when that someone was touching her vagina. She said that Brendan and Morgan were babysitting for her at the time. Michelle said that

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Narrative

her daughter would not tolerate the CARES exam and the report went no where. I asked Michelle if anything else happened, if Brendan ever exposed himself or anything. Michelle asked me if this would go to court. I told her it might at some point. She said yes. At this point Michelle had to stop the conversation for a count at the prison. Her Case Worker assured me that she would call back the following day.

Michelle's case worker did facilitate a second phone call on March 29, 2007. I again asked Michelle for her permission to record the conversation. Michelle was very hesitant and said that the information that she had involved a friend of her's. Michelle said that this friend was possibly sexually assaulted by Dunckley whenshe was 12 years old. Michelle said that her friend told her that Dunckley may have had sex with her when she was 12 years old in a parking lot off of Neil Road, when Dunckley drove her home. She said that her friend was also incarcerated and she did not want to cause problems for her. I reminded Michelle about her experience with Dunckley and her friend Lura's experience with Dunckley. Michelle said that her friend's name was Ashley Vanderby and she was incarcerated at the Silver Springs Correctional Camp. I ended the interview shortly thereafter.

VICTIM INTERVIEW: Ashley Vanderby 3-29-2007

I contacted the Silver Springs Women's Camp and made arrangements to talk to Ashley Vanderby. I explained to Ashley my investigation and asked her permission to record the conversation. She agreed. I told Ashley that Michelle hesitantly told me that she might have had a sexual encounter with Brendan Dunckley. Ashley said that she like Michelle and Lura did hang around Morgan and Brendan when she was younger. Ashley said that when she was 12 years old she, Michelle Lura, Dunckley and his wife went to dinner at the Atlantis Casino. Ashley said that she made the comment after dinner, that she has never been in the elevator that looked out over Reno. Ashley said that Dunckley took her into the elevator alone. Ashley said that Dunckley pushed her into a corner and put his hand down her pants. She did not tell anyone. On another occasion Ashley reported that Dunckley drove her home. She said that at the time she was 12 years old and lived with her parents off of Longley Lane at the Bristlepoint apartments. Ashley said that Dunckley pulled over in the parking lot and started kissing her. She said that they then had sex. I asked Ashley if she was forced to have sex. Ashley said that she never said that it was forced, she said" but I was 12 years old." She said that she stayed away from Dunckley after this happened. Ashley said that she was sexually active at the time, but she did not plan on having sex with the suspect. Ashley said that she remembers that Dunckley told her that he wanted to teach her stuff and not to tell anyone. I asked if Dunckley used a condom. She said that he did not. Ashley said that she only had sex with Dunckley the one time. I ended the interview shortly thereafter.

DETAILS CONTINUED:

At the beginning of my interview with Dunckley in the 07-9446 Saxual Assault, Dunckley told me that he talked to his wife and she knows everything and is upset but has forgiven him as she forgave him in this case. After listening to the Defendant's Jail calls after the 3-22-07 arrest, it is apparent that Morgan does not know that Dunckley has changed his story from a fabrication by the victim to a consensual sexual encounter. I also spoke with Detective Dixon with Special Investigations, who interviewed Dunckley regarding the business license for the booting company he now works for. Detective Dixon informed me that Amanda Brothwell, a 25 year old female actually holds the license for the booting company, however Dunckley spoke the majority of the time during the interview. Detective Dixon felt that Dunckley was somewhat manipulative in the interview.

Given the new information learned in the 07-9446 investigation and additional witnesses I drove to suspect Dunckley's residence on High Plains drive to place Dunckley under arrest for this Sexual Assault. Dunckley had posted bail for the 2007 case. Although I could see movement in the residence there was no answer. I phoned Dunckley who said that he was in a meeting and would meet me later. Shortly thereafter I received a call from Joel Barber a local attorney who advised that he represented Dunckley and did not want me to talk to him. I prepared an attempt to locate and distributed it to patrol officers, who attempted to locate Dunckley on March 30, 2007 to no avail. Detective Lopez contacted Joel Barber and advised him that we were seeking Dunckley to arrest him for the 2005 Sexual Assault. At approximately 1600 hours, Dunckley walked into the R.P.D. main station and surrendered himself. Detective Lampert facilitated the arrest.

On April 2, 2007 I monitored defendant Dunckley's phone calls from 911 Parr. In those calls Dunckley was clearly

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Narrative

manipulative of his wife and Amanda Brothwell in his attempts to get out of jail.

Investigation Continues. No further at this time.....

EXHIBIT 10

EXHIBIT 10

FACSIMILE
TRANSMITTAL MEMORANDUM
FAX. NO. (775) 325-6701
D.A. DVPT TEAM

TO: DAVID O'MARA, ESQ.
775-323-4082

RE: DNA LAB RESULTS

FROM: Kelli Anne Viloria
Deputy District Attorney

DATE: February 7, 2008

David-

Please see attached - as per our discussion.

