AFFIRMATION

(PURSUANT TO NRS. 239B.030)

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PROCEEDING DOCUMENT FILED IN CASE NO. CR07-1728 POST-CONVICTION WRIT OF HABEAS CORPUS PETITION.

PART NO: I

_X_ DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBERS OF ANY PERSON.

-OR-

_____ DOCUMENT DOES CONTAIN 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 THE APPLICATION OF A FEDERAL OR STATE GRANT

-OR-

_____ CONFIDENTIAL FAMILY COURT INFORMATION SHEET (NRS 125.130, NRS 125.230, NRS 125B.055)

DATED: 7/15/09

Brendan Dunckley

BRENDAN DUNCKLEY (#1023236)
L.C.C.
1200 PRISON ROAD
LOVELOCK, NEVADA. 89419

ATTORNEY: PRO PER

ORIGINAL

Code: 4100
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Attorneys for Petitioner 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. CR07P1728

Dept. No. 4

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

(Post Conviction)

Petitioner Brendan Dunckley, through his appointed counsel Robert W. Story, hereby files the following Supplemental Petition for Writ of Habeas Corpus (Post Conviction).

Mr. Dunckley alleges as follows, incorporating by reference his original and amended Petitions for Writ of Habeas Corpus (Post Conviction):

CURRENT CUSTODY

(1) Mr. Dunckley is currently incarcerated in the Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419 pursuant to a Judgment entered on August 11, 2008, by District Judge Connie J. Steinheimer of the Second Judicial District Court, Washoe County, Nevada.

(2) The District Court sentenced Mr. Dunckley to serve life in prison with the minimum

parole eligibility of ten years for Count I and a concurrent ten years with a minimum parole eligibility of twenty-four months for Count II. The District Court gave Mr. Dunckley credit for four days time served.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Justice Court

(3) On April 5, 2007, the State filed a Criminal Complaint against Mr. Dunckley in Reno Township Justice Court, charging him as follows: Court I Sexual Assault a violation of NRS 200.366 a felony.

(4) On April 16, 2007, the State filed an Amended Criminal Complaint against Mr. Dunckley in Reno Township Justice Court, charging as follows: Count I Sexual Assault on a Child a violation of NRS 200.366 a felony; Count II Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230 a felony; Count III Statutory Sexual Seduction a violation of NRS 200.364 and NRS 200.368; Count IV Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count V Sexual Assault a violation of NRS 200.366; Count VI Sexual Assault a violation of NRS 200.366; Count VII Sexually Motivated Coercion a violation of NRS 207.190 and NRS 207.193

(5) On April 20, 2007 Defendant appeared before Pro Tem Judge Jenny Hubach and was duly arraigned, advised of rights and informed of Complaint. The Justice of the Peace set the preliminary examination for May 2, 2007, and continued Mr. Dunckley's bail.

(6) On April 20, 2007, Mr. Dunckley requested appointment of Washoe County Public Defender.

(7) On May 7, 2007 Conflict Attorney David O'Mara was appointed to represent Mr. Dunckley.

(8) On July 2, 2007, Mr. Dunckley appeared together with attorney David O'Mara before Justice of the Peace Harold Albright for the preliminary examination. The State was represented by David Clifton. The State amended the Complaint by interlineation to conform to evidence. The Justice of the Peace found probable cause to believe the offenses set forth in the Criminal Complaint Counts I, II, III and VI were committed and there was probable cause that Mr. Dunckley participated

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as the principal in such offenses. Mr. Dunckley was bound over to answer in the Second Judicial District Court of the State of Nevada. The Court found insufficient probable cause to believe the offenses set forth in the Criminal Complaint Counts IV, V and VII were committed and/or there was insufficient probable cause that Mr. Dunckley participated as principal in such offenses. Accordingly the Justice of the Peace dismissed Counts IV, V and VII.

B. **District Court**

(9) On July 12, 2007, the State filed in The Second Judicial District Court an Information against Mr. Dunckley charging as follows: Count I Sexual Assault on a Child a violation of NRS 200.366; Count II Lewdness With a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count III Statutory Sexual Seduction a violation of NRS 200.364 and 200.368; Count IV Sexual Assault a violation of NRS 200.366

(10) On February 28, 2008, the State filed against Mr. Dunckley in the District Court an Amended Information charging as follows: Count I Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count II Attempted Sexual Assault a violation of NRS 193.330 being an attempt to violate NRS 200.366 a felony.

(11) On March 6, 2008, Mr. Dunckley pleaded guilty to Count I Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count II Attempted Sexual Assault a violation on NRS 193.330 being an attempt to violate NRS 200.366, pursuant to a Guilty Plea Memorandum in the District Court. 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.

(12) 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

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with sentence imposed in Count I with credit for four days time served.

C. **Nevada Supreme Court**

(13) On November 19, 2008, the Nevada Supreme Court entered an Order Conditionally Imposing Sanction against Mr. O'Mara. And on November 20, 2008, the Nevada Supreme Court returned as unfiled Appellant's Fast Track Appeal Statement.

(14) On January 8, 2009, Mr. O'Mara filed Appellant's Opening Brief filed in the Nevada Supreme Court; on January 20, 2009, the State filed Respondent's Answering Brief; and on March 12, 2009, Mr. O'Mara filed Appellant's Reply Brief.

(15) On March 21, 2009, the Order Submitting for Decision Without Oral Argument was filed in the Supreme Court.

(16) May 8, 2009, the Nevada Supreme Court entered an Order of Affirmance of the Judgment.

D. **Petition for Writ of Habeas Corpus (Post Conviction)**

(17) On July 21, 2009, Mr. Dunckley filed his Petition for Writ of Habeas Corpus (Post Conviction).

Request For An Evidentiary Hearing

Mr. Dunckley respectfully requests that this Court grant an evidentiary hearing on the allegations in his Petition and Supplemental Petition in order to properly and fully develop the following claims to demonstrate that Mr. Dunckley's conviction and sentence are unconstitutional.

Ground One: Petitioner Dunckley received ineffective assistance of counsel in pre-trial proceedings and sentencing in violation of the Constitution and Laws of Nevada and the United States Constitution. Nev. Const. Art. 1, §§ 3, 6 & 8; United States Constitution, Amendments V, VI, VIII & XIV.

Supporting Facts:

(1) 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.

(2) Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, to corroborate his alibi that he was not

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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 and failed to independently conduct such investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

(3) 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; and there were no physical or psychological examinations conducted of any of the victims. 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.

(4) In *Warner v. State of Nevada,* 102 Nev. 635, 729 P.2^{d} 1359 (1986), the Nevada Supreme 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.

(5) The Sixth Amendment to the United States Constitution guarantees to a defendant the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970); *Strickland v. Washington,* 466 U.S. 668 (1984); *Kirksey v. State,* 112 Nev. 980, 923 P.2^{d} 1102 (1997). That right applies to both retained and appointed counsel. *Cuyler v. Sullivan,* 446 U.S. 335 (1980). That right also applies at both the guilt and penalty phases. *Strickland, supra; Paine v. State,* 110 Nev. 609, 877 P.2^{d} 1025 (1994).

(6) This claim is of obvious merit. Mr. Dunckley's attorney failed to conduct a pretrial investigation into the alleged underlying crimes or into any potential mitigating circumstances or

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defenses and failed to interview any of the victims whose credibility was crucial for a conviction. 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 had that investigator complete an independent investigation with an eye toward defenses, and used the facts uncovered by the independent investigation in the trial and in sentencing. 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, Mr. Dunckley is entitled to relief.

Ground Two: Petitioner Dunckley was deprived of due process, equal protection, a fair proceeding, and a reliable sentence in violation of the Constitution and Laws of Nevada and the United States Constitution. Nev. Const. Art. 1, § 8; United States Constitution, Amendment XIV.

Supporting Facts:

(1) 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 the defense and the State informed the District Court as follows:

Mr. O'Mara: Your honor, there's been negotiations with the district

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> attorney's office to se 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.

(Transcript of Proceedings, Motion to Confirm Trial; March 6, 2008; pages 12 and 13; attached as Exhibit 1.)

(2) 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.

(3) Yet the State deprived him of the benefit of his bargain. The State 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.

(4) The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation, but 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. 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.

(5) 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.2^{d} 364, 368 (1986), *limited on other grounds by Smith v. State*, 110 Nev. 1009, 879 P.2^{d} 60 (1994).

(6) This claim is of obvious merit. Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum

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from him which held out the hope of probation, and then argued in bad faith against probation. Accordingly, Mr. Dunckley is entitled to relief.

Ground Three: Petitioner Dunckley was deprived of due process, equal protection, a fair proceeding, and a reliable sentence in violation of the Constitution and Laws of Nevada and the United States Constitution. Nev. Const. Art. 1, § 8; United States Constitution, Art. 1, § 9, cl. 3, and Amendment XIV.

Supporting Facts:

(1) 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.*

(Transcript of Proceedings, Sentencing; August 5, 2008; page 59; emphasis added; attached as Exhibit 2.)

(2) The District Court deprived Mr. Dunckley of the benefit of the Guilty Plea Memorandum through an *ex post facto* application of NRS 176A.110.

(3) 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...." (Amended Information; filed on February 28, 2008; page 1, lines 23 – 25; attached as Exhibit 3.)

(4) 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.

(5) The *Ex Post Facto* Clause of the United States Constitution prohibits laws which make more burdensome the punishment for a crime, after its commission. *Flemming v. Oregon Board of Parole*, 998 F.2d 721, 723 (9th Cir.1993).

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(6) This claim is of obvious merit. 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, Mr. Dunckley is entitled to relief.

Ground Four: Petitioner Dunckley received ineffective assistance of counsel in pre-trial proceedings and sentencing in violation of the Constitution and Laws of Nevada and the United States Constitution. Nev. Const. Art. 1, §§ 3, 6 & 8; United States Constitution, Amendments V, VI, VIII & XIV.

Supporting Facts:

(1) 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.

(2) 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; and there were no physical or psychological examinations conducted of any of the victims. 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.

(3) Mr. Dunckley's attorney failed to inform Mr. Dunckley of the elements of the crimes involved and further failed to inform Mr. Dunckley that the State could not prove its case. Instead, Mr. Dunckley's attorney became caught up in the media frenzy surrounding the Brianna Dennison investigation, misinformed Mr. Dunckley that no jury would believe him, and convinced Mr. Dunckley to plead guilty to crimes the State could not prove.

(4) The Sixth Amendment to the United States Constitution guarantees to a defendant the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson, supra*; *Strickland v. Washington, supra*; *Kirksey v. State, supra*. That right applies to both retained and

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appointed counsel. *Cuyler v. Sullivan, supra.* That right also applies at both the guilt and penalty phases. *Strickland v. Washington, supra; Paine v. State, supra.*

(5) This claim is of obvious merit. Mr. Dunckley's attorney failed to properly inform his client of the elements of the crimes involved so that Mr. Dunckley could make an informed decision about whether or not to plead guilty. There is no reasonable trial strategy designed to effectuate Mr. Dunckley's best interest that would have justified his counsel's failure in this regard. 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. Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault. Accordingly, Mr. Dunckley is entitled to relief.

PRAYER FOR RELIEF

Mr. Dunckley has demonstrated that he is entitled to relief. For the reasons stated above, Mr. Dunckley prays this Court:

(1) Issue a Writ of Habeas Corpus;

(2) Grant an evidentiary hearing;

(3) Vacate Mr. Dunckley's conviction and sentence;

(4) Enter an order granting Mr. Dunckley a trial on all issues and new sentencing, should Mr. Dunckley be convicted through the new trial; and

(5) Grant any other relief as this Court may deem necessary in the interest of justice.

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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.

Respectfully submitted on March 23, 2010.

STORY LAW GROUP

By: _____
ROBERT W. STORY, ESQ.

Attorneys for Petitioner Brendan Dunckley

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CERTIFICATE OF SERVICE

I, Robert W. Story, hereby declare and state as follows:

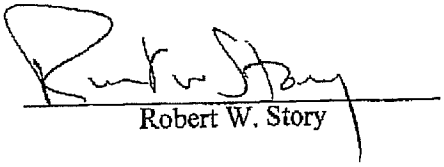
I am over the age of eighteen years, a member of Story Law Group in the City of Reno, County of Washoe, State of Nevada, and I am not a party to this action. My business address is 245 East Liberty Street, Suite 530, Reno, Nevada 89501.

On March 23, 2010, I served the **Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)** by placing a true and correct copy for delivery in the United States mail, postage prepaid, to the following address:

Terrence McCarthy
Deputy District Attorney
1 S. Sierra Street
Reno, Nevada 89501

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

Dated on March 23, 2010, at Reno, Nevada



Robert W. Story

INDEX OF EXHIBITS

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

IN AND FOR THE COUNTY OF WASHOE

* * *

BRENDAN DUNCKLEY,

Petitioner,

v.

JACK PALMER,

Respondent.

Case No. CR07P1728

Dept. No. 4

ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, to answer the petition and supplemental petition as follows:

1. That Respondent denies each and every allegation contained in the petition and supplemental petition.

2. That Respondent is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition are currently available.

3. That Respondent is informed and does believe that aside from an unsuccessful appeal from his judgment of conviction, an unsuccessful motion for modification of sentence, a pending appeal from the denial of his motion for modification of sentence, and a pending motion for withdrawal of guilty plea, Petitioner has not applied for any other relief from this

conviction.

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: May 5, 2010.

RICHARD A. GAMMICK
District Attorney

By /s/ GARY H. HATLESTAD
GARY H. HATLESTAD
Chief Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on May 5, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert Story, Esq.
for Petitioner Brendan Dunckley

/s/ SHELLY MUCKEL
SHELLY MUCKEL

BRENDAN DUNCKLEY (#1023236)
LOVELOCK CORRECTIONAL CENTER
200 PRISON ROAD
LOVELOCK, NEVADA 89419

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

PLAINTIFF

VS.

BRENDAN DUNCKLEY,

DEFENDANT. /

CASE NO: CR07-1728

DEPT. NO: 4

MOTION FOR WITHDRAWAL OF GUILTY PLEA

COMES NOW, DEFENDANT, BRENDAN DUNCKLEY, AND SUBMITS TO THIS COURT HIS MOTION FOR WITHDRAWAL OF GUILTY PLEA MEMORANDUM, ENTERED ON MARCH 6, 2008.

THIS MOTION IS MADE BASED ON THE COURT'S INHERENT AUTHORITY AND THE DEFENDANT'S RIGHT TO WITHDRAW A GUILTY PLEA TO CORRECT A MANIFEST INJUSTICE, UNDER, NRS. 176.165. ALL PAPERS, PLEADINGS AND DOCUMENTS ON FILE HEREIN; AND THE FOLLOWING POINTS AND AUTHORITY.

Points and Authority

Supporting Facts

A "Manifest Injustice" justifying withdrawal of guilty plea is one that is obvious, directly observable, overt, not obscure. The four indicia of manifest injustice generally recognized by state courts, for purpose of a motion to withdraw a guilty plea, are: 1) denial of effective assistanee of counsel; 2) Plea was not ratifyed by the defendant, or the defendant's agent; 3) involuntary plea; or; 4) violation of plea agreement by the prosecution.

Let the record show this motion will prove that a manifest injustice has indeed occured in this case. On March 6, 2008 a 'Guilty Plea Memorandum' was introduced and accepted by the courts in reference of case number CR07-1728, The State of Nevada vs. Brendan Dunckley. On the same date a Guilty Plea 'Canvass' was preformed by Judge Connie Steinheimer.

Special notice should be on page 4; 10 of the guilty plea memorandum, in it, it states: "That I am not eligible for probation unless psychosexual evaluation is completed..." Refering to count II Attempted sexual assault. On page 5; 2- in reference to count I Lewdness with a child under 14 "original count I and allow me the opportunity to qualify for probation, which would otherwise be unavailable...

AT THE HEARING ON MARCH 6, 2008 UPON ACCEPTANCE OF THE GUILTY PLEA, THE FOLLOWING QUESTIONS AND COMMENTS WERE MADE BY JUDGE CONNIE STEINHEIMER. ON PAGE 6; 18-19: "DO YOU HAVE ANY QUESTIONS ABOUT THE MODIFICATION TO THE TYPED DOCUMENT?" REFERING TO PGS, 4; 25, 5; 2. ALLOWING PROBATION TO BE A POSSIBLE SENTENCING OPTION. ALSO ON PAGE 10; 9-12: "NOW, DO YOU UNDERSTAND THAT PROBATION IS NOT AVAILABLE ON THESE CHARGES UNLESS YOU ARE CERTIFIED BY A PROFESSIONAL PURSUANT TO NRS 176.139, NOT TO REPRESENT A HIGH RISK TO REOFFEND AS TO BOTH COUNTS."

ALSO AT THE HEARING ON MARCH 6, 2008, DEFENSE ATTORNEY DAVID O'MARA REFERED TO PROBATION BEING A SENTENCING OPTION WHEN HE STATED: "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 THEROPY DURING THAT PERIOD OF TIME. AND BASICALLY THE D.A. IS GIVING HIM EVERY OPPORTUNITY TO TRY TO QUALIFY FOR PROBATION AND TO DO THINGS THAT WILL BE BENIFICIAL FOR HIM TO PRESENT TO YOU AT SENTENCING (PAGE 12; 24 to Pg 13; 7)

FURTHER INFERENCE THAT PROBATION WAS INFACT AN AVAILABLE SENTENCING POSSIBILITY, PROVIDED DEFENDANT KEEPS HIS END OF THE "CONTRACT" WAS ADA VILORIA COMMENTING ON MARCH 6, 2008 - Pg. 13; 8-14: "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."

ON AUGUST 5, 2008 THE IDEA OF PROBATION BEING ALLOWED FOR THE CRIMES AS ACCEPTABLE SENTENCING OPTION, DEFENSE ATTORNEY CONTINUED THIS 'FARSE' ON Pg. 4; 10, 11: " I WANT TO MAKE THE COURT AWARE OF THE FACT THAT PROBATION IN BOTH THESE CHARGES IS AVAILABLE IN THIS CASE." THEN Pg. 6; 2, 3: "GRANT MR. DUNCKLEY THE OPPORTUNITY TO BE ON PROBATION FOR BOTH THESE CHARGES." (Pg 7; 6, 7, Pg 10; 3) Pg 10; 14 "SO HE DOES QUALIFY FOR PROBATION." AND FINALLY ON Pg 8; 12, 13: "I RESPECTFULLY REQUEST THAT YOU ALLOW FOR PROBATION."

ASSISTAND DISTRICT ATTORNEY VILORIA ON AUGUST 5, 2008 STATED ON PAGE 12; 11, 12: "STATE'S CONCERN ARE THAT THE COMMUNITY HAVE TO BE SAFE. AND IF BRENDAN DUNCKLEY IS GIVEN PROBATION, IT WILL NOT BE." ANAMITLY FIGHTING AND ARGUING AGAINST ANY TYPE OF PROBATION BEING AWARDED. ALSO SPECIFICALLY ON PAGE 27; 18, 19: JUDGE STEINHEIMER STATED: "I KNOW YOU PLED TO SOMETHING THAT ALLOWS FOR A LESSER SENTENCE; BUT IT DOES NOT ALLOW FOR PROBATION." (EMPHASIS ADDED) PROBATION FOR NRS 201.230 OR NRS 193.330 IS NOT EVEN ALLOWED IN SENTENCING GUIDLINES

ARGUMENTS

"A PLEA AGREEMENT IS CONSTRUED ACCORDING TO WHAT THE DEFENDANT REASONABLY UNDERSTOOD WHEN HE OR SHE ENTERED THE PLEA" Sullivan v. State, 96 P.3d 761, 120 Nev. 537, 2008 WL 2566743 (1999); Gunn v. Ignacio, 263 F.3d 965 (Nev. 2001).

"TO DETERMINE WHETHER A PLEA BARGAIN IS VIOLATED, THE COURT MUST LOOK AT WHAT THE PARTIES HAD REASONABLY UNDERSTOOD TO BE THE TERMS OF THE AGREEMENT, AND TYPICALLY THE GOVERNMENT MUST BEAR RESPONSIBILITY FOR ANY LACK OF CLARITY IN THOSE TERMS, BECAUSE THEY HAD CRAFTED THE AGREEMENT" U.S. v. Johnson, 199 F.3d 1015 120 S.Ct. 2206, 530 US 1207, 147 L.Ed2d. 239 (1999)

"DISTRICT JUDGE'S ACCEPTANCE OF DEFENDANT'S GUILTY PLEA TO A CRIME OF SEXUAL ASSAULT WAS FATALLY DEFECTIVE BECAUSE RECORD DOES NOT INDICATE THAT DEFENDANT WAS INFORMED THAT SEXUAL ASSAULT WAS NOT A PROBATIONABLE OFFENSE." Meyer v. State, 603 P.2d 1066, 95 Nev. 885. (Nev. 1979)

"ACCEPTANCE OF GUILTY PLEA IS FATALLY DEFECTIVE IF RECORD DOES NOT AFFIRMATIVELY SHOW THAT DEFENDANT WAS INFORMED THAT PROBATION IS NOT AVAILABLE ... ACCEPTANCE OF A GUILTY PLEA WITHOUT DEFENDANT BEING INFORMED THAT PROBATION IS NOT AVAILABLE REQUIRES THAT DEFENDANT

BE ALLOWED TO WITHDRAW HIS GUILTY PLEA" SKINNER V. STATE, 930 P.2d 748, 113 NEV. 49 (NEV. 1997)

ONE OF THE FOUR INDICIA TO ESTABLISH A "MANIFEST INJUSTICE" IS A INVOLUNTARY PLEA. SINCE A VALID ENTRANCE AND ACCEPTANCE OF A PLEA THAT IS BOTH KNOWINGLY AND VOLUNTARY REQUIRES THAT DEFENDANT BE FULLY AND ACCURATLY INFORMED OF BOTH THE CRIMES AND THE TRUE SENTENCING GUIDLINES FOR SUCH CRIMES.

