ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 52383

APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGEMENT

FROM THE SECOND JUDICIAL DISTRICT COURT

HONORABLE CONNIE J. STEINHEIMER PRESIDING

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A. STATEMENT OF ISSUES FOR REVIEW

(a) WHETHER THE SENTENCE IMPOSED BY THE DISTRICT COURT IS EXCESSIVE OR CONSTITUTES AN ABUSE OF DISCRETION

B. STATEMENT OF RELEVANT FACTS

Mr. Dunckley was charged with (1) Sexual Assault on a Child, or in the alternative, (2) Lewdness with a Child Under the Age of Fourteen Years, or in the alternative, (3) Statutory Sexual Seduction, and (4) Sexual Assault, by information filed on July 12, 2008. *See* Appx. 001-005. By an Amended Information filed on February 28, 2008, Mr. Dunckley was charged with one count of Lewdness with a Child under the Age of Fourteen Years, a violation of NRS 201.230, and one count of Attempted Sexual Assault, a violation of NRS 193.330, being an attempt to violate NRS 200.366. *See* Appx. 006-009. Subsequently, on March 6, 2008, Mr. Dunckley signed a guilty plea memorandum and entered a guilty plea to both counts. *See* Appx. 028:13-16.

The State, pursuant to negotiations, agreed not to file additional criminal charges resulting from the arrest in this case, and/or would refrain from pursuing additional and/or transactionally related offenses, including those counts filed and dismissed in RJC Case No. 2007-033884. *See* Appx. 013:22-25. The State was also free to argue for an appropriate sentence. *See* Appx. 013:21-22.

Pursuant to an agreement between counsel, sentencing was set out for approximately five (5) months 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. *See* Appx. 038. Sentencing was set for the morning of August 5, 2008. *See* Appx. 33.

At the sentencing hearing, Mr. Dunckley's counsel argued that probation was an appropriate sentence in this case. *See* Appx. 038. At the time, the Presentence Investigative Report had incorrectly advised the district court that Mr. Dunckley was not eligible for probation. *See* Appx. 064. Thus, prior to seeking probation, Mr. Dunckley's counsel first had to correct the Presentence Investigative Report and advice the Court that Mr. Dunckley was eligible for probation because he was certified as an individual that does not represent a high risk to re-offend. *See* Appx. 064, *see*

also, 036:2-14 ("I want to make the Court aware of the fact that probation in both of these charges is available in this case.")

The Court was provided evidentiary support for sentencing Mr. Dunckley to probation instead of prison time. *See* Appx. 037-040 and 089-090. ***First,*** the district court was provided with information regarding Mr. Dunckley's pursuit of therapy from Eng Counseling, in which he participated in group and individual sexual-offender counseling. *See* Appx. 037:11-15, *see also* 090. ***Second,*** Mr. Dunckley provided the district court a letter from Leslie Deach, Food & Beverage Director, Alamo Casino, in which Ms. Deach stated that she had "know [Mr. Dunckley] for over eight years, and that she was "surprised to hear of the alleged allegation against [him]" as [h]e has been professional and respectful in his action with [Ms. Deach] and interactions with my staff both male and female." *See* Appx. 089. ***Third,*** Mr. Dunckley's mother in law, Ms. Pam McFerren testified on his behalf and asked for probation "so that he can be with his family which is a very important thing." *See* Appx. 039-040. Ms. McFerren stated that Mr. Dunckley has "helped me financially as well as physically when I have needed help off and on over the years" and that "the counseling that [Mr. Dunckley] is getting has been very effective." *See* Appx. 039. ***Fourth***, Mr. Dunckley further asked the Court to give him the opportunity to prove that there is good in him and that he can be a productive and beneficial member of society. *See* Appx. 058.

On the other hand, the State failed to present a single witness or either of the two victims, Ashley V and Jessica H. The State argued that the Court should follow the recommendation of the Presentence Investigation Report as to the Lewdness[1] charge and to increase the time in prison to twenty (20) years for the charge of Attempted Sexual Assault.[2] *See* Appx. 043-050. The State's

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[1] The Presentence Investigation Report provided that the district court could sentence Mr. Dunckly on Count I "[f]or live with the possibility of parole, with eligibility of parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $10,000.00. The PSI omitted the possible penalty of probation. *See* Appx. 064.

[2] The Presentence Investigation Report provided that the district court could sentence Mr. Dunckley on Count II "[b]y a minimum term of 2 years and a maximum term of 20 years Nevada Department of Correction. *Id.*

argument was based on self-serving statements which were not supported by documentary evidence. *Id.*

After hearing from Mr. Dunckley and the State, the district court, the Honorable Connie Steinheimer sentenced Mr. Dunckley to the following:

> imprisonment in the Nevada Department of Prisons for the maximum term of life with the minimum parole eligibility of ten (10) years for Count 1; 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 determine genetic markers, Twenty-Five Dollar ($25.00) administrative assessment fee, 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. to concurrent prison terms as set forth above.

See Appx. 062-063. Mr. Dunckley now appeals his sentence.

C. LEGAL ARGUMENT

(a) WHETHER THE SENTENCE IMPOSED BY THE DISTRICT COURT IS EXCESSIVE OR CONSTITUTES AN ABUSE OF DISCRETION

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.

Traditionally, the Nevada Supreme Court has expressed the view that absent a district court's reliance on impalpable or highly suspect evidence at sentencing it would not interfere with a district court's imposition of sentence. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *see also Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992)(presumptively improper for Court to superimpose its views on sentences of incarnation lawfully imposed by sentencing judges). However, there has been an indication that at least some members of the Court may be interested in appellate review of sentences imposed to determine if the sentence imposed is excessive or constitutes an abuse of discretion given the facts of the case and the nature of the defendant. *See Tanksley v. State*, 113 Nev. 844, 944 P.2d 240 (1997)(Rose, J. dissenting).

