SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

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Case No. 59957

APPELLANT BRENDAN DUNCKLEY'S REPLY BRIEF

Appeal from Denial of Motion to Withdraw Guilty Plea
Second Judicial District

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I. ARGUMENT

Mr. Dunckley did not knowingly or intelligently plead guilty because at the time of his plea Mr. Dunckley believed that probation was an option when as a matter of law probation was not an option.

1. Standard of Review:

This Court evaluates whether or not a defendant knowingly and intelligently entered a plea by the abuse of discretion standard. *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). In addition, this Court follows the doctrine of lenity, whereby this Court interprets criminal statutes liberally and construes inconsistencies or ambiguities in the defendant's favor. *Washington v. State*, 117 Nev. 735, 30 P.3d 1134 (2001).

2. Argument:

In *Little v. Warden*, this Court held as follows:

> Because of the gravity of a defendant's decision to plead guilty, due process demands that the face of the record reveal that a defendant knew at the time of the entry of the guilty plea that probation was not an option or that the defendant would be serving actual time in prison.

117 Nev. 845, 848, 34 P.3d 540, 545 (2001) *citing Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). In the present case, Mr. Dunckley was deprived of his right of due process because the face of the record reveals that Mr. Dunckley

believed that probation was an available option when he pleaded guilty to Lewdness with a Child Under the Age of Fourteen Years.

In 1997 through AB 280, the Nevada Legislature substantially amended NRS 201.230 by elevating lewdness with a child under the age of 14 years from a category B felony with a sentence of two to ten years to a category A felony with a sentence of ten to life. Indeed, the Washoe County District Attorney's office was instrumental in securing the change:

> Egan Walker, Deputy District Attorney, Washoe County District Attorney's Office, spoke in support of A.B. 280. He said part of the problem with current legislation was a sieve at the bottom of the system by that he meant offenders would frequently plea bargain sexual assault charges down to lewdness which was a probational offense. The hope and the reality for offenders was that they would receive a term of probation rather than a mandatory prison sentence for offensive conduct. Mr. Walker stated the way the law was currently written a person charged with sexual assault frequently would offer as a defense and as a lessor included jury instruction at the time of trial, lewdness with a child under the age of 14 years, in the hope that the process of trial they would get the benefit of the doubt from the jury and receive a lewdness conviction which would give them the opportunity for probation. Right now a sexual offender who committed lewdness, served his or her prison term and successfully completed probation outside of the community notification and restriction laws, was free. ….

(Assembly Committee on Judiciary, May 22, 1997, page 7.) The clear and unequivocal intent of the Nevada Legislature was to eliminate probation as an option under NRS 201.230. Indeed, as this Court has repeatedly held, "[w]here a statute is amended, provisions of the former statute omitted from the amended

statute are repealed." *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 730 P.2d 438, 442 (1986). The Nevada Legislature repealed the provisions that allowed probation for lewdness with a minor, largely on the advice of the Washoe County District Attorney's office's advice.

In its Answering Brief, the State cites *Sanders v. State*, 119 Nev. 135, 140, 67 P.3d 323, 327 (2003), for the proposition that "statutes are interpreted based on their plain meaning and to reflect legislative intent." (Answering Brief, page 5.) Mr. Dunckely agrees and so does Chief Justice Shearing, who in *Scott E. v. State*, 113 Nev. 234, 931 P.2d 1370, 1375 (1997), described NRS 201.230 as "a non-probational felony with a life prison sentence." The clear and unequivocal intent of the Nevada Legislature was to eliminate probation as an option under NRS 201.230.

Because probation was not available, but the face of the record states clearly that Mr. Dunckley thought probation was available, Mr. Dunckley was deprived of due process and must be allowed to withdraw his guilty plea.

II. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request to withdraw his guilty plea.

III. 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 12, 2012.

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IV. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 12, 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

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