"REQUIREMENT OF VOLUNTARY GUILTY PLEA IS THAT THE PLEA BE ENTERED WITH UNDERSTANDING OF CONSEQUENCES OF PLEA, INCLUDING POSSIBLE RANGE OF PUNISHMENT, IS NOT MET WHEN A DEFENDANT IS EXPRESSLY GIVEN MISINFORMATION BY THE STATE OR DISTRICT COURT AT TIME OF ENTRY OF HIS PLEA TO EFFECT THAT MANDATORY MINIMUM SENTENCE HE MIGHT RECEIVE IS MUCH LESS THAN WHAT IS ACTUALLY POSSIBLE UNDER THE STATUTE... RECORDS SHOW IT DID NOT AFFIRMATIVELY DEMONSTRATE FULL UNDERSTANDING BY DEFENDANT OF CONSEQUENCES OF PLEA, AND THUS DID NOT REFLECT THAT PLEA WAS ENTERED KNOWINGLY AND VOLUNTARY." SIERRA V. STATE, 691 P.2d 431, 100 NEV. 614 (NEV. 1984)

"ANY DOUBT AS TO WHETHER PLEA WAS VOLUNTARY MUST BE RESOLVED IN FAVOR OF THE DEFENDANT" STATE V. SCHOONER, 973 P.2d 230, 293 MONT. 54. (MONT. 1999)

THE RECORD IS CLEAR. NOT AT ANY POINT DID ADA VILORIA, DAVID O'MARA NOR JUDGE STEINHEIMER CORRECT

THE INFORMATION IN REGARDS TO PROBATION BEING A OPTION. AT NO POINT DID THE "OFFICERS OF THE STATE / COURT" STATE TO THE DEFENDANT THAT NRS. 201.230 AND NRS 193.330 DONT EVEN ALLOW FOR PROBATION TO EVEN BE CONSIDERED. THUS INTENTIONALLY MISINFORMING THE DEFENDANT, AND FALSELY IMPLYING AND LEADING DEFENDANT TO BELIEVE PROBATION WAS AVAILABLE. WITH THE NUMEROUS COMMENTS AND REFERENCE TO SUCH BY ADA VILORIA, DAVID O'MARA AND JUDGE STEINHEIMER ON MARCH 6, 2008 AND AUGUST 5, 2008.

WHEN ADA VILORIA FOUGHT AT SENTENCING FOR NOT GRANTING PROBATION (PG 12; 12) AND PG 14; 12, 13: "WE CREATED THIS ALLEGATION OR THIS PLEA BARGAIN SO THAT THIS DEFENDANT COULD ASK YOU FOR PROBATION". THE CONTINUAL FACT THAT PROBATION IS NOT EVEN AVAILABLE BY LAW, BUT THAT WAS KEPT 'HIDDEN' ALLOWING THE DEFENDANT TO BELIEVE IF HE KEPT HIS END OF THE 'CONTRACT' HE WOULD 'QUALIFY FOR PROBATION'. (SEE SULLIVAN V. STATE & GUNN V. IGNACIO) THEREFORE MEETING THE REQUIRED 'INDICIA' OF NUMBER 3 - INVOLUNTARY PLEA.

AS STATED THE COMMENTS AND MISINFORMATION WAS NOT JUST INVOLVING ADA VILORIA SOLEY. BUT IT ALSO INCLUDED DEFENSE ATTORNEY DAVID C. O'MARA.

"ENTERING A PLEA UPON MISTAKEN LEGAL ADVICE THAT NO DEFENSE TO MISCONDUCT EXISTS, ESTABLISHES FAIR

AND JUST REASON TO WITHDRAW PLEA." HANSEN V. STATE, 824 P.2d 1384 (ALASKA 1992)

BY NOT ONLY NOT CORRECTING THE RECORD, BUT TO ADVISE AND ALLOW DEFENDANT TO SIGN AND ENTER A PLEA OF GUILTY, WITH THE FULL KNOWLEDGE HE THINKS PROBATION IS AN OPTION. A BELIEF AND UNDERSTANDING THAT ALONG WITH ADA VILORIA, DEFENSE ATTORNEY O'MARA CONTINUALLY COMMONTED ON AND REFERED TO. SUCH ADVICE WOULD NEVER HAVE BEEN GIVEN BY A DEFENSE ATTORNEY WHO WAS TRUELY WORKING AS AN ADVISARY TO THE STATE. HIS 'ADVICE' AND COMMENTS INCOURAGING THE MISINFORMATION AND FARSE ON PART OF THE STATE FELL BELOW A BAR OF STANDARDS ATTORNEY'S HOLD THEMSELVES TO. THE BASIC AND FULL KNOWLEDGE OF THE CRIME IS A 'BASIC/BEGINNER' REQUIREMENT OF A COMPETANT ATTORNEY. DAVID O'MARA HAS PROVEN HE WAS NOT ACTING AND ADVISING HIS CLIENT IN A COMPETANT WAY. HIS MISADVICE AND DECEPTION PREJUDICED THE DEFENDANT LEADING HIM TO PLEAD GUILTY. BY HIS IN-COMPETANT PREJUDICIAL ADVICE/ACTION, BOTH 'PRONGS' OF STRICKLAND V. WASHINGTON HAVE BEEN MET. YET ANOTHER 'INDICIA' OF NUMBER 1) DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL. A VALID 'MANIFEST INJUSTICE' TO ALLOW REVERSAL/WITHDRAWAL OF PLEA.

"THE BEST COURSE OF ACTION FOR THE DISTRICT COURTS DURING PLEA CANVASS IS TO AFFIRMATIVELY STATE THAT PROBATION IS NOT A SENTENCING OPTION FOR THE CHARGED CRIME'

RIKER V. STATE, 905 P.2d 706, 111 NEV. 1316 (NEV. 1995)

THE DISTRICT COURT HAS IN ITS DISCRETION AND POWER TO GRANT THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA FOR ANY SUBSTANTIAL REASON IF IT IS JUST AND FAIR. INTENTIONAL MISREPRESENTATION OF THE LAW AND STATUTES, INCLUDING THE STATUTE OF SENTENCING STRUCTURE IS A STRONG AND VALID REASON TO ALLOW THE WITHDRAWAL OF PLEA.

"COUNSEL'S DELIBERATE MISREPRESENTATION CONCERNING SENTENCING THAT INDUCES A GUILTY PLEA IS A VALID AND JUST CAUSE CONSTITUTING INEFFECTIVE ASSISTANCE OF COUNSEL"
PEOPLE V. DIGUGLIELMO; 33 P.3d 1248 (COLO. 2001)

THIS 'COUNSEL' CAN REFER TO BOTH DEFENSE AND PROSECUTING ATTORNEYS. SINCE BOTH HAVE A DUTY AS OFFICERS OF THE COURT TO SEEK JUSTICE. IN THE DEFENDANT'S IMMEDIATE CASE AND THE RECORD SHOW THAT IT IS SO OBVIOUS, DIRECTLY OBSERVABLE, AND BOTH OVERT AND NOT OBSCURE THAT SUCH MISINFORMATION WAS INFACT INTENTIONAL WITH THE INTENT TO INDUCE A GUILTY PLEA. BUT IN SUCH A CASE 'INDUCE' IS INCORRECT WORD. COERSION IS MORE APPROPRIATE. THE ONLY REASON WOULD BE THAT 'COUNSEL' DID NOT KNOW PROBATION WAS NOT AVAILABLE. THAT IS FAR FROM LIKELY TO BE THE CASE HERE.

NRS. 176.165 STATES: "... TO CORRECT A MANIFEST INJUSTICE, THE COURT AFTER SENTENCING MAY SET ASIDE THE

JUDGEMENT OF CONVICTION; AND PERMIT THE DEFENDANT TO WITHDRAW HIS PLEA." (RULE OF CRIM. PROC. RULE 11(h)(1))

PURSUANT TO BRYANT V. STATE WHEN A DEFENDANT BRINGS FOWARD A MOTION TO WITHDRAW A GUILTY PLEA THE TRIAL COURT HAS A DUTY TO REVIEW THE ENTIRE RECORD TO DETERMINE WHETHER THE PLEA IS VALID. ESPECIALLY IF THE DEFENDANT CAN PROVE A CREDIABLE CLAIM OF FACTUAL INNOCENCE, AND LACK OF PREJUDICE TO THE STATE.

ALSO THE STATE VIOLATED THE 'PLEA BARGAIN' TO ESTABLISH NUMBER 4) VIOLATION OF PLEA BARGAIN BY PROSECUTOR. WITH THE GUILTY PLEA BEING CONSTRUED AND GOVERNED UNDER CONTRACT LAW NOT CRIMINAL, THE STATE BREACHED IT BY MEANS OF FRAUD. SINCE ADA VILORIA CREATED AND GENERATED THE GUILTY PLEA MEMORANDUM., SHE KNEW IT WAS FALSE AND INVALID. BECAUSE SHE KNEW THAT THE STATE LAW RESTRICTS THE CONSIDERATION OF PROBATION FOR THE CRIMES CHARGED. BY HER ACTIONS AND COMMENTS AT THE HEARINGS SHE INTENTIONALLY COMMITED FRAUD BY ENTERING / INTRODUCING A CONTRACT UNDER FALSE PRETENSE. THEREFORE UNDER CONTRACT LAW VOIDING THE 'CONTRACT'. ALSO A TRUE AND JUST MANIFEST INSUSTICE ALLOWING WITHDRAWAL OF GUILTY PLEA.

"IF MISINFORMATION AS TO SENTENCE EXISTS IT RENDERS A GUILTY PLEA INVOLUNTARY MADE, AND IT MUST BE VACATED, EVEN IF THE ACTUAL SENTENCE IMPOSED WAS WITHIN THE PERIMITER." TAYLOR V. WARDEN, NSP., 607 P.2d 587, 96 NEV. 272 (NEV. 1980)

SINCE A MOTION TO WITHDRAW A PLEA IS INCIDENT TO PROCEEDINGS IN TRIAL COURT AND IS THEREFORE NOT SUBJECT TO STATUTORY TIME LIMITATIONS APPLICABLE TO A PETITION FOR WRIT OF HABEAS CORPUS.

"WHEN STATE ENTERS INTO A PLEA AGREEMENT IT IS HELD TO THE MOST METICULOUS STANDARDS OF BOTH PROMISE AND PREFORMANCE, VIOLATIONS OF TERMS OR OF "SPIRIT" OF PLEA BARGAIN REQUIRES AN IMMEDIATE REVERSAL." CITY V STATE, 807 P.2d 724, 107 NEV. 89 (NEV. 1991): & STATZ V. STATE, 944 P.2d 813, 113 NEV. 987 (NEV. 1997)

CONCLUSION

THE REVIEW OF BOTH THE RECORD AND THIS MOTION IT IS CLEAR THAT THE DEFENDANT WAS INFACT INTENTIONALLY MISINFORMED, BY BEING LED TO BELIEVE PROBATION WAS A VALID SENTENCING OPTION, BY ADA VILORIA, DAVID O'MARA AND EVEN JUDGE STEINHEIMER STATING PROBATION WAS AN OPTION, AND NOT AFFIRMATIVELY STATING TO DEFENDANT IT IS NOT AN OPTION, ACTUALLY THERE WAS TWENTY-THREE DIRECT REFERENCES TO PROBATION BEING AN OPTION. SUCH BEHAVIOR SHOWS SUCH MISINFORMATION INVALIDATES THE PLEA MAKING IT BOTH NOT KNOWINGLY GIVEN NOR VOLUNTARY.

AS MENTIONED IN THIS MOTION DEFENDANT HAS PROVEN NOT ONE, NOT TWO BUT THREE OF THE FOUR INDICIA.

ALLOWING REVERSAL OF GUILTY PLEA. MORE THAN SATISFIED THE PICTURE OF A "MANIFEST INJUSTICE" AS PER NRS. 176.165.

WHEN A DEFENDANT ENTERS INTO A PLEA AGREEMENT THAT INCLUDES AS A MATERIAL ELEMENT A REFERENCE FOR AN ILLEGAL SENTANCE, THE GUILTY PLEA IS INVALID. AND MUST BE VACATED. BECAUSE THE BASIS THAT THE DEFENDANT ENTERED THE PLEA INCLUDED THE IMPERMISSIBLE INDUCEMENT OF AN ILLEGAL SENTANCE, PROBATION, WHICH IS NOT AN OPTION, LEGALLY. NO SOUND PUBLIC POLICY SUPPORTS ALLOWING A DEFENDANT TO BARGAIN FOR AN ILLEGAL SENTENCE. THUS SUCH A PLEA AGREEMENT CAN NOT BE ALLOWED TO STAND.

SINCE PROPER INTERPRETATION OF A PLEA AGREEMENT IS A QUESTION OF LAW: IT IS NOT JUST BASED ON THE SUBJECTIVE UNDERSTANDINGS OF THE DEFENDANT BUT RATHER ON THE MEANING A REASONABLE PERSON WOULD HAVE ATTACHED TO IT UNDER THE CIRCUMSTANCES. WHEN A PARTY ATTEMPTS TO FASHION A SENTENCE TO INDUCE A GUILTY PLEA, THAT IN ITSELF IS CONTRARY TO LAW, SUCH A PLEA MUST BE REGARDED AS INVALID AND INVOLUNTARY.

VIOLATIONS OF A PLEA BARGAIN BY AN OFFICER OF THE STATE SUCH AS ADA VILORIA, DAVID O'MARA AND EVEN JUDGE STEINHEIMER RAISES THE NECESSITY TO PROTECT THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT: AS A REMEDY, ALLOWING WITHDRAWAL OF GUILTY PLEA.

THE REMEDY FOR THIS, BREACH, COERCION, INTENTIONAL MISREPRESENTATION, MANIFEST INJUSTICE IS THAT THE DEFENDANT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA, BY ALLOWING SUCH TO ALSO ALLOW DEFENDANT TO RETURN TO STATUS OF NOT GUILTY. REQUIRING THE STATE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT, AND UNTIL SUCH TIME BE CONSIDERED INNOCENT.

SINCE THE PLEA WAS INFACT NOT ENTERED KNOWINGLY NOR VOLUNTARY, THE MOTION AND RECORD ESTABLISH THAT PLEA OF GUILTY WAS CONSTITUTIONALLY INVALID. THE DEFENDANT ASKS THAT HE BE ALLOWED TO RETURN TO THE STATUS OF NOT GUILTY.

DEFENDANT ALSO REQUESTS THAT WITH THE WITHDRAWAL OF HIS GUILTY PLEA, RETURN TO NOT GUILTY STATUS, THAT THE ORDER OF CONVICTION ENTERED ON AUGUST 11, 2008 BE REVERSED AND CONVICTIONS BE VACATED.

IN THE INTREST OF JUSTICE AND AS ATTORNEY PRO PER FOR CASE NUMBER: CR07-1728, IN ACCORD WITH DCR 13(3) A IMMEDIATE DECISION IS REQUESTED. FOR "JUSTICE DELAYED IS CLEARLY JUSTICE DENIED". DOUGAN V. GUSTAVENSON, 835 P.2d 795, 799, 108 NEV. 517 (NEV. 1992) IF TEN (10) DAYS PASS FROM SERVICE OF THIS MOTION TO THE STATE, AND NO OPPOSITION IS FILED BY THE STATE, DEFENDANT REQUESTS THAT SUCH FAILURE TO OPPOSE THE MOTION FOR WITHDRAWAL OF GUILTY PLEA,

BE VIEWED AND CONSTRUED AS AN ADMISSION BY THE STATE THAT THE MOTION IS MERITORIOUS AND AS A CONSENT TO GRANTING THE SAME. AND ANY OTHER RELIEF YOUR HONOR SEES FIT TO GRANT DEFENDANT.

DATED THIS 26th DAY OF FEBRUARY, 2010

Brendan Dunckley

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR WITHDRAWAL OF GUILTY PLEA to the below address(es) on this 26th day of FEBRUARY, 2010, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

WASHOE COUNTY DISTRICT ATTORNEY
C/O GARY HATLESTAD
P.O. BOX 30083
RENO NEVADA 89520-3083

&

CLERK OF THE COURTS
SECOND JUDICIAL DISTRICT
C/O DEPT 4.
P.O. BOX 30083
RENO, NEVADA 89520-3083

Brendan Dunckley
BRENDAN DUNCKLEY #1023256
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
DEFENDANT In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR WITHDRAWAL OF GUILTY PLEA filed in District Court Case No. CR07-1728 does not contain the social security number of any person.

Dated this 26th day of FEBRUARY, 2010.

Brendan Dunckley
BRENDAN DUNCKLEY
DEFENDANT In Pro Se

CODE #2645
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Plaintiff

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

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR07-1728

BRENDAN DUNCKLEY,

Dept. No. 4

Defendant.

_____/

OPPOSITION TO MOTION TO STRIKE STATE'S OPPOSITION TO MOTION TO WITHDRAW GUILTY PLEA AND SUPPLEMENT IN CONSIDERATION OF MOTION TO WITHDRAW GUILTY PLEA

Comes now, the State of Nevada, by and through counsel, to submit this Opposition to Dunckley's Motion to Strike State's Opposition to Motion to Withdraw Guilty Plea and Supplement in Consideration of Motion to Withdraw Guilty Plea. This Opposition is based on the accompanying discussion.

DISCUSSION

Although titled a Motion to Strike, Dunckley's argument sounds more like a Reply to our previously filed Opposition to his Motion to Withdraw Guilty Plea. Moreover, aside from taking a few predicable potshots at the State's Opposition, Dunckley has cited no reason to strike our Opposition, nor has he cited case law supporting it.

In short, the Court should treat Dunckley's Motion for what it is: a Reply. Accordingly,

Dunckley's Motion should be denied.

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 3, 2011.

RICHARD A. GAMMICK
District Attorney

By /s/ GARY H. HATLESTAD
GARY H. HATLESTAD
Chief Appellate Deputy

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 3, 2011, 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
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

Robert W. Story, Esq.
245 E. Liberty Street, Suite 530
Reno, NV 89501

/s/ SHELLY MUCKEL
SHELLY MUCKEL

3880

FILED

10 NOV -3 AM 9:18

HOWARD W. CONYERS

BY _____ DEPUTY

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

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

THE STATE OF NEVADA,

PLAINTIFF

VS.

BRENDAN DUNCKLEY,

DEFENDANT.

CASE NO: CR07-1728

DEPT. NO: 4

DEFENDANT'S RESPONSE TO STATE'S OPPOSITION TO MOTION TO WITHDRAW GUILTY PLEA, SUPPLEMENTAL TO MOTION TO WITHDRAW GUILTY PLEA AND SUPPLEMENTAL IN CONSIDERATION OF MOTION TO WITHDRAW GUILTY PLEA

COMES NOW, DEFENDANT, BRENDAN DUNCKLEY, AND SUBMITS TO THIS COURT THE RESPONSE TO THE ABOVE-MENTIONED MOTIONS. THIS RESPONSE TO OPPOSITION IS BASED ON THE ACCOMPANYING POINTS AND AUTHORITIES.

POINTS AND AUTHORITIES

THE STATE IN IT'S OPPOSITION STATED THAT THE ARGUMENT IN CONNECTION TO THE ABOVE-MENTIONED MOTION IS A "SIMPLE ISSUE, ONE THAT CAN EASILY BE DENIED, AT THE BASIC EXAMINATION OF

NRS 176A.110. FIRST AND FOREMOST THE STATE LISTED AS IT'S AUTHORITY ASWEGAN V. STATE, 101 NEV. 760, 710 P.2d 83 (1985); HEMRICH V. STATE, 97 NEV. 358, 630 P.2d 1224 (1981); MEYER V. STATE, 95 NEV. 885, 603 P.2d 1066 (1979); OVERRULED BY LITTLE V. WARDEN, 117 NEV. 845, 849-51; 34 P.3d 540, (2001)"

THE BASIS FOR ALL THESE CASES WERE THAT PROBATION WAS NOT SPECIFICALLY INFORMED TO THE DEFENDANT UPON THE ENTRANCE OF THE PLEA OF GUILTY, INCLUDING MY CURRENT 'CELLIE' LITTLE, C., IN LITTLE V. WARDEN. THE ERROR IN THIS ARGUMENT AS A FOUNDATION TO OPPOSE THE MOTIONS UNDER ATTACK, IS THESE CASES ARE THE EXACT OPPOSITE. AT NO POINT WAS THERE EVER ANY ARGUMENT THAT PROBATION WAS NOT MENTIONED. TO BE SPECIFIC PROBATION WAS DIRECTLY REFERENCED TO IN THE RECORD AS A VIABLE SENTENCING OPTION FOR THIS COURT TO CONSIDER A TOTAL OF ONE HUNDRED AND TWELVE (112) TIMES. (UP TO AND INCLUDING THE SUPREME COURT'S AFFIRMATION).