Kelli Anne Viloria

This facsimile transmittal consists of 2 pages, including this memorandum.
Should you have any difficulties with the transmission or receipt of this/these document(s), please call (775) 328-3288.

L1806-07-1

WASHOE COUNTY SHERIFF'S OFFICE
MICHAEL HALEY, SHERIFF
FORENSIC SCIENCE DIVISION
911 PARR BLVD.
RENO, NV 89512-1000
PHONE (775) 328-2800
FAX (775) 328-2831

LABORATORY NUMBER:	L1806-07-1
AGENCY:	RENO P.D.
AGENCY CASE #:	07-9446
SUSPECT:	DUNCKLEY, BRENDAN
VICTIM:	HAMBRICK, JESSICA
PERSON REQUESTING:	DET BROOME
DATE OF SUBMISSION:	4/6/2007
OFFENSE:	SEXUAL ASSAULT

Received from the Washoe County Sheriff's Office Evidence Section on 04/09/2007

CONTROL#	DESCRIPTION
P149540	RPD Tag 0700021934, Item 1: Genitals and control swabs
P149541	RPD Tag 0700022369, Item 1: Reference saliva standard from Jessica Hambrick

RESULTS OF EXAMINATION:

For additional DNA results in this case refer to Laboratory report L4130-05, which includes the analysis of the Brendan Dunckley reference standard.

No DNA foreign to the source, Brendan Dunckley, was obtained from the genitals swab. No DNA results were obtained from the control swab.

PCR quantitation was completed at the 5pI5.33 genetic locus. PCR amplification was completed at the following STR genetic loci: D8S1179, D21S11, D7S820, CSF1PO, D3S1358, THO1, D13S317, D16S539, D2S1338, D19S433, vWA, TPOX, D18S51, D5S818, and FGA. The sex determining Amelogenin locus was also examined.

The above listed evidence was returned to the Washoe County Sheriff's Office Evidence Section.

JEFFREY M. ROLANDS, CRIMINALIST

5-21-7
Date

FILED
Electronically
CR07-1728
2016-11-21 04:07:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5817262

CODE

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

Case No. CR07-1728

Dept. No. 4

ORDER

On November 7, 2016, the Petitioner, Brendan Dunkley, in pro per, filed a *Petition for Habeas Corpus to Exhaust State Claims*.

This Court having reviewed the pleadings filed herein, in the interests of justice and good cause appearing,

IT IS HEREBY ORDERED that the State file a Response to the *Petition for Habeas Corpus to Exhaust State Claims* within forty-five (45) days of the date of this order.

DATED this 20 day of November, 2016.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 21st day of November, 2016, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Terrence McCarthy, Esq.
Chief Deputy District Attorney

__X__ **Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and certified mailing with the United States Postal Service in Reno, Nevada:**

Brendan Dunckley
Inmate no. 1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

_____ **Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**
_____ Federal Express or other overnight delivery service – **[NONE]**
_____ Inter-Office Mail – **[NONE]**

DATED this 21st day of November, 2016.

F I L E D
Electronically
CR07-1728
2016-11-21 04:09:03 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5817274

Return Of NEF

Recipients

TERRENCE MCCARTHY, ESQ.	- Notification received on 2016-11-21 16:09:01.347.
DIV. OF PAROLE & PROBATION	- Notification received on 2016-11-21 16:09:01.55.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:	11-21-2016:16:07:54
Clerk Accepted:	11-21-2016:16:08:24
Court:	Second Judicial District Court - State of Nevada Criminal
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Order...
Filed By:	Court Clerk MTrabert

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

TERRENCE P. MCCARTHY, ESQ. for STATE OF NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY for BRENDAN DUNCKLEY

STATE OF NEVADA for STATE OF NEVADA

F I L E D
Electronically
CR07-1728
2017-01-05 02:15:50 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5886052 : csulezic

CODE #2526
CHRISTOPHER J. HICKS
#7747
P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

BRENDAN DUNCKLEY,

Petitioner,

v. Case No. CR07-1728

THE STATE OF NEVADA, ROBERT LEGRAND, Dept. No. 4

Respondent.

_____/

NOTICE OF CHANGE OF RESPONSIBLE ATTORNEY

COME NOW, Respondent, by and through Joseph R. Plater, Appellate Deputy, and hereby provides notice to the Court, all parties, and their respective counsel that Joseph R. Plater, Appellate Deputy, has replaced Terrence P. McCarthy, Chief Appellate Deputy, as the responsible attorney for Respondent in all future matters related hereto.

Respondent herein requests that the Court and all parties herein update their service list with Joseph R. Plater's name and address in order to facilitate timely service of all documents in the matter.

/ / /

/ / /

/ / /

/ / /

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 5, 2017.

CHRISTOPHER J. HICKS
District Attorney

By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
Appellate Deputy
Nevada Bar No. 2771

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on January 5, 2017, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Brendan Dunckley #1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ DESTINEE ALLEN
DESTINEE ALLEN