ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 52383

FILED

MAR 12 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY _____ DEPUTY CLERK

# APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGEMENT

FROM THE SECOND JUDICIAL DISTRICT COURT

HONORABLE CONNIE J. STEINHEIMER PRESIDING


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09-06382

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## A. INTRODUCTION

The Honorable Connie Steinheimer ("Judge Steinheimer") sentenced Mr. Dunckley to the following:

> [i]mprisonment in the Nevada Department of Prisons for the maximum term of life with the minimum parole eligibility of ten (10) years for Count I; and was sentenced to imprisonment in the Nevada Department of Prisons for the maximum term of one hundred twenty months with the minimum parole eligibility of twenty-four (24) months for Count 2, which is to be served concurrently with the sentenced imposed in Count 1, with credit for four (4) days time served. Additionally, Mr. Dunckley was sentenced to submit to a DNA Analysis Test for the purpose of determining genetic markers, Twenty-Five Dollar ($25.00) administrative assessment feem One Hundred Fifty Dollar ($150.00) DNA testing fee, and a Nine Hundred Fifty Dollar ($950.00) Psychosexual Evaluation Fee. The Court further ordered that Appellant serve a special sentence of lifetime supervision to commence after any term of imprisonment or after any period of release on parole.

*See* Appx. 062-063. During the sentencing, Judge Steinheimer specifically and clearly stated that "I know you pled to something that allows for a lesser offense, but it does not allow for probation." *See* Appx. 059. The State claims that "Judge Steinheimer could have been clearer, and her use of the work "it" in the excerpted sentence does not help matters. *See* Respondent's Answering Brief ("Answer") 4:22-5-1. However, Judge Steinheimer's statement was clear and unambiguous in that Judge Steinheimer believed that probation was not available for the lesser included offenses Mr. Dunckley pled guilty.

## B. LEGAL ARGUMENT

### (a) THE SUPREME COURT SHOULD REMAND THIS ISSUE BACK TO THE DISTRICT COURT SO THAT THE COURT CAN IMPOSE AN APPROPRIATE SENTENCE OF PROBATION

This Court should review the sentence imposed in this case and remand for re-sentencing with instructions to strike imposing a prison term and instead impose probation on both counts. Respondent's assertion that the Supreme Court could "remand so that Judge Steinheimer can clarify her ruling" simply does not go far enough to maintain that justice is served. *See* Answer 7:1-2, *see also*, Answer 5:8 ("Ultimately, Judge Steinheimer's lack of clarity may call for a limited remand.")

Contrary to Respondent's claim that Judge Steinheimer's statement that; "I know you pled to something that allows for a lesser offense, but it does not allow for probation," could have been clearer, this statement is clear and unambiguous. Indeed, Judge Steinheimer's statement is clear that

Judge Steinheimer abused her discretion in finding that Mr. Dunckley's entry of plea does not allow for probation, even when such a result is provided for by statute. *See* Appx. 059.

Unfortunately for Mr. Dunckley, the temptation to ignore the fact that probation was available was even more inviting in light of the current community concerns relating to criminal sentences related to sexual crimes, ie: the alleged Brianna Dennison abduction, assault and murder, which was highly documented by the media during the period of time Mr. Dunckley was being sentenced.

Respectfully, the district court acted in hast. The district court not only rejected probation, the district court specifically stated, albeit incorrectly, that Mr. Dunckley's entry of a plea ***"does not allow for probation."*** *See* Appx. 059 (emphasis added). Whether or not Judge Steinheimer "was either mistaken about its availability, forgot about it, or simply ignored it," in either case, the district court abused its discretion in concluding that Mr. Dunckley' entry of a plea "does not allow for probation" with the result being extremely prejudicial to Mr. Dunckley. *See* Answer 5:22-23, *see also*, Appx. 059. Indeed, under either of these situations the ultimate decision, albeit improper, that the entry of plea by Mr. Dunckley does not allow for probation is excessive and an abuse of discretion.