ONCE AGAIN ALLOW THE ISSUES TO BE PRESENTED AGAIN. THE ARGUMENT IS NOT IN QUESTION OF NRS 176A.110, ESPECIALLY IMPORTANT SINCE MR. HATLESTAD STATED ON PAGE 2 SO PERFECTLY STATED THE 'ISSUE':

"IT NECESSARILY FOLLOWS THAT IF PROBATION WAS NOT AVAILABLE, THE COURT SHOULD GRANT THE MOTION." (2;2-3)

"HOW THE COURT RESOLVES THIS DISPUTE REVOLVES AROUND NRS 176A.110 ...." (2;5,6)

"COUNT I ALLEGED THAT DUNCKLEY COMMITTED THE CRIME OF LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN BETWEEN AUGUST 1998 AND AUGUST 2000. DUNCKLEY CONTENDS THAT PROBATION

WAS NOT AVAILABLE FOR THIS OFFENSE DURING ALL OR PART OF THAT TIME FRAME, WE DISAGREE. (2; 7-9)

"EVEN THOUGH THE CHARGE, AS ALLEGED, COVERS A TWO YEAR PERIOD OF TIME, OUR LEGISLATURE HAD MADE PROBATION AVAILABLE FOR THIS OFFENSE DURING THE ENTIRETY OF THAT TIME FRAME. SEE 1997 STATUTES OF NEVADA, PP 2504-5, ESP. SEC 7(3)(J) AND SEC 9 (1); 1997 STATUTES OF NEVADA, P. 2509, SEC. 13; 1997 STATUTES OF NEVADA P. 1187, SEC. 13; 1999 STATUTES OF NEVADA, P. 567, SEC 67; 1999 STATUTES OF NEVADA, P. 1192, SEC. 10 (1)(a)(c). ACCORDINGLY, THIS COURT PROPERLY ADVISED DUNCKLEY OF THE CONSEQUENCES OF HIS PLEA" (2; 10-15)

"IT SHOULD BE NOTED THAT IN 2003, THE LEGISLATURE DECIDED THAT PROBATION WOULD NO LONGER BE AVAILABLE FOR LEWDNESS WITH A CHILD. SEE 2003 STATUTES OF NEVADA, P. 2827, SEC. 3; STATUTES OF NEVADA, P. 2828, SEC. 4." (FN1)

IN RESPECT FOR THE LEARNED MR. HATLESTAD, AS I HAVE PREVIOUSLY NOTED I HAVE RESPECT FOR. BUT I DISAGREE.

AS ALWAYS THIS RESPONSE WILL DISECT THE STATE'S EXACT VERBAGE AND ONCE AGAIN SHOW HOW THE STATE HAS MADE THE ARGUMENT FOR THIS MOTION TO BE GRANTED IN IT'S ENTIRETY.

LETS BEGIN WITH LINE 10(b)-11 AS NOTED BY BOLD PRINT ABOVE "... OUR LEGISLATURE HAD MADE PROBATION AVAILABLE FOR THIS OFFENSE DURING THE ENTIRETY OF THAT TIME PERIOD." THAT IS INCORRECT. AT NO POINT CAN A PERSON EVER BE CONVICTED OF VIOLATING NRS. 176A.110. SO IT IS NOT A CRIMINAL OFFENSE AND THUS BECOMES A 'SECONDARY STATUTE'. WITH THAT SAID, MR. HATLESTAD IS CORRECT, NRS 176A.110 DID INCLUDE THE OFFENSE OF "(J) LEWDNESS WITH A CHILD PURSUANT TO NRS 201.230" UP UNTIL

JUNE 10, 2003. BUT BY ALL MEANS LETS BE SPECIFIC. ON PAGE 2828 SEC. 4 (2003 NEVADA STATUTES) IT SAYS: " NRS 176A.110 IS HEREBY AMENDED TO READ AS FOLLOWS: 176A.110 1. THE COURT SHALL NOT GRANT PROBATION TO OR SUSPEND THE SENTENCE OF A PERSON CONVICTED OF AN OFFENSE LISTED IN SUBSECTION 3 UNLESS..."

CONVICTED OF AN OFFENSE, THUS NOT A CRIME. SO THE 'OFFENSE' CONVICTED OF IS THE 'PRIMARY STATUTE' A VIOLATION OF NRS 201.230.

FORGIVE MY 'USE' OF MR. HATLESTAD'S FOOTNOTE FOR MY OWN BENEFIT. IT SHOULD BE NOTED THAT, IN 1997, THE LEGISLATURE DECIDED THAT PROBATION WOULD NO LONGER BE AVAILABLE FOR LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS OF AGE. (NRS 201.230). SEE 1997 STATUTES OF NEVADA, CHAPTER 524, PP 2502-3, (DELETING SECTION 6 RELATING TO PROBATION); 1997 STATUTES OF NEVADA. CHAPTER 455, P. 1722 (MAKING A VIOLATION OF NRS 201.230 A CATAGORY 'A' FELONY WITH THE SENTENCE OF LIFE IN PRISON WITH PAROLE AVAILABLE AFTER TEN YEARS)

NOW LETS EXAMINE THIS INFORMATION AND 'SPELL IT OUT'! NRS 201.230 IS THE ACTUAL CHARGE / CRIME AND THAT IS THE CHARGE THE DEFENDANT PLED GUILTY TO, NOT NRS 176A.110. AS A BASIC EXPLANATION OF COMMON SENSE, A SECONDARY STATUTE THAT IS SIMPLY A 'LIST' OF PROBATIONABLE SEXUAL OFFENSES, DOES NOT SUPERCEDE THE PRIMARY OFFENSE. IN LEGAL TERMS IF THE DECISION OF THE 1997 LEGESLATURE WERE SPECIFIC AND NOT AMBIGUOUS IN ITS INTENTIONS TO NO LONGER ALLOW CONSIDERATION OF PROBATION TO NRS 201.230. A SECONDARY STATUTE CAN NOT NEGATE THE INTENT OF THE LEGISLATIVE DECISION.

AS A COMMON LEGAL CONTENTION IS THAT A GUILTY PLEA

AGREEMENT AS THIS MOTION DEALS WITH, IS GENERALLY COVERED BY THE STANDARD OF CONTRACT LAW, TEMPERED WITH THE AWARENESS OF DUE PROCESS.

A 'INSTRUCTIVE TOOL' RECOGNIZED BY THE COURTS IS THE CORPUS JURIS SECUNDUM (CJS), VOLUME 17A TO BE USED AS REFERENCE TO FOLLOWING STATUTES (§).

"A MUTUAL MISTAKE OCCURS WHEN BOTH PARTIES, AT TIME OF CONTRACTING SHARE A MISCONCEPTION ABOUT A VITAL FACT, UPON WHICH THEY BASE THEIR BARGAIN." GRAMANZ V. GRAMANZ, (113 NEV. 1, 930 P.2d 753) (NEVADA 1997)

§150 STATES THAT WHEN ONE OR MORE PARTY MISUNDERSTOOD THE LAW AT THE TIME OF THE CONTRACT BEING ENTERED INTO AND THE OTHER PARTY KNOWS ABOUT THIS MISUNDERSTANDING, BUT FAILS TO RECTIFY SAME, RECISSION IS PERMITTED.

§156 A MATERIAL MISSTATEMENT, WHEN RELIED UPON, AVOIDS A CONTRACT, BECAUSE THE STATED SUBJECT MATTER OR TERMS OF IT DID NOT INFACT EXIST.

SINCE THIS DIRECT OPPOSITION IS BASED SOLEY ON NRS 176A.110 AND THE STATES FAILURE TO INTERPET NRS 201.230 (1997 C. 524) CORRECTLY, THIS WILL BE ARGUED CONTRACTURALY IN THAT ISSUE TO START. BUT SINCE NUMBER 4 OF THE INDICIA LISTED IN THE PRIMARY MOTION FILED TEN MONTHS AGO WAS "4) VIOLATION OF PLEA AGREEMENT BY THE PROSECUTION." THE INITAL ARGUMENT OF NRS 201.230 / 176A.110 WILL BE ADDRESSED, FOLLOWED BY CONTRACT LAW PROVING BREACH BY THE STATE.

§208 SHOWS THAT A CONTRACT IS 'PLAINLY ILLEGAL' WHEN MADE CONTRARY TO A STATUTE OR REGULATION EITHER BECAUSE OF

SOME ACTIONS OR STATEMENTS. ANY SUCH ILLEGALITY VOIDS AN ENTIRE CONTRACT.

THE FACT THAT THE INTENTIONS OF THIS 'CONTRACT' WAS TO IMPLY AND INDUCE THE BELIEF, BY BOTH THE LETTER OF THE CONTRACT AND BY THE COMMENTS OF ALL ATTORNEYS, THAT PROBATION WAS AVAILABLE. AS THE OPPOSITION CLEARLY CLAIMS. IN DIRECT VIOLATION OF NRS. 201.230, MAKING THE 'CONTRACT' ILLEGAL.

IF AN AGREEMENT OR CONSIDERATION CONTRAINED IN A 'CONTRACT' IS IN EFFECT ILLEGAL, IT IS NOT RENDERED LEGAL BY A DIRECT OR IMPLIED PROVISION IN A 'CONTRACT' THAT IT'S PURPOSE IS A LAWFUL ONE, OR BY THE FACT THAT THE ILLEGAL AGREEMENT IS INCIDENT TO THE ACCOMPLISHMENT OF A LAWFUL PURPOSE. MERE WORDS AND INGENUITY OF CONTRACTUAL EXPRESSIONS, WHATEVER THEIR EFFECT BETWEEN THE PARTIES CANNOT BY DESCRIPTION MAKE PERMISSIBLE A COURSE OF CONDUCT FORBIDDEN BY LAW.

SINCE A GUILTY PLEA AGREEMENT HAS BEEN RULED BY THE COURTS TO STAND AND FALL AS AN ENTIRETY. WHERE PART OF THE CONSIDERATION IS ILLEGAL (AS IS THE INTENT TO ALLOW PROBATION). BECAUSE IT VIOLATES THE LAW, THE ENTIRE CONTRACT IS VOID. IF THE CONTRACT IS ENTIRE AND INDIVISIBLE, AS ARE GUILTY PLEAS.

IN SUM, TO CONSIDER PROBATION WHEN IT IS RESTRICTED BY STATUTES, TO DO CONTRARY TO A LAW IS AN ILLEGAL CONTRACT AND AS SUCH CAN NOT BE ENFORCED OR ALLOWED TO STAND. THE USUAL REMEDY TO A WITHDRAWAL OF GUILTY PLEA BECAUSE OF A BREACH BY THE STATE IS 1) ALLOWANCE OF DEFENDANT'S WITHDRAWAL OF HIS GUILTY PLEA AND GO TO TRIAL ON ORIGINAL CHARGES; OR 2) SPECIFICALLY ENFORCE THE AGREEMENT. SINCE SUCH ENFORCEMENT WOULD BE

ILLEGAL, THE LATTER IS NOT AN OPTION.

"WHEN PARTIES ATTEMPT TO FASHION A SENTENCE THAT IS IN ITSELF IS CONTRARY TO LAW, ASSUMING THAT THE TRIAL COURT ERRONIOUSLY APPROVES OF SUCH AN ILLEGAL BARGAIN, PLEA MUST BE REGARDED AS INVALID AND INVOLUNTARY." (CRAIG V. PEOPLE, (986 P.2d 951) (COLO. 1999).

"PLEA BARGAINING AGREEMENTS CANNOT EXCEED STATUTORY AUTHORITY GIVEN TO THE COURTS". MATTER OF GARNER, (617 P.2d 1001, 94 WASH. 2d. 504) (WASH. 1980)

§161 GIVES ANOTHER EXTREMLY RELEVANT AREA OF 'FRAUD' THAT THE STATE AND DEFENSE ATTORNEY O'MARA PREFORMED THAT CONSTITUTES A BREACH BY THE STATE AND INEFFECTIVE ASSISTANCE OF COUNSEL BY O'MARA. SUPPRESSION OF TRUTH.

"SUPPRESSION OF TRUTH BY ONE OR TWO PARTIES TO A CONTRACT 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 THEIR CONTRACT". MORRIS V. McGOUGH, (230 S.W. 1092)

THE RULE OF CRIMINAL / CONTRACT LAW THAT FAILURE TO DISCLOSE FACTS IS NOT FRAUD DOES NOT APPLY WHERE THE CIRCUMSTANCES ARE SUCH TO IMPOSE A DUTY TO DISCLOSE THEM, THUS, WHERE, WITH INTENT TO DECEIVE A PARTY TO A CONTRACT CONCEALS MATERIAL FACTS WHICH GOOD FAITH REQUIRES HIM OR HER TO DISCLOSE, THIS IS EQUIVALENT TO A FALSE REPRESENTATION, FRAUD.

THE RULE OF CRIMINAL PROCEEDINGS REFER TO THE INTENTIONAL WITHHOLDING OF 'MATERIAL EXCULPATORY EVIDENCE' AS A SERIOUS CONSTITUTIONAL VIOLATION OF DUE PROCESS

BY ADA VILORIA BEING IN POSSESION OF THE WASHOE COUNTY CRIME LAB REPORT DATED MAY 21, 2007, STATING THE DNA TEST RESULT TO COUNT II 'NO FOREIGN DNA TO SOURSE, BRENDAN DUNCKLEY, WAS OBTAINED FROM GENITAL SWABS.' AND NEVER INTRODUCING THIS INFORMATION TO THE COURTS, SHOWING THAT THERE IS 'QUESTION' AS TO THE FACTUAL BASIS THE 'CONTRACT' IS BASED ON. (FED. RULES, CRIMINAL PROC. 11(h)). NOR CORRECTING JUDGE STEINHEIMER FROM ACCEPTING A GUILTY PLEA AND STATING: "YOU PICKED SOMEONE YOU DIDN'T KNOW, AND YOU COMMITTED A SEXUAL ASSAULT ON HER." (SENTENCING P. 27; 16, 17)

ON FEBRUARY 7, 2008, THREE DAYS AFTER SHE OFFERED THIS 'CONTRACT' ADA VILORIA FAXED THIS 'REPORT' TO DEFENSE ATTORNEY O'MARA. WHO KNOWINGLY ALLOWED THE 'CONTRACT' TO BE ENTERED INTO ON MARCH 6, 2008, WITH NEVER INFORMING HIS CLIENT OF THE SCIENTIFIC TEST RESULT THAT CLEARS HIM.

AT NO POINT ON MARCH 6, 2008 OR AUGUST 5, 2008 DID EITHER OF THESE 'OFFICERS OF THE COURT' DO THEIR DUTY TO SPEAK UP AND BRING THIS INFORMATION FOWARD. SUCH SILENCE FORMS A BASIS FOR ACTIONABLE FRAUD, WHEN THERE IS A DUTY TO SPEAK. NOT ONLY WAS IT A SUPPRESSION OF TRUTH, BUT IT WAS AN ACT OF INTENTIONAL FRAUD ON THE COURT.

THIS 'INSTANCE' OF FRAUD IS A SMALL AREA OF FRAUD, THIS DEFENDANT CAN SHOW, PROVE, ESTABLISH, INSTANCING AMOUNTING TO INTENTIONAL VIOLATION OF GOOD FAITH AND FAIR DEALING (NRS. 104.1203) MUNN V. THORTON, (956 P.2d 1213, 1220) (ALASKA 1998); MUTUAL MISTAKE OF BOTH LAW AND FACT; (NRS 201.230, 1997 C. 524) GRAMANZ V. GRAMANZ; CJS §§ 148, 149, 150, 153, 156, 158, 160, 161, 163, 164, 195, 196, 197, 199, 208, 213, 215, 297 & 333

MISINTERPETATION OF LAW, MISSTATEMENT OF FACT, FRAUDULENT INDUCEMENT AND ILLEGALITY OF CONTRACT IN GENERAL.

THE STATES CONTINUAL IGNORANCE AT THE COST OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS, BY NOT INTERPETING THE LAWS THAT THEY ARE ENTRUSTED WITH, TO BOTH KNOW AND DEFEND, CORRECTLY IS INEXCUSABLE. THIS ARGUMENT MADE BY MR. HATLESTAD IS THE EXACT SAME AS HIS OPPOSITION TO MR. O'MARA'S DIRECT APPEAL THE ARGUMENT HAS NOT CHANGED, NEITHER HAS HIS 'IGNORANCE OF LAW', 'MIS)INTERPETATION OF LAW', 'MISTAKE OF LAW', TO THE FACT THAT AS THIS MOTION HAS STATED, THROUGH ALL THE 'MOVING PAPERS' THAT 1) NRS 201.230 DOES NOT ALLOW FOR PROBATION AFTER OCTOBER 1, 1997, AND 2) NO MATTER HOW MANY TIMES THE STATE NOTES IT NRS 176A.110 DOES NOT CHANGE THE LAW - AND MIRACULOUSLY ALLOW PROBATION.

AS I HAVE STATED PRIOR, AND MR. HATLESTAD KNOWS, I HAVE THE UTMOST RESPECT FOR HIM, BUT THAT DOES NOT NEGATE THE FACT THAT ADA KELLI VILORIA'S ACTION, CONDUCT; COMMENTS, BEHAVIOR BREACHED THE 'CONTRACT' LONG BEFORE THIS CASE EVER LANDED ON HIS DESK. THE PASSAGE OF TIME DOES NOT CHANGE THE FACT THAT KELLI VILORIA WHILE HOLDING THE PRECIOUS TITLE OF PROSECUTOR ABUSED THAT SACRED PUBLIC TRUST, INTENTIONALLY VIOLATING THE 'CONTRACT' BY 1) WITHHOLDING EXCULPATORY EVIDENCE; LIED TO AND MISLED JUDGE STEINHEIMER; 2) FAILED TO UPHOLD THE 'SPIRIT' OF THE CONTRACT, BY HER ANIMATED ARGUMENT TO THE MAXIMUM SENTENCE TO BOTH CHARGES; 3) BY ORIGINALLY INSTITUTING THIS MISTAKEN INTERPETATION OF THE LAWS (NRS 201.230/176A.110); 4) TRUE, THE STATE DID RESERVE IT'S RIGHT TO ARGUE AT SENTENCING. BUT IT (ADA VILORIA) COMMITTED A BREACH BY INTENTIONALLY CIRCUMVENTING THE CONTRACT, AND THIS INCLUDES THE 'SPIRIT'. WHAT THE DEFENDANT REASONABLY UNDERSTOOD WHEN HE

ENTERED INTO THIS 'CONTRACT'. SULLIVAN V. STATE, (96 P.3d 761, 120 NEV. 537); CITTI V. STATE, (807 P.2d 724, 107 NEV. 89); STATZ V. STATE, (944 P.2d 813, 113 NEV. 987)

THE COURTS HAVE RULED REPEATEDLY "THAT "ANY DOUBT AS TO WHETHER THE PLEA WAS VOLUNTARY MUST BE RESOLVED IN FAVOR OF THE DEFENDANT." STATE V. SCHOONOVER, (973 P.2d 230, 293 MONT 54) (MONT. 1999).

BY ADA VILORIA AND UNBELIEVABLY, DEFENSE ATTORNEY DAVID O'MARA WITHHOLDING A MATERIAL FACT, AS BLACK'S LAW DICTIONARY DEFINES:

"PLEADINGS AND PRACTICE: ONE WHICH IS ESSENTIAL TO THE CASE DEFENSE, APPLICATION, ECT. AND WITHOUT WHICH IT COULD NOT BE SUPPORTED ONE WHICH TENDS TO ESTABLISH ANY ISSUES RAISED. THE 'MATERIAL FACTS' OF AN ISSUE OF FACTS ARE SUCH AS ARE NECESSARY TO DETERMINE THE ISSUE. MATERIAL FACTS ARE ONE UPON WHICH OUTCOMES OF LITIGATIONS DEPEND." (2nd ED. P. 881)

THIS COURT NEEDS TO ACCEPT THE OBVIOUS ISSUE, HOW CAN THERE BE ANY CONFIDENCE IN THE OUTCOME OF ANY LITIGATION, WHETHER BY WAY OF A 'CONTRACT' OR A JURY TRIAL, IF THE 'OFFICERS OF THE COURT' CHOSE NOT TO LET THE DEFENDANT, OR JUDGE AWARE OF SERIOUS MATERIAL FACTS?

WITH THE 'FORMAL' INTRODUCTION OF THE LETTER DATED FEBRUARY 4, 2008 IN WHICH ADA VILORIA OFFERED AN TENATIVE 'OFFER' THAT IS THE IDENTICAL TERMS, CHARGES, STIPULATIONS, CONSIDERATIONS, SENTENSING OFFERS, AS THE 'CONTRACT' PRESENTED TO THE DEFENDANT ON MARCH 6, 2008 IS OF HUGE IMPORTANCE. THIS LETTER IN CONNECTION TO THE PREVIOUSLY EVIDENCE ENTERED OF THE FAX DATED FEBRUARY 7, 2008, IN AND OF ITSELF IT ESTABLISHES INEFFECTIVE ASSISTANCE OF COUNSEL. IN THE LAST TWO YEARS OF LEGAL RESEARCH, REVIEWING AND READING AROUND 3,000 CASES, AS MANY WEST VOLUMES POSSIBLE AND EVEN THOUGH THERE ARE COUNTLESS CASES OF PROSECUTORS WITHHOLDING 'BRADY'

EVIDENCE. BUT I HAVE NOT SEEN ANY CASE THAT THE DEFENSE COUNSEL HAD EXCULPATORY EVIDENCE TO CLEAR HIS CLIENT AND THEY HID THE EVIDENCE. UNTIL I HAD DAVID O'MARA AS AN ATTORNEY.

IN 1948 SUPREME COURT JUSTICE BLACK SAID: "THE RIGHT TO COUNSEL GUARENTEED BY THE U.S. CONSTITUTION CONTEMPLATES THE SERVICE OF AN ATTORNEY DEVOTED SOLEY TO THE INTREST OF HIS CLIENT... UNDIVIDED ALLEGIANCE AND FAITHFUL, DEVOTED SERVICE TO A CLIENT ARE PRIZED TREASURES OF AN AMERICAN LAWYER. IT IS THIS KIND OF SERVICE FOR WHICH THE SIXTH AMENMENT MAKES PROVISION. AND NOWHERE IS THIS SERVICE DEEMED MORE HONORABLE THAN IN A CASE OF APPOINTMENT TO REPRESENT AN ACCUSED TOO POOR TO HIRE A LAWYER".