Indeed, Chief Justice Rose "urge[d] this court. . . to reconsider its refusal to review criminal sentences for excessiveness and to provide criminal defendants with the opportunity to have the most

important aspect of their criminal cases examined on appeal." *See Santana v. State*, 122 Nev. 1458, 148 P.3d 741, 746 (2006).

The instance case provides such an opportunity for the Court in light of the facts underlying the charges of Lewdness With a Child Under the age of Fourteen Years and Attempted Sexual Assualt, and the life sentence imposed against Appellant for Count One and 12-120 months for Count Two. It is of course tempting to impose a life sentence and 12-120 months for the two separate counts. This temptation is even more inviting in light of the current community concern 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. While there is no question that given the current state of Nevada law the district court certainly could legally asses the sentences it did. However, the sentences were inappropriate in that the district court failed to consider Nevada Law at the time the crimes were committed. Indeed, in entering her sentence against Mr. Dunckley, the district court stated that "I know you pled to something that allows for a lesser offense, but it does not allow for probation." Contrary to the district court's statement, Mr. Dunckley's plea to a lesser offense does allow for probation. *See* Appx. 010-016. Indeed this fact was omitted by the Presentence Investigative Report and Mr. Dunckley's counsel had to make the district court aware, albeit unsuccessfully, of the availability of probation during the sentencing hearing. *See* Appx. 064.

Additionally, in the instant case, at a time where this nation now incarcerates many millions of people,[3] this Court must review the district court's sentence to determine whether, given the facts, a prison sentenced as opposed to a probationary term was the more appropriate sentence in this case.

Mr. Dunckley sought an opportunity for probation and sexual offender therapy. His counsel argued that therapy was necessary and more appropriate to prison time. And, more importantly, Mr. Dunckley was already successfully participating in group and individual therapy. However, unpersuaded, the district court elected to follow the Division's recommendation and incarcerate Mr.

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[3] According to the United States Department of Justice, on December 31, 2007, the United States incarcerated 2,294,157 individuals within federal and state prisons and local jails. *See* http://www.ojp.gov/bjs/prisons.htm.

Dunckley in the Nevada State Prison for life for the Lewdness conviction and 12-120 months for the Attempted Sexual Assault conviction.

Respectfully, the district court acted in hast. The district court should have placed Mr. Dunckley on probation with or without very strict conditions. When Mr. Dunckley is successful in completing his probation, both Mr. Dunckley and society would benefit. Indeed, Mr. Dunckley had a strong motivation to succeed – his wife and his children. If he failed, prison would await him. The word here is "opportunity." This was all Mr. Dunckley and his counsel argued for.

Further, 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). The district court was influenced by the mendacious Presentence Investigation Report which improperly omitted the fact, in the "Charge Information" that Mr. Dunckley's entry of plea specifically allows for probation. Notwithstanding Mr. Dunckley's counsel's statements to the district court that Mr. Dunckley was eligible for probation, the district court later found that Mr. Dunckley's entry of a plea "does not allow for probation." *Id.* The district court either relied on the omitted information which was not contained in the presentence report or the district court specifically ignored the fact that probation was available. 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. To thereafter conclude, albeit improperly, that the entry of plea by Mr. Dunckley does not allow for probation is excessive and an abuse of discretion.

Moreover, the district court was influenced in the unsubstantiated belief of the prosecutor that "[w]e craft[ed] this creative plea bargain so [Mr. Dunckley] could have the right to posture himself to ask the district court for sentencing." *See* Appx. 044. What the Court failed to consider is the other side of this equation; in that 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."). In this case, Mr. Dunckley gave up several of his constitutional rights by pleading guilty to offenses that provided for probation. 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.

D. 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: January 7, 2009.

THE O'MARA LAW FIRM, P.C.
WILLIAM M. O'MARA
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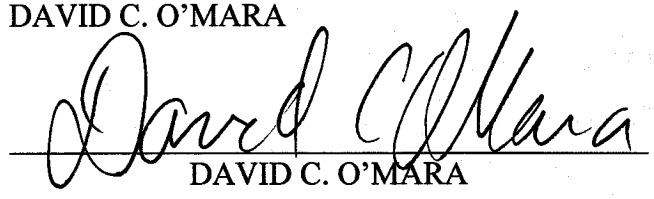
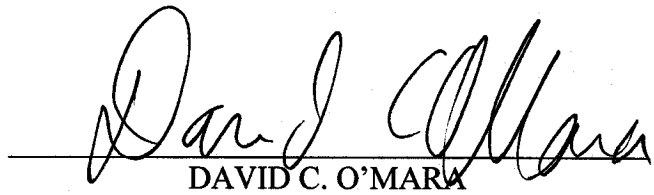


DAVID C. O'MARA

ATTORNEY'S CERTIFICATE

I recognize that pursuant to NRAP 28 and NRAP 28A, I hereby certify that I have read this Appellate Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.[4] 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: January 7, 2009.



DAVID C. O'MARA

[4] *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
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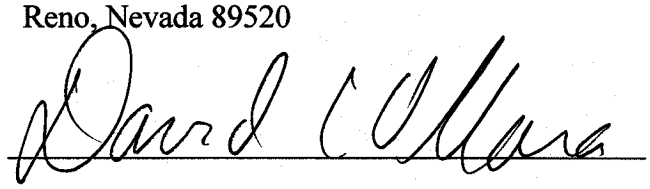

AFFIRMATION
(Pursuant to NRS 239B.030)

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

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-or-

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

DATED: January 7, 2009.

THE O'MARA LAW FIRM, PC

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