In this regard, Mr. Dunckley gave up several of his constitutional rights by pleading guilty. *See Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973)(noting that the prompt adjudication of many criminal prosecutions "flow, however, from the defendant's waiver of almost all of the constitutional rights we deem fundamental."). The district court abused its discretion in finding that Mr. Dunckley's entry of plea does not allow for probation, even when such a result is provided for by statute. The district court's action is excessive and an abuse of discretion. The district court's decision places a defendant into an uncertain reality as to whether the district court will consider the statutory provision regarding probation or just unilaterally determine that a defendant's entry of plea does not allow for probation. Allow for such a result would make it extremely difficult to resolve criminal matters without a trial. Mr. Dunckley was entitled to have his sentence evaluated by the district court with the understanding that probation was available. The district court's refusal to allow such an evaluation was excessive and an abuse of discretion requiring reversal.

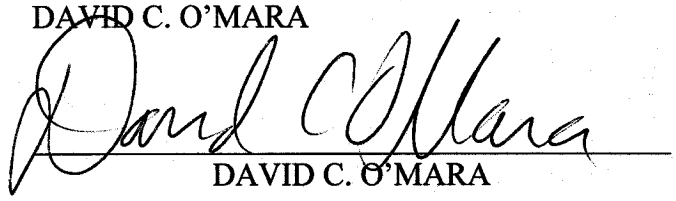
Accordingly, this Court, upon reviewing this excessive sentence, should conclude it appropriate to remand this matter to the district court with instructions to re-sentence Appellant to probation.

## C. CONCLUSION

For the foregoing reasons, the sentence imposed by the District Court is excessive and constitutes an abuse of discretion. Accordingly, this Court should conclude it appropriate to remand this matter to the district court with instructions to re-sentence Mr. Dunckley to probation, or at the very least, for a new sentencing.

DATED: March 10, 2009.

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA

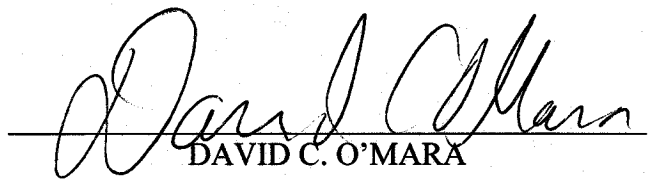


DAVID C. O'MARA

## ATTORNEY'S CERTIFICATE

I recognize that pursuant to NRAP 28 and NRAP 28A, I hereby certify that I have read this Appellate Reply Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.[1] I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page or 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: March 10, 2009.



DAVID C. O'MARA

[1] *See Mann v. State*, 118 Nev. 351, 46 P.3d 1228 (2002)(counsel must appeal if defendant expresses dissatisfaction with the sentence.)

## CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by:

X Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada

_____ Personal delivery

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_____ Federal Express or other overnight delivery

_____ Messenger Service

addressed as follows:

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Washoe County District Attorney
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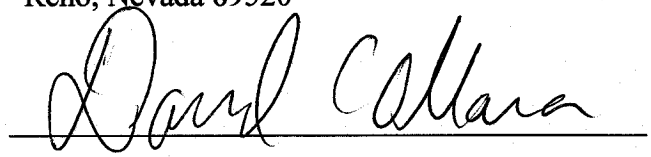
Reno, Nevada 89520

DATED: March ~~10~~ 12, 2009.



**AFFIRMATION**
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-entitled matter

X Document does not contain the social security number of any person

-OR-

___ Document contains the social security number of a person as required by:

____ A specific state or federal law, to wit:

-or-

____ For the administration of a public program

-or-

____ For an application for a federal or state grant

-or-

____ Confidential Family Court Information Sheet (NRS 125.130, NRS 125.230 and NRS 125B.055)

DATED: March 10, 2009.

THE O'MARA LAW FIRM, P.C.

BY: _____
DAVID C. O'MARA, ESQ.