"AN ATTORNEY WHO ADOPTS OR ACTS UPON A BELIEF THAT HIS CLIENT SHOULD BE CONVICTED, FAILS TO FUNCTION IN ANY MEANINGFUL WAY AS THE GOVERNMENTS ADVESARY." OSBORNE V. SHILLINGER, (861 F.2d 612, 625) & U.S. V. CRONIC, (466 US 648, 658-9, 104 U.S.S.CT. 2039, 2046-7, 80 L.ED.2d 657)

BY ATTORNEY O'MARA FAILING TO ACT AS THE STATES ADVESARY, HE CONSTRUCTIVELY DENIED THE DEFENDANT OF ANY TYPE OF COUNSEL, HE JOINE THE STATE IN AN EFFORT TO OBTAIN A CONVICTION OF HIS CLIENT. THEREBY SUCH CONDUCT WAS A CONFLICT OF INTREST.

"THE COURTS HAVE HELD THAT DEPRIVATION OF THE RIGHT TO COUNSEL IS SO INCONSISTANT WITH THE RIGHT TO A FAIR TRIAL, THAT IT CAN NEVER BE TREATED AS HARMLESS ERROR" FRAZIER V. U.S., (18 F.3d 788)

THERE IS NO EXCUSE, NO EXPLINATION, NO WAY TO IGNORE OR 'SKATE OVER' ALL THE ISSUES, LITERALLY SCREAMING TO BE RECOGNIZED AND TO BE CORRECTED. I FIND IT APPAULING THAT MR. HATLESTAD FELT IT WAS SO SIMPLE AN ISSUE, SO THAT TO STATE: "THE UPSHOT OF DUNCKLEY'S SUBMISSION IS FAIRLY SIMPLE," THEN, "IN SUM, SINCE ALL DUNCKLEY'S COMPLAINTS

IN HIS MOVING PAPERS - UNKNOWING PLEA, INEFFECTIVE ASSISTANCE AND PROSECUTORIAL MISCONDUCT - DEPENDS ON THE VALIDITY OF HIS CENTRAL PREMISE - THE UNAVAILABILITY OF PROBATION.

BUT IT HAS BEEN TEN MONTHS AND THE STATE STILL SEEMS TO VIEW ALL THE OTHER ISSUES AFOREMENTIONED TO BE UNIMPORTANT. AFTER ALL THEY ALREADY DID THEIR JOB AND GOT A CONVICTION AT ANY COST. EVEN IF IT WAS AT THE COST OF A CITIZEN'S PESKY CONSTITUTIONAL RIGHTS.

THIS MOTION WAS NOT INTENDED, NOR MENT TO BE SO LENGTHY, BUT CONSIDERING THE IMPORTANCE OF THIS MOTION, I FELT IT TO BE IMPERRATIVE TO SHOW ONCE AGAIN, ALL THE ISSUES THAT GO TO THE ACCEPTABLE 'SCOPE' FOR A MOTION TO WITHDRAW A GUILTY PLEA. IN ANALYZING THIS 'CONTRACT' WHILE RESEARCHING AND REVIEWING CONTRACT LAW, WARRENTING RECISSION, OR AVOIDANCE I WAS ABLE TO DRAFT 22 PAGES.

OUR SYSTEM OF JUSTICE REPRESENTS A RULE OF LAW BASED ON THE PREMISE / PRINCIPLE THAT OFFICERS OF THE COURT ARE BOUND BY AND MUST ACT WITHIN THE LAW. PROSECUTING ATTORNEYS AND APPOINTED COUNSEL OCCUPY A SPECIAL POSITION OF PUBLIC TRUST. SOCIETY RELIES ON THESE PUBLIC SERVENTS TO BE HONORABLE ADVOCATES FOR NOT JUST THE COMMUNITY ON WHOSE BEHALF THEY LITIGATE, BUT ALSO THE JUDICIAL SYSTEM OF WHICH THEY ARE AN INTEGRAL PART. WHEN AN ATTORNEY BETRAYS THEIR SOLEMN OBLIGATION, AND ABUSE THE IMMENSE POWER THEY HOLD, THE FAIRNESS OF OUR ENTIRE SYSTEM OF JUSTICE IS CALLED INTO DOUBT, AND PUBLIC CONFIDENCE IN IT IS UNDER-MINED.

AS A FINAL CITATION OF AUTHORITY THAT IS A PERFECT FIT IS

STATE V. BENNETT, (81 P.3d 1, 119 NEV. 589)(NEVADA 2003) "A PROSECUTOR HAS A DUTY TO BRING TO THE ATTENTION OF THE COURTS OR OF PROPER OFFICIALS ALL SIGNIFICANT EVIDENCE SUGGESTIVE OF INNOCENCE OR MITIGATION. AT TRIAL THIS DUTY IS ENFORCED BY THE REQUIREMENTS 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 AQUIRED OR OTHER INFORMATION THAT CASTS DOUBT UPON THE CONFIDENCE, CORRECTNESS OR VALIDITY OF THE CONVICTION."

IT HAS BEEN USEFUL TO UTILIZE MR. HATLESTAD'S OPPOSITION AS A 'JUMPING OFF POINT'. SO I USE HIS CONCLUSION, THIS ENTIRE ARGUMENT HOLDS SUBSTANTIAL, SUPPORTED, VERIFIED MERITS, AS A RESULT THE REQUEST FOR PLEA WITHDRAWAL SHOULD BE GRANTED.

IN THE INTREST OF JUSTICE, CONSTITUTIONAL REMEDY IS NEEDED; BY NOT ONLY GRANTING THIS MOTION, BUT ALSO CONSIDERATION AFTER THE REVERSAL OF THIS CONVICTION, A FULL DISMISSIAL OF ALL RELATED CHARGES WITH EXTREME PREJUDICE.

IN ADDITION TO WHATEVER OTHER RELIEF THIS HONORABLE COURT DEEMS APPROPRIATE TO GRANT IN THIS MOTION TO WITHDRAW GUILTY PLEA, IN ADDITION TO ALL PREVIOUS PRAYERS FOR RELIEF IN PRIOR MOTIONS

DATED: OCTOBER 28, 2010

Brendan Dunckley # 1023236

BRENDAN DUNCKLEY #1023236

DEFENDANT IN PRO SE

CERTIFICATE OF SERVICE

I DO CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE FOREGOING MOTION TO THE BELOW ADDRESSES ON THE 28TH DAY of OCTOBER, 2010, BY PLACING SAME IN THE U.S. MAIL VIA PRISON LAW LIBRARY STAFF; PURSUANT TO NRCP 5(b):

CLERKS OF THE COURT
SECOND JUDICIAL DISTRICT COURT
P.O. BOX 30083
RENO, NEVADA 89520-3083

WASHOE COUNTY D.A.
C/O GARY HATLESTAD
P.O. BOX 30083
RENO NV. 89520-3083

ROBERT STORY ESQ.

Brendan Dunckley #1023236

OCTOBER 28, 2010

AFFIRMATION IN PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING DOCUMENT FILED IN DISTRICT COURT CASE NO: CR07-1728 DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED THIS 28TH DAY OF OCTOBER, 2010

BRENDAN DUNCKLEY #1023236
DEFENDANT IN PRO SE.

FILED

10 JUL 14 AM 9:30

HOWARD W. CONYERS

BY

BRENDAN DUNCKLEY (#1023236)
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

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

THE STATE OF NEVADA,

PLAINTIFF,

VS.

BRENDAN DUNCKLEY,

DEFENDANT.

CASE NUMBER: CR07-1728

DEPT. NUMBER: 4

SUPPLEMENTAL IN CONSIDERATION OF MOTION TO WITHDRAW GUILTY PLEA.

COMES NOW, DEFENDANT, BRENDAN DUNCKLEY, IN PROPER PERSON, SUBMITS TO THIS HONORABLE COURT, AN OFFICIAL TRUE AND CORRECT COPY OF A LETTER SENT TO THE HONORABLE JUDGE CONNIE STEINHEIMER ON MAY 25, 2010. A TRUE AND CORRECT COPY WAS ALSO SENT TO ALL ATTORNIES OF RECORD IN PROTECTION AGAINST EX-PARTE COMMUNICATION.

THE FOLLOWING IS THE ABOVE REFERENCED LETTER IN IT'S ENTIRETY. FORMATED TO BE FILED WITH THE CLERK, AS AN OFFICIAL PART OF THE RECORD, TO BE USED IN CONSIDERATION AS TO WHY A DECISION IS BOTH REQUESTED AND NECESSARY, IN REGARDS TO THIS DEFENDANT'S MOTION TO WITHDRAWAL OF GUILTY PLEA, FILED ON MARCH 1, 2010. ALSO IN DIRECT REFERENCE TO ORDER TO STAY DECISION FILED ON APRIL 23, 2010. THE LETTER READS AS FOLLOWS:

"DEAR JUDGE STEINHEIMER,

"I UNDERSTAND AND APPRECIATE YOUR 'RULING' FILED ON APRIL 23, 2010 IN REGARDS TO THE MOTION TO WITHDRAW GUILTY PLEA FILED ON MARCH 1, 2010 AND THE SUPPLEMENTAL MOTION TO WITHDRAW GUILTY PLEA.

"IN YOUR ORDER IT STATED: 'THAT THE COURT, HAVING REVIEWED THE PLEADINGS FILED HEREIN, FINDS THAT AT THIS TIME IT IS INAPPROPRIATE TO RENDER A DECISION ON THE MOTION TO WITHDRAW GUILTY PLEA BASED ON THE CASE HAVING BEEN APPEALED TO THE SUPREME COURT FOR REVIEW.'

"THERE IS ONE SERIOUS CONCERN I HAVE IN REGARDS TO THIS 'ORDER.' THE MOTION BEFORE THE SUPREME COURT 'FOR REVIEW' IS BASED ON THE COURTS DENIAL OF THE MOTION FOR MODIFICATION OF SENTENCE, A COMPLETLY DIFFERENT MOTION. ONE THAT WAS FILED AND SUBMITTED PURSUANT TO NRS, ALLOWING YOUR COURT TO HAVE JURISDICTION TO CORRECT/MODIFY A SENTENCE IF IT IS BASED ON MISINFORMATION PERTAINING TO MY CRIMINAL HISTORY, LEADING TO THE 'EXTREME DETRIMENT' OF THE DEFENDANT. THE MOTION FILED TO YOUR COURT FOR SUBMISSION ON MARCH 22, 2010 WAS A MOTION TO WITHDRAW A GUILTY PLEA, A COMPLETLY SEPERATE MOTION, WITH ENTIRELY DIFFERENT SCOPE.

"THE MOTION FOR WITHDRAWAL OF GUILTY PLEA WAS SUPPORTED BY SUBSTANTIAL DOCUMENTATION WARRENTING A GRANTING OF THE MOTION IN ITS ENTIRETY. THE MOTION ESTABLISHED AND PROVED BEYOND A REASONABLE DOUBT THAT THE REQUIRED MANIFEST INJUSTICES HAVE INDEED OCCURED.

"AS THE SUPPLEMENTAL TO THE MOTION SHOWED, THAT AS OF OCTOBER 1, 1997, PER LAWS 1997 C.524, PROBATION WAS DELETED FROM THE STATUTE OF NRS 201.230, AND IN CONNECTION TO TAYLOR V. WARDEN, N.S.P.; SIERRA V. STATE; SKINNER V. STATE; MEYER V. STATE; SULLIVAN V. STATE; AND GUNN V. IGNACIO, THE MOTION REQUIRES A ACCEPTANCE AND AN IMMEDIATE REVERSAL OF CONVICTION.

"ANOTHER FACT IS THAT IN RELATION TO DCR 13(3) THE STATE FAILED TO FILE AN OPPOSITION AS TO WHY THE MOTION SHOULD BE DENIED, AND AS SUCH THE 'SILENCE' OF THE STATE SHOULD BE VIEWED AS AN ADMISSION OF GUILT AND AS A CONSENT TO GRANTING THE SAME. YOU SEE, THERE IS ABSOLUTLY NO WAY THE STATE CAN ARGUE OR FIGHT THE MOTION, SINCE IT IS OVERWHELMINGLY SUPPORTED BY THE LAW AND STATUTES, AS WELL AS SUPPORTED BY SUBSTANTIAL CASE LAW.

"YOUR HONOR, WITH ALL DUE RESPECT, I DO RESPECT YOUR 'CAUTIOUS' DECISION, BUT I RESPECTFULLY ASK YOU TO RENDER A DECISION. THERE IS SUBSTANTIAL EVIDENCE PROVING THAT THE MOTION SHOULD NOT ONLY BE GRANTED, BUT ALSO THAT THE ENTIRE CASE RECORD PROVES ACTUAL AND FACTUAL INNOCENCE.

"YOUR ORDER STATES THAT "IN THE INTREST OF JUSTICE," THAT PHRASING IS OF EXTREME IMPORTANCE SO I TOO WILL USE IT ALSO. IN THE INTREST OF JUSTICE, SINCE THE STATE HAS CONTINUALLY FAILED TO PROVE, ESTABLISH ANY TYPE OF GUILT, AND ALL THE ACTUAL EVIDENCE THAT EXISTS PROVES THAT IT IS IMPOSSIBLE FOR ME TO HAVE COMMITED ANY OF THE CHARGES FILED AGAINST ME. THE EVIDENCE NOT ONLY PROVES INNOCENCE BEYOND A REASONABLE DOUBT TO THE 'AMENDED' CHARGES, BUT ALSO TO THE ORIGINAL CHARGES.

"JESSICA CLAIMED THAT A PENIS WAS SHOVED INTO HER MOUTH AND I WAS CHARGED WITH SEXUAL ASSAULT, THE ENTIRE CONVICTION TO THE CHARGE AND ACCUSATION IS SOLEY BASED ON HER TESTIMONY, AND HER TESTIMONY ALONE. THERE CAN BE NO IGNORING THE FACT THAT THE STATE HAD THE RESULTS OF THE DNA SWABS OBTAINED ON THE NIGHT IN QUESTION AND NEVER INTRODUCED IT AS EVIDENCE. THE RESULTS WAS NOT ONLY RELEVANT, BUT NECESSARY TO PROVE MY INNOCENCE., IT SAYS: "NO FORIEGN DNA TO SOURCE,

BRENDAN DUNCKLEY, WAS OBTAINED FROM THE GENITAL SWABS."

"ASHLEY CLAIMED THAT BETWEEN AUGUST 14, 1998 - AUGUST 13, 1999 WE HAD CONSENTUAL SEX, AFTER SPENDING THE NIGHT AT MY HOME IN RENO, IN MY FORD TAURUS. AGAIN THE ONLY EVIDENCE IN THIS CASE WAS IS THE TESTIMONY OF ASHLEY. WHEN I HAVE GIVEN YOUR COURT AND THE STATE IRS PAPERWORK, DMV REGISTRATION, COLLEGE TRANSCRIPTS, RPD REPORTS, COURT PAPERWORK SERVING ME AT MY RESIDENCY IN FRESNO, CALIFORNIA ON 8/16/99, AND MADERA COUNTY PAPERS. ALL PROVING I DID NOT EVEN LIVE IN RENO UNTIL 2000. SINCE ASHLEY STATED WITH CERTAINTY SHE WAS 12, AS DID KELLI A. VILORIA IT IS IMPOSSIBLE TO HAVE DONE IT.

"SO, IN THE INTREST OF JUSTICE, I HAVE BEEN OVERLY PATIENT GIVING THE STATE COUNTLESS CHANCES TO CORRECT THIS GROSS MISJUSTICE, AND IT HAS NOT OCCURED. AS I HAVE STATED BEFORE I HAVE NO DOUBT THAT THIS CASE WILL BE REVERSED. THROUGHOUT THIS ENTIRE PROCESS I HAVE REPEATEDLY MENTIONED AND SAID THAT THE STATE HAS CONTINUALLY WITHHELD CRUCIAL AND RELEVANT INFORMATION TO ENSURE UNFAIR AND UNJUST PROCEEDINGS. THIS IS A WONDERFUL OPPORTUNITY TO CORRECT THIS GROSS MISCARRIAGE OF JUSTICE, AND I WOULD PREFER IT BE YOUR COURT THAT REVERSES IT. IN THE INTREST OF JUSTICE, A DEFENDANT SUCH AS MYSELF HAVING PROVED ACTUAL AND FACTUAL INNOCENCE TO ALL THE CHARGES. THE OBVIOUS CORRECTION IS IN YOUR POWER AND ALSO AT YOUR DISCRETION TO VACATE AND DISMISS ALL THE CHARGES RELATED TO CR07-1728 WITH PREJUDICE.

"SINCE, THE STATE KNEW EVEN PRIOR TO EVEN THE PRELIMINARY HEARING THAT IT WAS IMPOSSIBLE FOR ME TO HAVE COMMITED THE CRIMES AS ACCUSED BY THE "VICTIMS." BUT INSTEAD OF CORRECTING THE RECORD, THEY CHOSE TO IGNORE, HIDE AND DISREGARD ALL THE ACTUAL EVIDENCE PROVING MY INNOCENCE. IT IS ON YOU TO DO WHAT IS RIGHT AND JUST.

"IT SHOULD BE NOTED THAT A COPY OF THIS ENTIRE LETTER HAS BEEN SENT TO ADA. G. HATLESTAD, ATTORNEY ROBERT STORY, NEVADA ATTORNEY GEN NEVADA SUPREME COURT C.J., KOLO 8, KRNV/KTVN, RENO GAZETTE AND THE NEVADA BAR ASSOCIATION. ALSO SINCE THIS LETTER IS IN DIRECT REFERENCE TO CR07-172 AND THE MOTION IN WHICH I AM LISTED AS DEFENDANT IN PROPER PERSON ON RECORD SINCE I AM REPRESENTED BY MR. ROBERT STORY IN CR07P1728 FOR THE PETITION FOR WRIT OF HABEAS CORPUS ONLY, THIS LETTER IS VALID.

"I EMPLORE YOU, YOUR HONOR TO HELP ME. AS THE EVEDENCE FOR THE INSTANT MOTION PROVES, THE OVERWHELMING DOCUMENTED EVIDENCE IN THE PETITION, I AM AN INNOCENT MAN. A INNOCENT MAN WHO WAS DECEIVED BY AN INCOMPETANT ATTORNEY, PROSECUTED BY AN OVERZEALOUS DISTRICT ATTORNEY, PRESSURED BY COMMUNITY OUTRAGE DUE TO BRIANNA DENNISON. ALL I ASK YOUR HONOR IS TO ALLOW THE OVERWHELMING EVIDENCE TO SPEAK FOR ITSELF. TO BE RETURNED TO THE FAMILY I WAS RIPPED AWAY FROM. THIS RELIEF IS ENTIRELY WITHIN YOUR POWER, TO DO SO BEFORE ANOTHER COURT RULES AND DECIDES TO DO JUST THAT.

"AS I HAVE STATED AT THE OUTSET OF THIS LETTER; I DO UNDERSTAND AND APPRECIATE YOUR 'CAUTIOUS' DECISION, BUT IN THE INTREST OF JUSTICE, PLEASE ALLOW ME TO GO HOME WHERE I TRULY BELONG. IN THE LEAST PLEASE GRANT MY MOTION SO THAT I MAY HAVE MY 'DAY IN COURT'.

"I AM MORE THAN CONFIDENT THAT THE SUPREME COURT JUSTICES WILL UNDERSTAND AND COMMEND YOU FOR TAKING THE STEPS TO ENSURE THAT JUSTICE IS TRULY DONE.

"THANK YOU FOR ALLOWING ME THE OPPORTUNITY TO SEND YOU THIS LETTER. I AM SURE, AS I AM SURE ALL THE OTHER RECIPIENTS OF THIS LETTER, THAT YOU WILL DO WHAT IS RIGHT AND ENSURE AN INNOCENT MAN RETURNS TO HIS WIFE AND CHILDREN.

"I LOOK FOWARD TO YOUR HELP IN RESOLVING THIS SITUATION AND CORRECT THIS MISCARRIAGE OF JUSTICE AND MANIFEST INJUSTICE."

THE SUPPLEMENTAL IN CONSIDERATION AND INCLUDED LETTER IS HEREBY SUBMITTED TO THIS HONORABLE COURT, FOR CONSIDERATION

AFFIRMATION PURSUANT TO NRS 239B.030

IT IS AFFIRMED BY THE UNDERSIGNED. THAT THE PRECEEDING DOCUMENT ENTITLED SUPPLEMENTAL IN CONSIDERATION OF MOTION TO WITHDRAW GUILTY PLEA, FILED IN DISTRICT COURT CASE NO: CR07-1728, DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS.

SUBMITTED THIS 8TH DAY OF JULY, 2010

Brendan Dunckley

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

DEFENDANT IN PROPER PERSON

CERTIFICATE OF SERVICE

I DO CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE PRECEEDING: SUPPLEMENTAL IN CONSIDERATION OF MOTION TO WITHDRAW GUILTY PLEA, TO THE BELOW ADDRESS(ES) ON THIS 8TH DAY OF JULY, 2010, BY PLACING SAME INTO THE HANDS OF PRISON STAFF FOR POSTING IN THE U.S. MAIL:

ADA. G. HASTESTAD
% W.C.D.A.
P.O. BOX 30083
RENO, NEVADA 89520-3083

CLERK OF THE COURT
2ND JUDICIAL DISTRICT
P.O. BOX 30083
RENO, NEVADA 89520-3083

Brendan Dunckley

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

DEFENDANT IN PRO PER

Code No. 4185

COPY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

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STATE OF NEVADA, Plaintiff, vs. BRENDAN DUNCKLEY, Defendant.	Case No. CR07-1728 CR07P1728 Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

MOTION TO WITHDRAW PLEA

FRIDAY, JUNE 3, 2011

RENO, NEVADA

Reported By: STEPHANI L. LODER, CCR No. 862

APPEARANCES:

For the Plaintiff:

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EXHIBITS

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RENO, NEVADA, FRIDAY, JUNE 3, 2011, 9:35 A.M.

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THE COURT: Thank you. Please be seated.

Counsel, are you ready to proceed?

MR. STORY: Yes, Your Honor.

MR. HATLESTAD: Ready, Your Honor.

THE COURT: Go ahead, Mr. Story.

MR. STORY: This is set for a motion to withdraw. Mr. Dunckley represents himself on that, so may he go forward?

THE COURT: Certainly.

MR. STORY: May he be unchained?

THE COURT: He can have his right hand, absolutely.

THE DEFENDANT: Thank you, Your Honor.

Good morning, Your Honor.

THE COURT: Good morning.

THE DEFENDANT: Your Honor, excuse my ignorance at times. I apologize. I'm not familiar with how to do this correctly.

But from what I can gather, the oral arguments for my motion to withdraw the guilty plea, it's my understanding that when a manifest injustice occurs after

a sentence has been carried out, that a guilty plea can be withdrawn if it can be proven that either ineffective assistance of counsel was not ratified, involuntary pleas, or if the State violated the contract in some way, shape, or form.

It's further my belief that the guilty plea is construed and viewed as a contract between myself and the State with due process.

I raised numerous issues, but the one before us here today that Mr. Hatlestad is arguing is the availability of probation. I am contesting the fact that, in 1997, the legislative statute deleted probationability for the statute of lewdness.

Now, for the record, at no time in any of the motions or moving papers have I argued that probation is not available for the second charge, attempted sexual assault. The only argument in contestion (sic) is the lewdness charge. As a guilty plea memorandum is construed as a whole, the entirety should be viewed as such.

The law basically -- it boils down to a dispute and a disagreement or discrepancy or, as the Court's view, a conflict between two statutes. I believe, in my opinion in the moving papers, that the statute is clear, plain, and unambiguous.

In 1997, the law read -- or 1998 when the -- for the record, it read that: "A violation 201.230 is defined as a person who willfully and lewdly commits any lewd or lascivious act other than acts constituting the crime of sexual assault upon the body or part or member thereof of a child under the age of 14 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child is a Category A felony and shall be punished by imprisonment in the State Prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of ten years has been served and may be further punished by a fine of not more than $10,000."

The law was clear and unambiguous. The meaning and the intent of the Legislature was clear.

Mr. Hatlestad and the State's contention was and argument was that a secondary rule or a general statute, ergo NRS 176A.110, actually allowed for probation up until the year 2003.

Unfortunately, if Mr. Hatlestad had quoted fully, the law read in that statute: "The Court shall not grant probation or suspend the sentence of a person convicted of an offense listed in subsection (3) unless," and subsection (3) reads: "The provisions of this section

apply to a person convicted of any of the following offenses."

Specifically, Mr. Hatlestad referred to section (j) which read -- which previously read "lewdness with a child pursuant to 201.230." But if you read further, it says "an attempt to commit an offense listed in paragraphs (b) through (m), inclusively."

Your Honor, it's my understanding that two things happened here. One, by using the terminology "pursuant to," and "according to" carrying out in the conformity with the statute.

The statute that that wording gives the precedence to is 201.230. And as we know, a conflict between two statues, between a general and specific, the specific, which is the criminal statute, will take precedence. Because of that, 176A does not hold any bearing because it automatically shifts the authority to 201.230.

But more importantly, it's further on in section (n) where it says the attempt to commit any of the these offenses, inclusively.

I was never charged, Your Honor, with attempt to commit lewdness. I was charged with lewdness. So again, it holds no bearing in this case. At no time was

probation available.

If -- as you know, Your Honor, if a statute is unclear on its face, then we review the legislative intent. What was the history?

Washoe County District Attorney's office had a part in the changing of this Legislature. In 1997, on May 22nd, 1997, before the judiciary committee, Mr. Egan Walker represented the district attorney's office for Washoe. And in it, he said, in favor of the new bill, of AB 280, he said that there is a scythe at the bottom of the system, that there's a problem with the current Legislature.

By that, he was referring to people are being charged with sexual assault and being allowed to plead to a lesser offense of lewdness which was a probationable offense. They thought and adamantly their opinion was that not only should that stop and that, quote, scythe close, but that it should be equally as severe of a punishment.

The law previously read before October 1st of 1997 when it went into effect that it was a Category B felony, not a Category A, and was punishable with a sentence of two to ten years, not a ten to life. When AB 280 went into effect, it had the full support of the

Washoe County District Attorney's office. It deleted probation from the statute. It increased the punishment to a ten to life, and it also increased the punishment to a Category A felony.

And as you're aware, Your Honor, and every officer of the court knows, after 1995, a Category A felony can only be punished by one of three ways: life with or without the possibility of parole and death. At no point can I be offered probation.

It is my belief that not once, not twice, but 112 different times probation was mentioned as a viable option. Even Mr. Hatlestad in his argument conceded to the fact that if probation were not available, the motion should be granted. It shows that it's inseparable for the fact that it was a deciding factor amongst whether or not to enter this contract or to proceed to trial.

But also the fact that even if we looked further, not only the legislative history, not only is the law clear, the legislative history is clear. The district attorney's office even argued that probation should never be allowed. But more importantly, the Nevada Supreme Court even ruled in 1997, in a case of *Scott v. State*. He was a minor at that time charged with lewdness, and the Court said that that was an incorrect statute to charge a

B) Ground Two: PROSECUTORIAL MISCONDUCT

THE PETITIONER IS IMPRISONED IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER BOTH THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND THE RIGHT TO A FAIR AND JUST TRIAL. BY THE COUNTLESS MISSTATEMENTS OF FACTS BY THE PROSECUTOR. IN ADDITION TO VINDICTIVE PROSECUTION, BECAUSE OF THE MISCONDUCT BY INVESTIGATIVE LAW ENFORCEMENT AGENT DETECTIVE TOM BROOME (CCPD), RELEASING THE CRIMINAL COMPLAINTS ILLEGALLY TO A THIRD-PARTY ATTORNEY NOT A PARTY TO THE CASE INVOLVED. AS WELL AS THE STATE HAD IN ITS POSSESION A REPORT SHOWING ACTUAL AND FACTUAL INNOCENCE IN REGARDS TO COUNT ONE OF THE ORDER OF CONVICTION UNDER ATTACK, YET NOT ONLY FAILED TO BOTH PRESENT IT OR USE IT TO CORRECT KNOWN PREJUDICIAL TESTIMONY IT ALSO KNEW TO BE FALSE. BUT ACTIVELY PURSUED THE CHARGE UP TO A DEAL OFFER AND STRONG ARGUMENT FOR CONVICTION AT SENTENCING TO A CHARGE THEY KNEW PETITIONER WAS IN FACT INNOCENT OF.

SUPPORTING FACTS:

1) NUMEROUS COMMENTS BY ASSISTANT DISTRICT ATTORNEY (ADA) Viloria IN THE RECORD ATESTING TO THE AGE OF THE VICTIM IN REGARDS TO COUNT ONE OF THE ORDER OF CONVICTION, TO BEING TWELVE YEARS OF AGE (12). MAKING THE STATES CONTENTION THAT WITH THE VICTIM'S DATE OF BIRTH BEING AUGUST 14, 1986 THE STATE CLAIMS THAT THE CRIME OF LEWDNESS WITH A CHILD UNDER FOURTEEN (14) YEARS OF AGE IN FACT OCCURED BETWEEN THE DATES OF AUGUST 14, 1998 UP UNTIL AUGUST 13, 1999, WHEN SHE

TURNED THIRTEEN YEARS OLD. (See Sentencing Hearing III pg: 44/line 1; pg 45/line 21; pg 48/line 17; and pg 49/line 17). AT NO POINT DID THE STATE EVER CLAIM THAT THERE WAS ANY OTHER INCIDENTS INVOLVED IN THE CHARGE EXCEPT WHEN VICTIM CLAIMED AND STATE COMMENTED ON, THAT BEING TWELVE (12) YEARS OLD. THE PROBLEM WITH THAT IS THAT AS OF JULY 2, 2007 AT THE PRELIMINARY HEARING WHEN ASHLEY V. MADE THE ACCUSATION OF THE CRIME OCCURING WHEN SHE WAS TWELVE (12), THE STATE HAD IN ITS POSSESION A RENO POLICE DEPARTMENT (RPD) REPORT DATED 4/19/07 CREATED BY LEAD DETECTIVE TOM BROOME. (SEE RPD 'DRAFT' 4/19/07 ON pg 128-129 IV). IN THAT REPORT WHICH WAS CREATED SEVENTY-FIVE (75) DAYS PRIOR TO PETITIONERS PRELIMINARY HEARING, IT HAS AN INTERVIEW WITH DETECTIVE TOM BROOME AND JENNY DUNCKLEY, (PETITIONER'S EX-wife). DURING THE INTERVIEW ON APRIL 18, 2007, JENNY DUNCKLEY INFORMED DETECTIVE BROOME THAT SHE AND PETITIONER MET IN NEW YORK AND LATER MOVED TO MADERA COUNTY CALIFORNIA. THEY LIVED IN OAKHURST, CALIFORNIA UNTIL THE MARRIAGE BROKE UP IN JULY of 1999. CONFIRMED ALSO BY DETECTIVE BROOME OBTAINING A POLICE REPORT FROM MADERA COUNTY SHERIFF DEPARTMENT. BOTH CONFIRMED THAT PETITIONER DID NOT RESIDE IN THE STATE OF NEVADA DURING AUGUST 14, 1998 to AUGUST 13, 1999. THE STATE KNEW AND WAS IN POSSESION OF EVIDENCE TO PROVE, BOTH THE ACCUSATION WAS ACTUALLY AND FACTUALY IMMPOSSIBLE TO HAVE OCCURED AS ALLEGED, AND IT PROVED PERJURY ON PART OF ASHLEY V. IN REGARDS TO HER TESTIMONY AT THE PRELIMINARY HEARING (SEE II 71/21-72/4). YET THE STATE FAILED TO BOTH CORRECT THE RECORD AND DISMISS THE ORIGINAL CHARGES IN CONNECTION TO THE ALLEGATION BY ASHLEY V., AS

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WELL AS THE STATE FAILED TO PRESENT THE POLICE DRAFT TO DEFENSE COUNSEL. BY SUPPRESSING EVIDENCE THAT IS FAVORABLE TO THE PETITIONER IS GROUNDS TO PROVE IN THE LEAST PROSECUTORIAL MISCONDUCT ON THE PART OF THE STATE. INTENTIONALLY AND KNOWINGLY PREJUDICING PETITIONER AND VIOLATING HIS RIGHT TO DUE PROCESS.

2) BY THE DETECTIVE RELEASING RENO POLICE REPORTS IN THE DIRECT CONNECTION TO ORIGINAL CASE FILED APRIL 16, 2007 IN THE RENO JUSTICE COURT (RJC) IN CASE NUMBER RJC2007-033884 TO PETITIONERS EX-WIFE'S ATTORNEY KENNETH BALLARD ON 5/25/07 HE VIOLATED PETITIONERS RIGHT TO BEING CONSIDERED INNOCENT UNTIL PROVEN GUILTY, AS WELL AS PETITIONERS RIGHT TO A FAIR AND JUST TRIAL. THERE IS ABSOLUTELY NO REASON TO RELEASE THE REPORTS TO A THIRD-PARTY ATTORNEY WHO IS NOT A IMMEDIATE PARTY TO THE MATTER AT HAND, EXCEPT THAT OF INTENTIONAL MOTIVE ON THE PART OF DETECTIVE TOM BROOME TO CAUSE HARM TO PETITIONER IN REGARDS TO THE ONGOING CUSTODY DISPUTE BETWEEN PETITIONER AND HIS EX-WIFE IN MADERA SUPERIOR COURTS. THE ACTIONS OF DETECTIVE BROOME IS BY THE DIRECT DEFINITION OF MALICIOUS INTENT AND INSURY, BY HIM DOING IT WITH WANTON DISREGARD TO THE HARM IT MAY OCCUR OR CAUSE TWOARDS THE PETITIONER. THE ACTIONS OF THE DETECTIVE IS RECORDED BY THE REPORTS BEING STAMPED INTO EVIDENCE ON JUNE 22, 2007 AS EXHIBIT 'A', 'B', 'C' AND 'D', IN CASE NUMBER CV03749. (See page: 111-128 PT V)

-30- THE REASON THE ACTIONS BY DETECTIVE TOM BROOME IS BEING INCLUDED UNDER PROSECUTORIAL MISCONDUCT BECAUSE THE

AS NOTED BY THE COURTS REPEATEDLY IS THAT, THE MISCONDUCT ON PART OF THE INVESTIGATING LAW ENFORCEMENT AGENTS IS INDISTINGUISHABLE FROM MISCONDUCT BY PROSECUTING ATTORNEY'S WITH DETECTIVE TOM BROOME'S GRATUITOUS ACTIONS TO CAUSE A HARMFUL OUTCOME IN A UNRELATED CIVIL MATTER VIOLATED THE PETITIONERS RIGHTS TO A FAIR AND JUST TRIAL. BOTH IN THIS MATTER, AS WELL AS THE MATTER BEFORE THE HONORABLE JAMES OAKLEY OF MADARA SUPERIOR COURT, MADERA CALIFORNIA. RESULTING IN PETITIONER LOSING CUSTODY OF HIS CHILDREN FOR ACCUSATIONS THAT WERE NOT EVEN FOUND TO HAVE SHOWN PROBABLE CAUSE TO EVEN PROCEED WITH TRIAL.

3) ON PAGE 47 OF THE SENTANCING HEARING TRANSCRIPTS (III) AND PAGE 90 (III) THE DATES OF ATTENDANCE IN CONNSELING WITH DR. STEVEN ING, THE DATE OF COMMENSEMENT WAS MARCH 3, 2008. THREE (3) DAYS PRIOR TO THE ACCEPTANCE OF THE GUILTY PLEA MEMORANDUM DATED MARCH 6, 2008. YET AS NOTED ON THE ABOVE REFERENCED PAGE TO THE SENTENCING HEARING, ADA VILORIA STATED ON LINE 3-6: "I DO RECOGNIZE THAT FOLLOWING THE DAY OF THIS PLEA BARGIN, AND I WOULD NOTE FOR THE COURT NOT A DAY SOONER, THAT THE DAY AFTER HE ENTERED HIS PLEAD OF GUILTY HE BEGAN HIS SEX OFFENDER TREATMENT." THIS IS YET ANOTHER EXAMPLE OF ADA VILORIA'S INTENTIONAL ATTEMPT TO PREJUDICE THE PETITIONER IN THE EYES OF THE JUDGE IN REGARDS TO SENTENCING. AGAIN WITH THE COMMENTS THAT ARE NOT ONLY UNSUPPORTED BY THE RECORD OR OF EVIDENCE BUT IN DIRECT CONTRADICTION OF THE EVIDENCE. FOR NO OTHER REASON BUT TO AQUIRE HER DESIRED OUTCOME, THAT OF IMPRISONMENT OF THE PETITIONER

4) Other examples of making comments at the sentencing Hearing to prejudice Petitioner in the eyes of the Judge that were both unsupported by record and blaintantly inappropriate are on page III 43 /lines 24, pg 44/1; pg 45/12; and page 46/6. All directing the courts to the assertion that Petitioner has in fact been a known criminal on the 'radar' of the Reno police detectives. For ten years, Exept the only criminal Record Petitioner in fact Did Possess was an arrest on 7/25/05 for a Gross Misdemenor of Petty Larcany as noted on p# III 67 in the Presentencing Report generated by Parole and Probation. Also in that same report it noted under education on page 66 (III) "the defendant graduated from the Culinary Institute of America in New York in 1999" So no where does the state Have any evidence to support the contention of a ten year criminal History, But the absolute opposite. Unless Petty Larcany is now considered a major criminal history in the eyes of ADA. Viloria. (SEE PART V pg-60)

The state even went as far as to blame the Petitioner for the incarceration of Ashley V. on page 46 lines 9-11 (pt III) "Ashley V. is in prison right now. A good part of it is Because she turned to drugs and alcohol as being molested by this defendant when she was a little girl". There is absolutely no justifiable reason for the state to make that asumption and aligation. Especially since it still has exculpatory evidence proving actual and factual innocence of Petitioner. Yet ADA Viloria's comments again intending to prejudice and adversly influence the sentence of Petitioner before the Judge.

EVEN IN ADA VILORIA'S REGERTATION OF THE INCIDENT IN REGARDS TO COUNT TWO OF THE ORDER OF CONVICTION AS COMPARED TO THE TESTIMONY OF JESSICA H. AT THE PRELIMINARY HEARING. BOTH ARE THE EXACT OPPOSITE (SEE PG 46/16-17 III; Prelim. TRAN. PG 5 1 40 II) ANOTHER EXAMPLE OF HER NOT BEING ABLE TO KEEP TO THE FACTS OF RECORD.

5) WHEN ADA VILORIA STATED "WHAT'S HAPPENED OVER THE YEARS, JUDGE, EVERY TIME HE HAS RAPED SOMEBODY OR INAPPROPRIATELY TOUCHED SOMEONE AND GOTTEN AWAY WITH IT, HE HAS GONE UP TO THE NEXT LEVEL." (PG 49/LINE 13-16 III) THE STATE MADE THE CONTENTION THAT THERE ARE OTHER, POSSIBLY NUMEROUS INCIDENTS AND ATTACKS PREFORMED BY THE PETITIONER THAT THE STATE WAS/IS INTERESTED IN BUT COULD NOT PROCEED WITH IN A CRIMINAL PROSECUTION. EVEN "GOTTEN AWAY WITH". AS WELL AS BY THE ADDITION OF THE STATEMENT "JUDGE AS A PARENT -- FROM THE RECITATION OF ALL THE FACTS YOU SEE ON EVERYTHING, AND, BASICALLY, HOW WE ENDED UP SOLVING THE ULTIMATE CASE IS BECAUSE THE DETECTIVES AND LAW ENFORCEMENT HAVE BEEN ON THIS DEFENDANT'S TAIL FOR YEARS." (PG III PG 46/ 3-6). THE STATE AGAIN MAKES INDIRECT REFERANCE TO THE PETITIONERS EXTENSIVE CRIMINAL HISTORY. (SEE PART III)

6) ON PAGE 45 LINE 8-11 (III) THE STATE REFERS TO THE FULL INVESTIGATION DISPROVING PETITIONERS ALIBI OF BEING ON THE PHONE WITH WIFE. EXCEPT AGAIN EVIDENCE AND RECORD IN THE POSSESION OF THE STATE IN RPD REPORT DATED 5/20/07

IT SHOWED ON PAGE 52 (IV) PETITIONER IN FACT DID GET OFF THE PHONE WITH WIFE, TO CALL RENO POLICE DEPARTMENT NON-EMERGANCY DISPACH NUMBER - 775-334-2677 (COPS). SO IF INCIDENT OR 'RAPE' OCCURED DURING THE FIVE MINUTES IT WOULD BE EITHER RECORDED BY POLICE DISPATCH OR AS NOTED IN REPORT, PETITIONER THAN CALLED HIS WIFE BACK SO SHE WOULD HAVE HEARD IT. (SEE RPD REPORT 07-9946 pg 52) (PART IV)

IT IS IMPORTANT TO NOTICE THAT ADA VILORIA MAKES IT A POINT TO HIDE THE TRUTH OF THE RECORD AND EVIDENCE. ALL THE WHILE MAKING COMMENTS TO ATEST AND SOLIDIFY HER OWN CREDIABILITY BEFORE THE COURTS. " I ABSOLUTLELY MADE A REPRESENTATION AS AN OFFICER OF THE COURT," (pg 57 / LINE 19-20) (III) AND MADE A POINT TO CORRECT THE PSI... " THE FACTUAL CORRECTION THAT I NEED TO MAKE..." (pg III 4/1/13) AS well AS THE STATE CORRECTING THE RECORD IN THE AREA OF ASHLEY V.'s AGE. " BUT HE CALLS ASHLEY 14 YEARS OLD AT THE TIME WHEN WE ALL KNOW SHE WAS 12. (pg 45 / 19-21) (III) THIS IS IMPORTANT BECAUSE NOT ONLY IS THE RECORD RIDDLED WITH INAPPROPRIATE UNSUPPORTED COMMENTS, ACCUSATIONS AND ALLEGIATIONS NOT DOING ANYTHING BUT INTENTIONALLY PREJUDICING PETITIONER, BUT NOWHERE IS THE ADA CORRECTING THE RECORD IN REGARDS TO THE ACTUAL INNOCENCE OF PETITIONER IN REGARDS TO COUNT ONE. AGAIN BY THE WITHHOLDING OF FAVORABEE EVIDENCE PROSECUTION HINDERED PETITIONER TO RENDER AN ADAQUATE DEFENSE. ALSO WITH THE COMMENTS OF ADA VILORIA'S INTENT TO PREJUDICE AND INFLUENCE THE SENTENCE IT SHOULD WARRENT GROUNDS FOR PROSECUTURIAL MISCONDUCT.

With REGARDS TO ALL THE EVIDENCE SHOWING PROSECUTORIAL MISCONDUCT, THE PETITIONER PROVES THAT THE STATE NOT ONLY ILLEGALY INFLUENCED SENTANCING BUT MALICIOUSly AND VINDICTIVELY PROSECUTED PETITIONER. FOR SEVENTEEN (17) MONTHS, FROM APRIL 18, 2007 to SENTENCING ON AUGUST 5, 2008 THE STATE HAD INFORMATION TO PROVE THE ALLEGATIONS MADE BY ASHLEY V. WERE IN FACT IMPOSSIBLE TO HAVE OCCURED BY THE BASIC RULES OF GILES' IN ITSELF IT WOULD BE PHYSICALLY IMPOSSIBLE TO HAVE COMMITTED A CRIME IN A STATE PETITIONER DID NOT RESIDE IN. DURING THE ALLEGATION OF ASHLEY V. SHE STATES THAT INCIDENT OCCURED AFTER SPENDING THE NIGHT AT THE PETITIONERS HOME, IN RENO NEVADA. BUT THE STATE KNEW PETITIONER IN FACT RESIDED IN NEW YORK AND IN MADERA COUNTY CALIFORNIA. EXCEPT NOT ONLY DID THE STATE CONTINUALLY FAIL TO CORRECT AND SET THE RECORD STRAIGHT, BUT THE EXACT OPPOSITE IT EAGARLY AND ZEALOUSLY PERSUED THE CHARGE EVEN UP TO PRESENTING A 'DEAL' TO PETITIONER.

THAT 'DEAL' IN AND OF ITSELF SHOULD BE WITHDRAWN AND DEEMED FRAUDULANT ON THE PART OF THE STATE. ALLOWING PETITIONER TO WITHDRAW HIS GUILTY PLEAS. IN ADDITION THE FACT THAT THE STATE INTENTIONALLY CONTINUED TO WITHHOLD THE INFORMATION BUT MALICIOUSLY VIOLATED PETITIONERS RIGHTS, WOULD IN THE LEAST WARRENT A DISMISSAL OF COUNT ONE LEWDNESS WITH A CHILD (NRS 201.230) DUE TO BRADY VIOLATION, INSUFFICIENT EVIDENCE, MANIFEST INJUSTICE AS WELL AS ACTUAL INNOCENCE.

(GILES V. STATE, 10 OKL CR. 72, 108 P.2d 975)(1940)

C) GROUND THREE: VIOLATION OF PETITIONER'S MIRANDA RIGHTS

PETITIONER'S CONVICTION IS INVALID UNDER FEDERAL CONSTITUTIONAL GUARANTEES OF RIGHTS TO BE PROTECTED FROM THE UNREASONABLE SEARCH AND SIEZURE BY LAW ENFORCEMENT AGENTS, DUE PROCESS, RIGHTS TO COUNSEL AND THE FREEDOM AGAINST SELF-INCRIMINATION, BECAUSE LAW ENFORCEMENT OFFICIALS OBTAINED VARIOUS STATEMENTS FROM PETITIONER IN THE ABSENSE OF A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS. (US CONST. AMENDS. IV, V, VI, XIV.)

SUPPORTING FACTS:

1) IN ABMITANCE BY STATEMENT OF DETECTIVE TOM BROOME AT THE PRELIMINARY HEARING, THAT PRIOR TO ENTERING THE HOME OF THE PETITIONER ON THE DAY PRIOR TO PETITIONER'S ARREST ON MARCH 22, 2009, SECRETLY AND UNKNOWN TO PETITIONER RECORDED THE 'INTEROGATION/INTERVIEW' CONDUCTED INSIDE PETITIONER'S HOME. CONVERSATION AND QUESTIONING COMMENCED IMMEDIATLY IN REGARDS TO THE INCIDENT ON MARCH 10, 2009. BY DETECTIVE TOM BROOME SECRETLY RECORDING A CONVERSATION IN THE PETITIONER'S PRIVATE HOME, HE VIOLATED THE PETITIONERS FOURTH AMENDMENT RIGHT, OF UNLAWFUL SEARCH AND SIEZURE. BECAUSE PETITIONER AS WELL AS EVERY UNITED STATES CITIZEN HAS A RIGHT TO HAVE A PRESUMPTION AND AN EXPECTATION OF PRIVACY IN ONES OWN HOME. WITH DETECTIVE BROOME RECORDING WITHOUT PERMISION HE DID NOT RECIVE A CONSENTUAL AND VOLUNTARY WAIVER OF

THE PETITIONERS RIGHT.

2) MIRANDA RIGHTS HAVE BEEN A TOPIC OF DISPUTE AND CHALLENGE IN THE COURTS FOR YEARS. IT IS A COMMON TRAIN OF THOUGHT THAT TO REQUIRE THE NEED TO ADMINISTER THESE RIGHTS TO AN ACCUSSED / SUSPECT, TWO CRITERIA MUST BE MET. FIRST BEING THE 'SUSPECT' OR INTENDED INDIVIDUAL WHO IS BEING QUESTIONED MUST BE CONSIDERED IN CUSTODY. THE GENERAL RULE OF CUSTODY OCCURS WHEN A SUSPECT IS PLACED IN A 'UNFAMILIAR AND HOSTILE SURROUNDINGS'. FOR EXAMPLE WOULD BE A POLICE INTERROGATION ROOM BEING CONSIDERED A HOSTILE SURROUNDINGS. THE SECOND IS INTERROGATION WHICH NEEDS TO BE SPECIFIC QUESTIONS ABOUT A SPECIFIC INCIDENT THAT THE ACCUSED IS 'INTERESTED IN BY LAW ENFORCEMENT. (PART IV PG 120-140, NO RIGHTS)

ON MARCH 22, 2009. PETITIONER ARRIVED AT RPD' SEX CRIMES UNIT, WHERE HE WAS TAKEN TO AN INTERROGATION ROOM, AND QUESTIONING IMMEDIATELY COMMENCED ABOUT RPD CASE 07-9446. DURING THE QUESTIONING DETECTIVE TOM BROOM INFORMED PETITIONER THAT HE WAS FREE TO GO AT ANY TIME. EXCEPT IT SHOULD BE NOTED THAT DETECTIVE BROOME ENTERED THE ROOM WITH A MANILLA FOLDER. THE TOP SHEET WAS A 'BOOKING SHEET' FOR THE ARREST OF PETITIONER. AT NO POINT WAS THE PETITIONER INFORMED OF HIS MIRANDA RIGHTS. WHEN THE RULE IS THAT THE RIGHTS MUST BE READ PRIOR TO ANY QUESTIONING BEING DONE. ALSO THAT THERE IS RECORD ON THE TRANSCRIPT THAT NO SUCH WARNING IS GIVEN. AS WELL AS THE FACT THAT NO WHERE IN THE 'FILE' FOR PETITIONER IS A WAIVER / NOTIFICATION SHEET SIGNED BY PETITIONER. THE COMMON CONTENTION IN LEGAL MINDS

IS THAT THE PRODUCT OF AN INTERROGATION THAT DOES NOT COMPORT WITH MIRANDA AND ITS PERMUTATIONS, IS PRESUMED TO BE INVOLUNTARY WITHOUT REGARDS TO WHETHER IT WAS IN FACT INVOLUNTARY. SO BY DETECTIVE TOM BROOME SAYING..... "YOU KNOW YOU'RE NOT UNDER ARREST. YOUR FREE TO LEAVE ANY TIME YOU WANT." DOES NOT ALEAVIATE OR LESSEN THE REQUIREMENT TO INFORM/ISSUE THE PETITIONER HIS RIGHTS PROTECTED BY THE FIFTH AMENDMENT. THE SITUATION MET BOTH OF THE REQUIREMENTS DEMANDING THE READING OF THE PETITIONER'S 'MIRANDA RIGHTS'. (SEE PAGE 18 IN PT IV WAIVER FOR 05 NONE FOR 07)

WITH THIS VIOLATION OF THE PETITIONERS FIFTH AMENDMENT RIGHTS AS WELL AS THE PREVIOUS DAY (MARCH 21, 2009) OF DETECTIVE BROOME SECRETLY RECORDING PETITIONER, AND BY THAT ACT VIOLATING HIS RIGHT TO PRESUMPTION OF PRIVACY PROTECTED BY THE FOURTH AMENDMENT. DUE TO THE ACTIONS OF DETECTIVE TOM BROOME HE VIOLATED THE RIGHTS AND BECAUSE OF THAT THE INTERVIEWS/INTERROGATION SHOULD BE DEEMED TO BE INADMISSABLE. PLUS BECAUSE THOSE STATEMENTS ARE IN FACT TAINTED, ALL EVIDENCE PRODUCED/UNCOVERED BECAUSE OF THESE STATEMENTS SHOULD BE DEEMED AS FRUITS OF A POISONOUS TREE AND THEREFORE INADMISSABLE.

PETITIONER HUMBLY REQUEST THE COURT TO GRANT RELIEF FROM THIS VIOLATION AND ALL THE PREJUDICIAL 'FALLOUT' FROM THESE ACTIONS. CONFIRMED VIOLATION WITH RPD TRANSCRIPTS FOR 3/22/07 PAGES 1 TO 10 WHEN PETITIONER IS PLACED UNDER ARREST DETECTIVE BROOME NEVER LEFT THE ROOM, SO HE CAME IN WITH THE BOOKING SHEET WITH THE INTENT TO ARREST PETITIONER, REQUIRING HIS RIGHTS BE READ. ALL INFORMATION AND EVIDENCE DERIVED SHOULD BE DEEMED TAINTED.

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D) GROUND FOUR: DIRECT SUBJECT MATTER JURISDICTION

PETITIONER'S CONVICTION AND SUBSEQUENT IMPRISONMENT IS ILLEGAL DUE TO VIOLATIONS OF PETITIONERS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE GUARANTEED RIGHTS PROTECTED IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. BECAUSE THE STATE OF NEVADA IN FACT LACKED SUBJECT MATTER JURISDICTION FOR COUNT ONE IN THE AMENDED CRIMINAL COMPLAINT DATED FEBRUARY 28, 2008. (LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE. NRS. 201.230)

SUPPORTING FACTS:

1) THE CHARGE OF LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE A VIOLATION OF NRS 201.230, FALLS UNDER THE SUBSECTION OF (2) IN NRS 171.085, IN WHICH THE NEVADA LEGESLATURE DEFINES THE DIFFERENT OFFENSES AND SUBSEQUENT STATUTE OF LIMITATIONS IN WHICH A CHARGE MUST BE FILED. SINCE THIS CRIME IS NOT ONE OF THE SPECIFICLY NAMED OFFENSES IN SUBSECTION (1) IE: THEFT, ROBBERY, BURGLARY, FORGERY, ARSON, SEXUAL ASSAULT; IT FALLS INTO SUBSECTION (2): MAKING THE STATUTE OF LIMITATION TO FILE, MUST BE FOUND, OR AN INFORMATION OR COMPLAINT FILED, WITHIN 3 YEARS AFTER THE COMMISSION OF THE OFFENSE. NRS 171.085 STARTS BY SAYING "EXCEPT AS OTHERWISE PROVIDED IN ... NRS. 171.095.

NRS 171.095 IS A STATUTE THAT ALLOWS THE TOLLING OF THE STATUTE OF LIMITATION FOR A LONGER TIME IF THE

CRIME IS IN FACT DONE OR COMMITTED IN A SECRETIVE / SECRET MANNER. IN THE STATUTE IT STATES: "UNLESS A LONGER PERIOD IS ALLOWED BY PARAGRAPH (B) ... AN INDICTMENT MUST BE FOUND, OR AN INFORMATION OR COMPLAINT FILED FOR ANY OFFENSE CONSTITUTING SEXUAL ASSAULT OF A CHILD, AS DEFINED IN NRS 432B.100, BEFORE THE VICTIM OF THE SEXUAL ABUSE IS: (1) TWENTY-ONE YEARS OLD IF HE DISCOVERS OR REASONABLY SHOULD HAVE DISCOVERED THAT HE WAS A VICTIM OF THE SEXUAL ABUSE BY THE DATE ON WHICH HE REACHES THAT AGE." IN ADDITION TO NRS 171.095 SEC (b)(1) IS NRS. 171.083 IN IT IT SAYS THAT "A VICTIM OF SEXUAL ASSAULT AT ANY TIME DURING THE PERIOD OF LIMITATIONS IN NRS 171.085 AND NRS 171.095, FILES WITH A LAW ENFORCEMENT OFFICER A WRITTEN REPORT CONCERNING THE SEXUAL ASSAULT, THE PERIOD OF LIMITATION PRESCRIBED IN NRS 171.085 AND NRS. 171.095 IS REMOVED AND THERE IS NO LIMITATION." IT CLEARLY REQUIRES A WRITTEN REPORT. NO SUCH REPORT WAS EVER FILED SO NRS. 171.085 AND 171.095 STAY AT BAR.

NRS 171.095 TO BE UTILIZED BY THE STATE MUST BE ABLE TO PROVE THAT THE CRIME WAS IN FACT COMMITTED IN A SECRET MANNER. BECAUSE UNDER THE STATUTE PROVIDING TOLLING OF STATUTE OF LIMITATIONS IF A CRIME IS DONE IN A SECRET MANNER, THE STATE HAS THE BURDEN OF PROVING BY PREPONDERANCE OF THE EVIDENCE THAT THE CRIME WAS SECRET. THAT IS DEFINED BY THE COURTS AS A CRIME IS UNDISCOVERED AND BE CONSIDERED BEING DONE IN A "SECRET MANNER" SO LONG AS SILENCE IS INDUCED BY THE WRONGDOER'S THREATS TO REMAIN SILENT.

COERSION AND THREATS MUST BE MADE TO INDUCE THE CRIME BEING HIDDEN AND THEREFORE FALL UNDER THE STATUTE OF LIMITATIONS PRESCRIBED IN NRS. 171.095.

THERE ARE QUITE A FEW ISSUES WRONG WITH THE STATE FILING CRIMINAL CHARGES OF: SEXUAL ASSAULT ON A CHILD, LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, STATATURY SEXUAL SEDUCTION, AND LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS. COUNTS I, II, III, IV RESPECTFULLY IN AMENDED CRIMINAL COMPLAINT FILED APRIL 16, 2007 IN RJC CASE NUMBER 2007-033884. ALL THE ALLEGATIONS WERE STATING A TIME WINDOW OF 'ON OR BETWEEN AUGUST 14, 1998 AND AUGUST 13, 2000. HERE IS WHY THE STATE LACKED THE JURISDICTION TO BRING ANY OF THESE CHARGES FOWARD.

TRUE ALL THE 'VICTIMS' (ASHLEY V. AND MICHELLE ANTHONY) WERE STILL UNDER 21 YEARS OF AGE, AS REQUIRED IN NRS 171.095 (b)(1) but it also reads "HE DISCOVERS OR REASONABLY SHOULD HAVE DISCOVERED THAT HE WAS A VICTIM OF SEXUAL ASSAULT." BESIDES THE OBVIOUS FACT THAT PETITIONER WAS NOT EVEN IN THE RENO AREA DURING THIS TIME, ASHLEY V IN HER INTERVIEW WITH DETECTIVE TOM BROOME ON 3-29-2007 STATES THAT AT THE TIME SHE WAS SEXUALLY ACTIVE, AND SHE WAS NOT FORCED. ALSO NOT NOTED IS THAT ONE YEAR LATER SHE HAD A SON BY A MUCH OLDER 'BOYFRIEND'. SO THE AREA OF 'SHOULD HAVE DISCOVERED' IS MET. AS WELL AS STATING NOT FORCED. COUNT VII OF THAT SAME COMPLAINT WAS SEXUALLY MOTIVATED COERSION; NRS 207.190 DEFINES COERSION "IT IS UNLAWFUL FOR A PERSON, WITH THE INTENT TO COMPEL ANOTHER TO DO OR ABSTAIN FROM DOING AN ACT WHICH

THE OTHER PERSON HAS A RIGHT TO DO OR ABSTAIN FROM DOING, TO: (a) USE VIOLENCE OR INFLICT INJURY UPON THE OTHER PERSON OR ANY OF HIS FAMILY ... OR THREATEN SUCH VIOLENCE OR INJURY ... (c) ATTEMPT TO INTIMIDATE THE PERSON BY THREATS OR FORCE!" SO WITH THAT CHARGE THE STATE WAS ABLE TO SLIDE THE FIRST FOUR IN UNDER THE PRETENSE OF THE CRIMES BEING COMMITTED IN A SECRET MANNER. EXTENDING THE LIMITATION TO THE TWENTY-FIRST BIRTHDAY.

But, MR. CLIFTON BY HIS OWN ADMITION STATED THAT THERE IS NO RECORD OF ANY THREATS, VIOLENCE OR COERSION IN ANY OF THE CHARGES / COMPLAINTS. SO MOVED TO DISMISS COUNT VII SEXUALLY MOTIVATED COERSION. BECAUSE THE FACT THAT THE REMOVAL OF THAT CHARGE SHOWED THE STATE DID NOT AND COULD NOT PROVE THE CRIMES WERE DONE IN A SECRET MANNER, THAT ASHLEY WAS ADMITADLY SEXUALLY ACTIVE AND KNEW OR HAD AN ACCURATE KNOWLEDGE OF SEX, BOTH RIGHT AND WRONG, NEVER CLAIMED PETITIONER THREATENED HER TO KEEP QUIET, SHE KEPT QUIET ABOUT A SEXUAL EXPERIENCE OF HER OWN. NRS. 171.095 CAN NOT BE THE STATUTE OF LIMITATIONS AT BAR. SO ONCE COUNT VII WAS DISMISSED, THE STATE LOST SUBJECT MATTER JURISDICTION, BECAUSE THE STATE FAILED TO BRING CHARGES FOWARD WITHIN THE STATATORY PERIOD MANDATED BY LEGISLATURE, 3 YEARS I.E. 12 YEARS OLD = AUG. 14, 1998 TO AUG. 13, 1999 WITHIN THREE (3) YEARS WOULD REQUIRE THE CHARGES BE BROUGHT BEFORE AUGUST 13, 2002. (SEE PRELIMINARY HEARING TRANSCRIPTS PG 117/118)(PART II) PG 71/217

THEREFORE PETITIONERS PROSECUTION UNDER NRS 201.230 IS THEREFORE PRECLUDED BY THE STATUTE OF LIMITATION NRS 171.085

E) GROUND FIVE: STATES FAILURE TO INVESTIGATE ALLEGATIONS

PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND AS A RESULT OF NEVADA LAW THAT PERMITS PETITIONER TO BE CONVICTED OF LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS (NRS 201.230) AND ATTEMPTED SEXUAL ASSAULT (NRS 193.330) BASED SOLEY ON THE UNCORRABERATED TESTIMONY AND ALLEGATIONS OF THE VICTIMS. AS WELL AS BY THE RENO POLICE DEPARTMENT'S FAILURE TO ADEQUATLY INVESTIGATE THE ACCUSATIONS OF THE VICTIMS AGAINST PETITIONER.

SUPPORTING FACTS:

1) HAD AN ADEQUATE AND EVEN BASIC INVESTIGATION BEEN DONE BY THE 'INVESTIGATORS' IN THE AREA OF A SIMPLE RESIDENCE HISTORY AND DMV RECORD SEARCH THE STATE WOULD HAVE SEEN THAT THE PETITIONER DID NOT EVEN RESIDE IN RENO NEVADA UNTIL 2000. (SEE PS. 91-99 IRS PAPERWK; PS 86-88 DMV. PART II). THE LEAD INVESTIGATOR DETECTIVE TOM BROOME DID INVESTIGATE AND HAD DISCOVERED THAT PETITIONER WAS NOT IN RENO DURING AUGUST 14, 1998 TO AUGUST 13, 1999 BY MEANS OF A INTERVIEW WITH PETITIONERS EX-WIFE JENNY DUNCKLEY. (SEE PS 128 PART V) AND A MADERA COUNTY POLICE REPORT DATED 7-19-99 (PS 129,30 PART V) BOTH SHOWS PETITIONER RESIDING IN MADERA, COUNTY CALIFORNIA AND NEW YORK. BUT INVESTIGATORS CHOSE TO IGNORE THIS EXTREMLY MATERIAL AND RELEVANT INFORMATION GOING DIRECTLY TO PETITIONERS INNOCENCE

2) On March 29, 2007 Detective Tom Broome called Silver Springs Woman's Camp and interviewed Ashley V. and in that interview Ashley V. tells Detective Broome about two different incidents that occured when she was twelve years old Namely between 1998 and 1999. A span of nine to ten years between the interview and the alleged incidents. Yet there was absolutely no investigation done. As noted in RPD 0534027 pg (4) Detective Broome states: "Given the new information learned in 079446 investigation and addtional witnesses I drove to suspect Dunckley's residence on High Plains Drive to place Dunckley under arrest for this sexual assault." (See pg 47 part IV

Had Detective Broome actually looked in the Record and his notes he would see that there is absolutley no modus operandi conneting the two cases. Lord in 2005 was sober as confirmed by RPD Transcripts of interview (see pg 25/17-part IV) and the only mention of alcohol was in RPD 0534027 pg 4. "Serton did not answer her and poured a shot of vodka and ingested it" (pg 9 part IV). In 2007 Jessica was clearly intoxicated with a Blood Alcohol Level (BAL) of .226 (See pg 111/24 part IV). Except Detective Broome used that as a area of creating probable cause where it in fact did not exist. Also confirmed at the preliminary hearing on (pg 103/3-13 IV) intoxicated victims was the connection, But also stating that petitioner was on the phone with his wife during incidents to establish an alibi. (pg 127/1,2 part IV) except at no point during the 0534027 interviews was wife mentioned as an alibi. Failure to investigate even his own notes But ignoring it to create probable cause in areas he felt was needed to achieve

HIS GOAL 'TO GET BRENDAN BEHIND BARS" (ps. 59/22 PART II).
OBVIOUSLY BY ANY MEANS NECESSERY, LIKE IGNORING OBVIOUS EVIDENCE,
FAILING TO PROPERLY INVESTIGATE ALLEGATIONS, TO TAKE BUT A FEW HOURS
TO MAKE SURE THAT JUSTICE IS DONE. IN REGARDS TO COUNT ONE THAT
IS CURRENTLY UNDER ATTACK 'LEWDNESS WITH A CHILD' THE STATE HAS
IN FACT ABSOLUTELY NO EVIDENCE TO SUPPORT THIS ALLEGATION,
EXCEPT THE TESTIMONY OF ASHLEY V. DETECTIVES DID NOT EVEN FEEL
IT NEEDED TO GENERATE A REPORT/COMPLAINT OR STATEMENT FOR
ASHLEY V. TO SIGN CONFIRMING AND FORMALLY FILING A COMPLAINT
AGAINST PETITIONER WITH DIRECT RESPONCE TO COUNT ONE. EVEN
AT THE PRELIMINARY HEARING WHERE THE STATES ENTIRE CASE
RESTS ASHLEY COULD NOT GIVE ANY DATE OF THE INCIDENT AND
COULD NOT GIVE A SPECIFIC TIME WHEN SHE MET THE PETITIONER,
NOR HOW SHE MET HIM. THERE IS ABSOLUTELY NO EVIDENCE GATH-
ERED TO ESTABLISH WITH CERTAINTY THE AGE WHEN THE INCIDENT
OCCURED. AGE BEING AN IMPORTANT ASPECT IN A CHARGE OF LEW-
DESS WITH A CHILD UNDER 14. HAD THE STATE INVESTIGATED THIS
SPECIFIC ALLEGIATION IN STEAD OF RUSHING FOR AN ARREST IT
WOULD HAVE SEEN THE IMPOSSIBILITY OF THIS OCCURING, ALSO IT
NOT BEING ABLE TO CONNECT 2007 to 2005 to 1998/99.

3) ON MARCH 22, 2007 DURING THE INTERVIEW BETWEEN
PETITIONER AND DETECTIVE TOM BROOME ON LINE 19/20 PETITIONER
SAYS: "... DOES IT MEAN ANYTHING FOR THE FACT THAT WHILE SHE
WAS DOING IT SHE PULLED UP HER SHIRT AND WAS TRYING TO
SHOW ME HER BREASTS? AND ON HER LEFT NIPPLE IS - IS A
BAND AID?) (SEE PART IV ps. 130/19,20) DETECTIVE BROOME RESPONDED
"NOT REALLY." EXCEPT HE ALSO DISMISSED THAT 'LEAD'/INFORMATION

IN RPD 07944601 THERE IS ANOTHER MENTION OF THE BAND-AID AND AGAIN ANOTHER DISMISSAL BY DETECTIVE BROOME. EVIDENCE OR INFORMATION THAT COULD CREATE REASONABLE DOUBT IN REGARDS TO A CHARGE THE POLICE SHOULD INVESTIGATE NO MATTER WHERE IT MAY LEAD. (SEE PT. VI pg 58)

BY DETECTIVE BROOME MAKING A ROUTINE 'FOLLOW-UP' PHONE CALL TO THE VICTIM JESSICA'S BOYFRIEND TO EITHER CONFIRM THE BAND-AID OR NOT. IT WOULD HAVE CAST A DOUBT ON EITHER THE VICTIMS STATEMENT AND ACCOUNT OF THE INCIDENT OR THAT OF THE PETITIONERS RENDITION OF THE INCIDENT. ALAS BECAUSE THE STATE SPECIFICALLY DETECTIVE TOM BROOME IGNORED YET ANOTHER CRUCIAL PIECE OF INFORMATION THE WORLD OR THIS COURT WILL NEVER KNOWS WHERE THAT INFORMATION WOULD HAVE LED. PROVING YET AGAIN THAT MINOR THINGS LIKE MATERIAL EXCULPATORY EVIDENCE WILL NOT GET IN DETECTIVE BROOMES WAY OF REACHING HIS ULTIMATE GOAL SEEING THE PETITIONER 'BEHIND BARS!'

ALSO DURING THE SAME INTERVIEW WHILE BEING SEARCHED DETECTIVE BROOME FOUND A COMPUTER DISK WITH TEMPLATES OF LETTERS FOR THE 'PTO' PARENTS TEACHER ORGANIZATION. NOW THE FACT THAT DETECTIVE BROOME CONNECTED TWO RANDOM CASES OVER TWO YEARS APART WITHOUT NOTES OR REFERING TO THE RECORD SHOWS AN AMAZING MEMORY. SO HOW DID HE FORGET THAT THE PETITIONER WAS A PART OF THE P.T.O. AN ORGANIZATION CENTERED AROUND CHILDREN WHEN THE MAIN CHARGES IN RJC 2007-033884 WERE AGAINST CHILDREN. BUT FAILED TO INTERVIEW ANYONE ASSOCIATED WITH THE PTO TO SEE IF THERE MAY OR MAY NOT BE

OTHER VICTIMS. NO INVESTIGATION TO THE SCHOOL, INTERVIEW OF THE PRINCIPAL, TEACHERS, OTHER PARENTS, NOTHING. THAT BRINGS SERIOUS DOUBT AND CONCERN TO HIS UNDERLYING MOTIVES. A FLAG GOES UP WHEN A 'SEX OFFENDER' HAS INFORMATION DIRECTLY CONNECTING HIM TO A ORGINIZATION THAT CENTERS AROUND CHILDREN. (SEE PART IV PG 137/1-9)

4) ALL THE INFORMATION / EVIDENCE THAT DETECTIVE TOM BROOME FAILED TO INVESTIGATE OR FOLLOW UP WAS ALL MATERIAL EVIDENCE, THAT HAD IT BEEN INVESTIGATED PROPERLY AND BECOME A PART OF THE RECORD, THERE IS A REASONABLE PROBABILITY THAT THE RESULTS OF THIS CASE WOULD HAVE BEEN DIFFERENT. IGNORING OR OVERLOOKING ONE INCIDENT IS ONE THING POSSIBLY NEGLAGANCE, BUT TO INTENTIONALLY IGNORE AND FAIL TO PURSUE / GATHER POTENTIONALLY EXCULPATORY EVIDENCE IN OBVIOUS BAD FAITH, A DISMISSAL OF ALL RELATED CHARGES MAY BE AN ADAQUATE REMIDY BASED ON THE EXAMINATION OF THE CASE AS A WHOLE. BECAUSE THIS EVIDENCE AND LACK THERE OF FROM DETECTIVE BROOME PROVES BAD FAITH ON THE PART OF THE GOVERNMENT AND THAT PETITIONER IS ENTITLED TO A PRESUMPTION THAT THE EVIDENCE WOULD HAVE BEEN UNFAVORABLE TO THE STATE, RESULTING IN THE GROSS PREJUDICING OF PETITIONER IN REGARDS TO THE LACK OF EVIDENCE AND MALICIOUS CONDUCT OF DETECTIVE TOM BROOME.

PETITIONER THEREFORE HUMBLY REQUEST THE COURTS TO DISMISS AND VACATE THE ORDER OF CONVICTION AND THE GUILTY PLEA MEMORANDUM ON THE ILLEGAL AND INAPPROPRIATE ACTIONS OF THE STATE TO EVEN HAVE EVIDENCE TO SUPPORT OR ESTABLISH PROBABLE CAUSE LET ALONE A CONVICTION.

THE STATE HAD AND STILL HAS A DUTY TO BE DILIGENT AND TO ADAQUATLEY INVESTIGATE A CASE, TO LEAVE NO STONE UNTURNED. BY DOING A FULL AND ADAQUATE INVESTIGATION IN REGARDS TO A CASE IS THE ONLY WAY THAT THE STATE CAN FULLY ACOMPLISH ITS GOAL AS REPRESENTATIVES OF THE STATE AND ULTIMATLY THE PEOPLE. THAT OF HAVING THE DUTY TO NOT MERLY CONVICT BUT TO SEE THAT JUSTICE IS DONE BY SEEKING TRUTH OF THE MATTER AND TO ENSURE THAT A JURY OR JRIER, TRIES THE CASE SOLEY ON THE BASIS OF ACTUAL FACTS PRESENTED TO THEM. ALL THE NEEDED FACTS TO MAKE AN EDUCATED DECISION AS TOO GUILT OR INNOCENCE BEYOND A REASONABLE DOUBT.

F) GROUND SIX: FAILURE TO HAVE SUFFICIENT EVIDENCE

PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE THE STATE HAD/HAS INSUFFICIENT EVEDENCE TO PROVE AND SUPPORT A CRIME OCCURING LET ALONE ANY EVIDENCE TO SUBSTANCIATE AND JUSTIFY A CONVICTION.

SUPPORTING FACTS:

1) PETITIONER IS INCARCORATED DUE TO A GUILTY PLEA MEMORANDUM OFFERED TO HIM BY THE STATE, IN WHICH HE WAS LED TO BELIEVE THAT THE STATE WAS IN POSSESION OF ENOUGH EVIDENCE TO PRODUCE A VERDICT OF GUILTY IF THE

CHARGES IN FACT PROCEEDED TO A TRIAL BY JURY. BY THAT CLAIMING IT COULD PROVE GUILT BEYOND A REASONABLE DOUBT TO THE JURY. COUNT ONE THAT IS UNDER ATTACK IN THE ORDER OF CONVICTION IS A CHARGE OF LEWDNESS WITH A CHILD UNDER 14 YEARS. (NRS 201.230) AND COUNT TWO IS ATTEMPTED SEXUAL ASSAULT A VIOLATION OF (NRS 193.330) IN THE ALTERNATIVE TO SEXUAL ASSAULT (NRS 200.366. LETS EXAMINE BOTH OF THESE CHARGES AND THE EVIDENCE THAT THE STATE FELT JUSTIFIED THE CLAIM OF ENOUGH EVIDENCE TO OBTAIN A GUILTY VERDICT (BEYOND A REASONABLE DOUBT.).

2) WHEN A SUSPECT, DEFENDANT, PETITIONER IS CHARGED WITH THE ACCUSATION AND CRIME OF LEWDNESS WITH A CHILD UNDER 14 YEARS, THE STATE HAS AN OBLIGATION TO PROVE TWO FACTORS IN THE CASE. FIRST THEY MUST PROVE THAT A LEWD OR LASCIVIOUS ACT DID IN FACT OCCUR AND THE SECOND IS TO PROVE THAT SAID ACT WAS IN FACT COMMITTED ON A CHILD UNDER 14 YEARS. SO AGE IS A KEY FACTOR.

SINCE THE ONLY EVIDENCE THAT A CRIME EVEN DID OCCUR WAS BASED SOLEY ON ASHLEY V.'S TESTIMONY AT THE PRELIMINARY HEARING (SEE PART II PGS 61-90) WE WILL EXAMINE THAT 'EVIDENCE'. ASHLEY COULD NOT GIVE A DATE, ANY DATE FOR THAT MATTER IN WHICH SHE MET THE PETITIONER, NOR COULD SHE GIVE ANY INFORMATION AS TO HOW SHE MET HIM. EXCEPT THAT SHE WOULD CONCEDE THAT SHE COULD HAVE MET PETITIONER THE SAME TIME MICHELLE MET HIM, WHICH WOULD PUT IT INTO LATE SUMMER EARLY FALL OF 2000. (SEE PART II PG 46/14-24) MICHELLE STATES HOW SHE MET PETITIONER DURING HER

PREGNANCY OF HER DAUGHTER. MAKING THE DATE THAT SHE (ASHLEY) AND THE PETITIONER FIRST MET IN 2000. SINCE SHE IS OLDER THAN MICHELLE WHO CLAIMED TO HAVE MET PETITIONER WHEN SHE WAS PREGNANT AT THE AGE OF 13 THAN IT WOULD PROBABLY MAKE HER OLDER THAN 14. THERE IS ABSOLUTELY NO EVIDENCE TO SHOW WHAT HER AGE WAS. AND THUS THE STATE AT PRELIMINARY BY THE ONLY EVIDENCE IT HAD FAILED TO SHOW THAT THIS CRIME WAS IN FACT DONE UPON A CHILD. YET ALL THE EVIDENCE PETITIONER BRINGS FOWARD PROVES IT CAN NOT HAPPEN WHEN SHE WAS 12. SO THE STATE HAS NO SUCH EVIDENCE IN COUNT ONE TO ALLOW LEGALLY OR AT LEAST ETHICALLY THE STATEMENT IT HAD/HAS SUFFICIENT EVIDENCE TO SUPPORT AND OBTAIN A GUILTY VERDICT.

3) COUNT TWO IS ATTEMPTED SEXUAL ASSAULT BUT FOR ALL INTENSIVE PURPOSES TO PROVE INSUFFICIENT EVIDENCE WE WILL EXAMINE THE COUNT IN THE ORIGINAL FORM, THAT OF A VIOLATION OF NRS 200.366 SEXUAL ASSAULT. THE STATE LEGESLATURE DEFINES SEXUAL ASSAULT IN PART AS: "A PERSON WHO SUBJECTS ANOTHER PERSON TO SEXUAL PENETRATION, OR WHO FORCES ANOTHER PERSON TO MAKE A SEXUAL PENETRATION ON HIMSELF OR ANOTHER ... AGAINST THE WILL OF THE VICTIM ... IS GUILTY OF SEXUAL ASSAULT." (PART V pg 136)

ON MARCH 20, 2007 JESSICA MADE THE ALLEGATION THAT THE PETITIONER FORCED HIS PENIS INTO HER MOUTH WHICH SHE CLAIMED SHE SUBSEQUENTLY BIT REPEATEDLY. (SEE PART IV pg 49-53 RPD 079446), AND THEN SHE EXPLAINS TO MR. CLIFTON AT THE PRELIMINARY HEARING

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THAT THE PENIS WAS PLACED / FORCED INTO HER MOUTH WITH HER MOUTH OVER THE HEAD AND SHE BIT THE SHAFT. HARD ENOUGH AS SHE CLAIMS TO LEAVE TEETH MARKS. (SEE PART II PAGES 38/16 to 39/2). SO BY DEFINITION OF SEXUAL ASSAULT THE FORCABLE INSERTION OF THE PENIS INTO JESSICA'S MOUTH WOULD WARRENT A CHARGE OF SEXUAL ASSAULT. BUT THE ACTUAL EVIDENCE DOES NOT SUPPORT THIS CLAIM AT ALL. IN THE RPD REPORT 0709446 IT STATES "NO VISIABLE INJURY TO BRENDANS PENIS SHAFT, HEAD OR BASE" (SEE PART IV PG 52) BUT SURELEY THE DNA SAMPLES OBTAINED THAT NIGHT OF PETITIONERS PENIS SHOWS DNA TRANSFER WHICH IS TO BE IMPOSSIBLE FOR A SEXUAL PENETRATION TO HAVE OCCURED AND NO DNA TRANSFER. YET DNA RESULTS DATED "MAY 21, 2007 STATES "NO DNA FOREIGN TO THE SOURCE, BRENDAN DUNCKLEY, WAS OBTAINED FROM THE GENITAL SWABS". SO NO MARKS AND NO DNA THE ONLY LOGICAL ERRCLINATION TO THIS QUANDRY IS THE MOST OBVIOUS. NO SEXUAL PENETRATION OCCURED. SO THERE FORE NO CRIME. (SEE PART IV PG 58, 59)

ADD TO THAT THE FACT THAT JESSICA COULD NOT EVEN GIVE A DESCRIPTION OF THE 'ATTACKER' YET CLAIMS SHE PICKED THE PETITIONER OUT OF A PHOTO LINE UP. (SEE PART II PG 36/5-24) AND IN THE COURT ROOM STATED SHE COULD NOT GIVE A DESCRIPTION OF THE 'ATTACKER'. (SEE PART II PG. 22/11-13). THE 'LINE-UP' WAS CONFIRMED BY DETECTIVE BROOME AT THE PRELIMINARY HEARING (SEE PART II PG 108/21-24 to 109/1-8) YET NO WHERE IN THE ENTIRE TRANSCRIPT OF THE INTERVIEW BETWEEN JESSICA AND DETECTIVE BROOME DID THEY EVER DO A PHOTO LINE-UP. GIVING SERIOUS DOUBT AS TO JESSICAS ACTUAL ABILITY TO IDENTIFY THE 'ATTACKER'

(SEE PART IV PGS 111-119). AGAIN SHOWING THE GROSS WEAKNESS OF THE CASE. JESSICA SIMPLY IDENTIFIED THE PETITIONER BECAUSE HE WAS IN THE RIGHT SEAT. EVEN DURING HER INTERVIEW SHE TOLD DETECTIVE BROOME SHE COULD NOT IDENTIFY THE "ATTACKER". (SEE PART IV PG 113/18)

SO, IN OVERALL REVIEW OF THE STATES OBVIOUS LACK OF ANY SUFFICIENT EVIDENCE TO JUSTIFY THE APROACHING THE PETITIONER WITH A 'DEAL' IT KNEW IT COULD NOT PASS AS SUBSTANTIAL TO A JURY IS IN ITSELF DETRIMENTAL AND INTENTIONALLY PREJUDICIAL TO PETITIONER, BECAUSE IN COUNT ONE IN THE ABSENSE OF COMPETENT PROOF OF AGE THE PETITIONER COULD NOT BE PROPERLY CONVICTED of LEWDNESS WITH A CHILD UNDER 14 YEARS. ADD THE FACT THAT DEFENSE COUNSEL FAILED TO PREFORM ANY PRE TRIAL INVESTIGATION IT SHOWS THAT IN THE PRESENT CASE UNDER ATTACK, SINCE THERE IS ABSOLUTELY NO PHYSICAL EVIDENCE OF THE ALLEGED LEWDNESS CHARGE AND NONE IN THE SEXUAL ASSAULT (ATTEMPTED) CHARGE THE OUTCOME DEPENDED PRIMARILY IF A JURY WOULD BELIEVE THE 'VICTIMS' OR THE PETITIONER. By Counsel failing to In fact INVESTIGATE AND THE LACK OF PREPERATION FOR TRIAL IN THE ADDITION TO THE STATE HAVING NO EVIDENCE WHATSO EVER, IT LEFT THE PETITIONER WITH NO DEFENSE AT ALL.

BECAUSE THE STATE HAS NO EVIDENCE FOR COUNT ONE AND THE EVIDENCE IT HAS FOR COUNT TWO PROVES NO ATTACK OR PENETRATION HAPPENED THE ONLY JUSTIFIABLE REMIDY TO CORRECT THIS MANIFEST INJUSTICE IS TO VACATE DISMISS AND REVERSE ALL COUNTS IN THE ORDER OF CONVICTION ON GROUNDS OF THE STATES FAILURE TO PROVIDE SUFFICIENT EVIDENCE

G) GROUND SEVEN: BRADY VIOLATION (WITHHOLDING FAVORABLE EVIDENCE

PETITIONERS CONVICTION AND SENTENCE ARE INVALID UNDER FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION, DUE TO THE STATES FAILURE TO DISCLOSE MATERIAL AND EXCULPATORY EVIDENCE, AS WELL AS DEFENSE COUNSELS FAILURE TO INTRODUCE IMPEACHMENT EVIDENCE IT HAD IN ITS POSSESION. - UNITED STATES CONSTITUTIONAL AMENDMENTS V, VI AND XIV.

SUPPORTING FACTS:

1) IN GENERAL, BRADY VIOLATIONS PERTAIN DIRECTLY TO THE PROSECUTION'S LACK OF BRINGING FORTH EVIDENCE THAT IS FAVORABLE TO THE ACCUSED, BOTH TO THE DEFENSE COUNSEL WHETHER OR NOT A FORMAL REQUEST WAS GIVEN, AND ALSO TO BRING IT FOWARD TO THE COURTS OR THE RECORD. BUT IN THE BASIC FOUNDATION OF BRADY THE PREMISE IS THAT: 1) FAVORABLE EVIDENCE TWOARDS THE ACCUSED EXISTS; 2) COUNSEL (ON EITHER SIDE OF THE AISLE) FAILED TO INTRODUCE IT AND TO BRING IT FOWARD. ALLOWING THE TRIER OF THE CASE TO MAKE AN INFORMED DECISION AS TO THE GUILT OR INNOCENCE OF AN ACCUSED BASED ON ALL FACTS AND EVIDENCE RELEVANT TO THE CASE BEFORE THEM; AND 3) THAT DUE TO THE FAILURE OF COUNSEL (AGAIN ON EITHER SIDE OF THE AISLE) TO INTRODUCE SUCH EVIDENCE THAT WOULD CREATE REASONABLE DOUBT, AS TO THE ACCUSED GUILT OR INNOCENCE WHERE IT PREVIOUSLY DID NOT EXIST, EITHER BY GROSS NEGLAGANCE, BY

INCOMPETANCE, OR BY OBVIOUSLY INTENTIONAL WITHHOLDING BY THE STATE DUE TO IT BEING DAMAGING TO ITS CASE, THE ACCUSED WAS IN FACT PREJUDICED BY THESE ACTIONS.

THE ONLY DIFFERENCE BETWEEN THE STATES ACTIONS AND THE DEFENSE COUNSEL IS HOW THE PREJUDICE IS REFERED TO. THE GROSS NEGLAGENCE OF DEFENSE COUNSEL TO HAVE EVIDENCE THAT IS FAVORABLE TO HIS CLIENT AND TO NOT BRING IT FOWARD IS SO OBSENE IT ACTUALLY SHOCKS THE CONSCIENCE, AND WHAT SOCIETY BELIEVES TO BE THE BASIC DUTY OF A DEFENSE ATTORNEY. TO FIGHT AS AN ADVOCATE FOR THIER CLIENT. TO DO ANY LESS WOULD SHOW GROSS NEGLAGENCE, AS WELL AS INCOMPETANCE TO BE THE 'GUIDING HAND' TO HIS CLIENT HELPING HIM THROUGH THE ADVERSARIAL MINE FIELD CALLED THE CRIMINAL JUSTICE SYSTEM. FAILING TO PROVIDE THE BASIC STANDARDS SET OUT BY THE SIXTH AMENDMENT FOR EFFECTIVE ASSISTANCE OF COUNSEL.

WHEN THE STATE HAS EVIDENCE AND FAILS TO BRING IT FOWARD, THEN THEY INTENTIONALLY DECIDE TO VIOLATE THE ACCUSED RIGHTS OF DUE PROCESS. BUT DEEPER THAN THAT IT CAN ALSO CAST SERIOUS DOUBT ON THE PROSECUTIONS CREDABILITY BOTH THE CASE AND THE PROSECUTOR HIS/HERSELF. KNOWING THAT THE EVIDENCE WAS FAVORABLE TO THE ACCUSED AND AT THE SAME TIME IT MUST BE ASSUMED THAT IT WOULD BE EQUALLY DAMAGING TO THE STATES CASE. SO BY THE STATE DECIDING NOT TO INTRODUCE/PRODUCE THE EVIDENCE IT DECIDED THAT WINING THE CASE WAS MORE IMPORTANT THAN THE ACCUSED RIGHT TO ADAQUATLY DEFEND HIMSELF. NEGLECTING THE FACT THAT A PROSECUTORS DUTY IS NEVER

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MERELY TO OBTAIN A CONVICTION BUT TO SEE THAT JUSTICE IS DONE.

ALL OF THESE SERIOUS CONCERNS, VIOLATIONS AND NEGLAGENT ACTS HAVE HAPPENED IN THIS CURRENT CASE BEFORE THIS COURT. ALL ARE SUPPORTED BY RECORD AND ALSO BY THE LACK OF RECORD, BY COUNSEL NOT INTRODUCING THE FOLLOWING EVIDENCE, THAT WHEN LOOKED AT IN THE REFERANCE TO THE ENTIRE RECORD IT CREATES REASONABLE DOUBT WHERE IT PREVIOUSLY DID NOT EXIST. PUTTING THE ENTIRE CASE INTO AN ENTIRELY DIFFERENT LIGHT CASTING DOUBT ON THE CONFIDENCE OF THE CONVICTION, ITSELF. BECAUSE HAD THE EVIDENCE BEEN INTRODUCED BY EITHER SIDE OF THE AISLE, PROSECUTION OR DEFENSE, THERE IS SERIOUS DOUBT THAT PETITIONER WOULD HAVE ENTERED INTO A GUILTY PLEA AND NOT HAVE INSISTED ON GOING TO A TRIAL WITH A JURY.

2) IN COUNT TWO OF THE ORDER OF CONVICTION THAT IS UNDER ATTACK AS WELL AS THE GUILTY PLEA MEMORANDUM, THE CHARGE IS AN AMENDED CHARGE OF ATTEMPTED SEXUAL ASSAULT A VIOLATION OF NRS. 193.330 FROM THE ORIGINAL CHARGE OF SEXUAL ASSAULT A VIOLATION OF NRS. 200.366. THIS IS RELEVANT TO THE CURRENT GROUND OF THE STATE WITHHOLDING FAVORABLE EVIDENCE FROM THE ACCUSED / PETITIONER; AS WELL AS THE STATE KEEPING THE COURTS UNINFORMED. THE STATE LEGISLATURE DEFINES THE CHARGE OF SEXUAL ASSAULT IN PART AS: "A PERSON WHO SUBJECTS ANOTHER PERSON TO SEXUAL

PENETRATION OR WHO FORCES ANOTHER PERSON TO MAKE A SEXUAL PENETRATION ON HIMSELF OR ANOTHER ... AGAINST THE WILL OF THE VICTIM ... IS GUILTY OF SEXUAL ASSAULT".

IN THE VICTIMS TESTIMONY AT THE PRELIMINARY HEARING (PART II PG 38/16-40/2) AS WELL AS THE NIGHT IN QUESTION TO RENO POLICE (PART IV PGS. 52, PG. 87/33 to 88/10) AND LATER WITH DETECTIVE BROOME AT THE INTERVIEW ON 3/19/07 (PART IV PG. 112/49 to 113/20 & 113/29-40). SHE CLAIMED TO HAVE HAD THE PETITIONER SHOVE HIS PENIS INTO HER MOUTH LENGHTH WISE 'MOUTH OVER HEAD' AND SUBSEQUANTLY BIT AS HARD AS SHE COULD REPEATEDLY. ASSURING DETECTIVE BROOME THAT THERE WOULD BE POSSITIVE DNA TRANSFER. EXCEPT THE STATE FAILED TO PRODUCE A REPORT FROM THE WASHOE COUNTY SHERIFF'S OFFICE FORENSIC SCIENCE DIVISION DATED MAY 21, 2007 (PART V PG 58-59) A FULL FOURTY-FOUR DAYS PRIOR TO THE PRELIMINARY HEARING. THAT REPORT STATES." NO DNA FOREIGN TO THE SOURCE, BRENDAN DUNCKLEY, WAS OBTAINED FROM THE GENTAL SWABS." NO DNA, THAT IS EXTREMLY RELIVENT, ADD TO THAT THE FACT THAT ON THE NIGHT IN QUESTION WHICH JESSICA CLAIMED TO HAVE BIT THE PETITIONER RPD OFFICER HEGLAR STATED " BRENDAN HAD NO VISIBLE INSURY TO PENIS SHAFT, HEAD OR BASE" (PART IV pg 52). THE STATE KNEW PRIOR TO THE PRELIMINARY HEARING THAT THE EVIDENCE IN FACT POINTED TO THE EXACT OPPOSITE OF THE NRS DESCRIPTION TO SUPPORT A CHARGE OF SEXUAL ASSAULT. NO DNA PLUS NO MARKS EQUALS NO PENETRATION WHICH EQUALS NO CRIME. HAD DEFENSE BEEN TOLD THAT PRIOR TO THE PRELIMINARY HEARING

AND NOT AS (PART V pg 58) SHOWS FEBRUARY 7, 2008, IT WOULD HAVE BEEN ABLE TO CREATE REASONABLE DOUBT AT THE PRELIMINARY HEARING AND USE IT AS POSSIBLE IMPEACHMENT EVIDENCE TO JESSICA. BUT BECAUSE THE STATE DECIDED TO WITHHOLD THIS FAVORABLE EVIDENCE WE MAY NEVER KNOW WHAT JUDGE ALBRIGHT WOULD HAVE DECIDED IN REGARDS TO CASE NO. 2007-033584 AND COUNT VI OF SEXUAL ASSAULT AGAINT JESSICA H.

3) ON APRIL 18, 2007 DETECTIVE TOM BROOME (CPD) HAD A CONVERSATION WITH JENNY DUNCKLEY, PETITIONERS EX-WIFE. IN THAT CONVERSATION DETECTIVE BROOME WAS INFORMED THAT SHE AND THE PETITIONER WERE MARRIED AND RESIDED TOGETHER UNTIL OUR MARRIAGE BROKE UP IN JULY OF 1999'. SHE STATED THAT WE RESIDED IN OAKHURST CALIFORNIA IN MADERA COUNTY UNTIL THEN AFTER COLLEGE. HE ALSO LEARNED THAT WE MET IN NEW YORK AND HAD BEEN DIVORCED FOR ABOUT 5 TO 6 YEARS. (PART V pg 128). HE ALSO OBTAINED A MADERA COUNTY SHERIFF REPORT ON APRIL 19, 2007 (PART V pg 129, 130) IN IT IT SHOWS PETITIONER RESIDED IN OAKHURST, CALIFORNIA AT LEAST UNTIL JULY 19, 1999. THAT INFORMATION IS RELEVANT BECAUSE COUNT ONE IN THE ORDER OF CONVICTION IS LEWDNESS WITH A CHILD UNDER 14 YEARS, IN WHICH ASHLEY CLAIMED THAT BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999 SHE AND THE PETITIONER HAD CONSENTUAL SEX. (PART II pg 71/21 to 72/4; PART III pg 45/19-21; PART IV pg 47) BUT NO WHERE DURING HIS TESTIMONY ON JULY 2, 2007 DOES DETECTIVE BROOME MENTION THIS

CONVERSATION, REPORT HE GENERATED ON APRIL 19, 2007 OR THE MADERA COUNTY SHERIFF DEPARTMENT REPORT HE RECEIVED THE SAME DAY. (PART II PGS 90 to 116). AGAIN THAT INFORMATION AND EVIDENCE WOULD HAVE BEEN EXTREMLY RELEVANT AND FAVORABLE TO THE PETITIONER.

4) PETITIONERS COUNSEL DAVID C'O'MARA WAS IN POSSETION OF THIS REPORT BECAUSE DETECTIVE BROOME HAD RELEASED IT TO PETITIONER'S EX-WIFE'S ATTORNEY KENNETH BALLARD ON MAY 25, 2007 (PART V PG 115, 121) AND ENTERED INTO CASE NO: CV03749 AS EVIDIENCE EXHIBIT D (SEE PART V PG 111). PETITIONER PROVIDED COUNSEL DAVID C. O'MARA WITH THIS REPORT AS WELL AS ORIGINAL DMV REGISTRATION FOR FORD TAURUS, CULINARY INSTITUTE TRANSCRIPTS, (PART V PGS. 86 to 90) AS WELL AS INTERNAL REVENUE RECORDS (PART V PG 91-99) ALL CONFIRMING RESIDENCY DURING THE ALLEGED TIME FRAME OF AUGUST 1998 to AUGUST 2000. CONFIRMATION OF HIS HAVING THESE RECORDS IS HIS LETTER RETURNING THEM. (PART V. PG 56-57). YET AT NO POINT DID HE EVER USE THIS DOCUMENTATION TO PROVE HIS CLIENT'S INNOCENCE.

5) ON APRIL 21, 2009 AND ON JUNE 15, 2009 TWO LETTERS WERE SENT TO THE WASHOE COUNTY DISTRICT ATTORNEY OFFICE (PART V PG. 65 to 82) INCLUDING EXCULPATORY EVIDENCE TO PROVE ACTUAL AND FACTUAL INNOCENCE TO COUNT ONE IN THE ORDER OF CONVICTION. ALL THE EVIDENCE WAS EVIDENCE THAT EITHER THE STATE HAD OR DEFENSE COUNSEL HAD BOTH FAILING TO PRODUCE OR INTRODUCE. INCLUDING (PART V PAGES 87-90; 102-104; 127-128). YET THE STATE

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HAS STILL FAILED TO CORRECT THE 'MANIFEST INJUSTICE' OF THE COUNTS.

PETITIONER HAS ATTEMPTED REPEATEDLY TO ALLOW THE STATE TO TAKE IT UPON ITSELF TO CORRECT THE RECORD AND WITHDRAW A CHARGE THEY KNOW TO BE SUPPORTED BY PREJUDICIAL AND PERJURED TESTIMONY. AS WELL AS EVIDENCE IT KNOWS CONTRADICTS A CONVICTION IN ATTEMPTED SEXUAL ASSAULT KNOWING NO PENETRATION COULD HAVE OCCURRED. BUT ALAS THE STATE STILL FEELS THAT THE CONVICTION IS MORE IMPORTANT THAN SEEKING 'TRUTH' AND 'JUSTICE' LIKE ITS SEAL STATES. SO THE PETITIONER NOW HUMBLY REQUESTS THIS COURT TO GRANT HIM RELIEF THAT HE DESERVES. FOR HAD ALL THIS EVIDENCE AND INFORMATION COME FOWARD IT WOULD AND DOES CAST DOUBT ON THE CONFIDENCE OF THE CONVICTION AND THE MOTIVES OF THE STATE AND DEFENSE COUNSEL BY OFFERING AND ALLOWING A DEAL BASED ON FICTION, LIES AND UNSUPPORTED CHARGES. PREJUDICING THE PETITIONER, WHO HAD HE BEEN AWARE OF THIS HE WOULD HAVE INSISTED ON A TRIAL. BY THE SUPPORTING FACTS IN THIS MATTER IT WOULD JUSTIFY VACATING ON THE GROUNDS OF OBVIOUS VIOLATION OF PETITIONERS RIGHT TO DUE PROCESS BY GROSS NEGLIGANCE AND INCOMPETANCE ON THE PART OF BOTH THE PROSECUTION AND THAT OF THE DEFENSE COUNSEL DAVID C. O'MARA.

THE PRIMARY PURPOSE OF BRADY REQUIRING DISCLOSURE OF EVIDENCE FAVORABLE TO THE ACCUSED IS NOT TO DISPLACE THE ADVERSARY SYSTEM AS THE PRIMARY MEANS BY WHICH TRUTH IS UNCOVERED BUT TO ENSURE THAT A MISCARRIAGE OF JUSTICE DOES NOT OCCUR

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H) GROUND EIGHT: BREACH OF CONTRACT - BY MEANS OF FRAUD AND COERSION

PETITIONER WAS CONVICTED UPON ACCEPTANCE OF A GUILTY PLEA MEMORANDUM THAT IN ITSELF VIOLATED PETITIONERS DUE PROCESS RIGHTS, AND THE RIGHTS GUARANTEED IN THE FIFTH, SIXTH AND THE FOURTEENTH AMENDMENTS SET FORTH IN THE UNITED STATES CONSTITUTION.

SUPPORTING FACTS:

1) A CONTRACT BY DEFINITION IS SIMPLY A PROMISE SUPPORTED BY CONSIDERATION, WHICH ARISES, IN THE NORMAL COURSE OF EVENTS. CONTRACTS IN ITSELF MUST BE SUPPORTED BY VALID AND SUFFICIENT CONSIDERATION IN ORDER TO BE BOTH VALID AND LEGALLY ENFORCEABLE GENERALLY SPEAKING CONSIDERATION MUST FLOW FROM BOTH PARTIES INVOLVED. AT NO POINT DID PETITIONER BENIFIT FROM THIS CONTRACT, IF ANYTHING IT PREJUDICED AND PUNISHED HIM.

A CONTRACT MAY BE RESCINDED ON THE GROUNDS OF FRAUD, FAILURE TO DISCLOSE FACTS, MISREPRESENTATION OF FACTS, COERSION, AND BREACH OF CONTRACT. IT MUST BE NOTED THAT IN THE CASE OF THE MISREPRESENTATION OF FACTS INVALIDATING A CONTRACT IT MAY CONSIST IN DECEPTIVE CONDUCT AS WELL AS WORDS.

BECAUSE THE GUILTY PLEA MEMORANDUM AS WAS USED IN PETITIONERS CASE IS COVERED BY THE STANDARD PRACTICE OF CONTRACT LAW ANALYSIS, TEMPERED WITH THE AWARENESS OF DUE PROCESS CONCERNS FOR BOTH FAIRNESS AND ADEQUACY. AS WITH ANY CONTRACT IN WHICH THE DRAFTING PARTY HAS OVERWHELMINGLY SUPERIOR BARGAINING POSITION, PLEA AGREEMENTS ARE TO BE CONSTRUED STRICKTLY AGAINST THE GOVERNMENT.

2) Upon the creation of the Guilty Plea Memorandum the State presented a legally binding agreement that in itself must be accurate and based on factual basis. To do any less would be construed as knowingly entering into a contract under false pretense. Rendering the contract as a whole null and void. By the State adding the line for Petitioner to agree to in paragraph five (5) (ps 12(III) of the Guilty Plea Memorandum of: "I admit that the State possesses sufficient evidence which would result in my conviction" the State claimed and alledged or led Petitioner to believe that it (the State) was in fact in possesion of such evidence to support a verdict of guilty beyond a reasonable doubt. When in fact in regards to count one of the 'Plea deal' the charge of Lewdness a violation of NRS. 201.230, the State in fact was in possesion of absolutly no such evidence what so ever. It would be hard to comprehend that ADA Viloria actually believed that the mere testimony of Ashley V. would constitute sufficient evidence needed to obtain a guilty verdict by a jury. Especially since at that point was in fact in possesion of information that could be deemed exculpatory evidence. Favorable to the Petitioner. Because Detective Tom Broome had generated a report on April 19, 2007 after speaking to Petitioners ex-wife Jenny Dunckley the prior day. In that report Jenny stated that the Petitioner and Herself met in New York and were married. It also states they later moved to Madera California and resided in Oakhurst, California together until thier marriage broke up in July of 1999. (See RPD Report ps 127-128(IV). That report is relevant to actual innocence because, Ashley testified at the preliminary hearing on July 2, 2007 she was 17

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WHEN THE CRIME OCCURED. BEING AUG. 14, 1998 till AUG. 13, 1999. (pg 71, 21-24-72/4) (PART II)

IN REGARDS THAT INFORMATION IT SHOULD BE ASSUMED THAT AS A COMPETANT REPRESENTATIVE OF THE STATE ADA VILORIA KNEW THAT AS THE PROSECUTING ATTORNEY SHE HAD AND STILL HAS A DUTY TO LEARN OF ANY FAVORABLE EVIDENCE KNOWN TO OTHERS ACTING ON BEHALF OF THE GOVERNMENT IN THE CASE, INCLUDING THE POLICE. SO WITH THAT BEING SAID AND THAT WOULD MEAN EITHER ONE OF TWO THINGS HAVE IN FACT OCCURED IN THIS CASE. EITHER ONE, ADA VILORIA IN FACT FAILED TO OBTAIN THE EXCULPATORY EVIDENCE PROVING ACTUAL AND FACTUAL INNOCENCE TO THE SPECIFIC ALLEGIATIONS IN COUNT ONE, DEEMING THE 'CONTRACT' NULL AND VOID ON THE BASIS THAT IT WAS NOT CREATED WITH FULL KNOWLEDGE OF THE FACTS IN QUESTION. OR, SECOND, THE FACT THAT ADA VILORIA DID IN FACT KNOW OF THE RPD REPORT AND STILL PROCEEDED FOWARD ON A CHARGE SHE KNEW WAS IN THE LEAST SUPPORTED BY PERJURED TESTIMONY, THAT SHE CONTINUALLY FAILED TO CORRECT, AND EAGERLY PERSUED A DEAL STILL INCLUDING COUNT ONE. THAT BEING THE CASE RENDERS THE DEAL VOID AND SUBJECT TO RELIEF, BECAUSE ADA VILORIA KNOWINGLY AND INTENTIONALLY ENTERED AND CREATED A CONTRACT DENING PETITIONERS OF SUBSTANTIAL CONSTITUTIONAL RIGHTS, WITH THE EXPLICIT INTENT TO DECIEVE AND TO DEFRAUD PETITIONER. IN ADDITION EITHER BY INTENTIONALLY OR BY MEANS OF NEGLAGENCE BY MISREPRESENTING OF THE FACTS IT LED TO THE DETRIMENT OF THE PETITIONER, AS WELL AS PREJUDICE.

3) AS NOTED EARLIER A VALID CONTRACT MUST BE SUPPORTED BY SUFFICIENT CONSIDERATION TO BOTH PARTIES. THAT WAS FAR FROM THE CASE IN THIS CONTRACT AND SUBSEQUENT EXECUTION

OF SAID CONTRACT AT THE SENTENCING HEARING. PETITIONER SIGNED THE CONTRACT IN GOOD FAITH, GIVING UP NUMEROUS CONSTITUTIONAL RIGHTS, SO THE QUESTION IS TO REVIEW THE MUTUAL CONSIDERATIONS EQUALLY BENIFITING BOTH PARTIES. THE STATE BENIFITED BY OBTAINING A GUILTY PLEA, AND A RESULTING CONVICTION. BUT THE PETITIONER HAD HE GONE TO TRIAL WOULD FACE THE POSSIBILITY OF TEN YEARS TO LIFE IN COUNT ONE AND TWO TO TWENTY YEARS IN COUNT TWO. AT THE TIME OF SIGNING AND ENTERING PLEA, PETITIONER HAD THE BELIEF, BY BOTH THE WRITEN ADDITIONS TO THE DEAL (ps 14/2(III)) AS WELL AS THE COMENTS OF ADA VILORIA AT THE HEARING ON MARCH 6, 2008 "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" (ps 29/8-11) PETITIONER ABIDED BY ALL ASPECTS OF THE DEAL, BUT AT SENTENCING THAT ABIDING BY THE DEAL WAS CALLED POSTURING BY THE STATE TO THE COURTS. (ps III 47/8)

PETITIONER KEPT AND FULLY HONORED HIS SIDE OF THE DEAL. ALL THE WHILE THE ADA KNEW THAT SHE HAD NO INTENTION ON HONORING THE OPTION OF PROBATION. IN FACT SHE WENT AS FAR AS ARGUING AGAINST THE PSI RECOMMENDATION OF TWO TO FIVE YEARS FOR COUNT TWO, (ps III 49/2-5) BY ARGUING AND ADIMATLY CAMPAIGNING FOR TWENTY YEARS. SHE FOUGHT FOR, SUGGESTED AND RECOMMENDED FOR EXACTLY WHAT PETITIONER WOULD HAVE BEEN FACING HAD HE GONE TO TRIAL WITH A JURY. EXCEPT THE STATE (ADA VILORIA) KNOWINGLY MANIPULATED THE "CARROT" OF PROBATION KNOWING IT TO BE FALSE, DECEIVING PETITIONER AND DENING HIM HIS RIGHT TO DEFEND HIMSELF PROPERLY

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TO BRING WITNESSES ON HIS BEHALF, CONFRONT HIS ACCUSERS, REMAIN FREE OF SELF INCRIMINATION, BE TRIED BY A JURY OF HIS PEERS, (pg 23/2-5 & 7-10). ALL THESE THE STATE KNEW THE PETITIONER WAS GIVING UP ON A FALSE DREAM OF PROBATION CREATED BY AN OVERZEALOUS ASSISTANT DISTRICT ATTORNEY MORE FOCUSED ON OBTAINING A CONVICTION THAN SEEING THAT JUSTICE IS DONE. BY CONVICTING A PERSON KNOWING THAT THEY ARE INNOCENT IS THE FARTHEST THING FROM JUSTICE. (SEE PART III)

4) IN PARAGRAPH SEVEN (7) (pg 3 III) OF THE GUILTY PLEA MEMORANDUM THE STATE ADDED A LINE TO THE DEAL THAT WAS NOT PART OF THE ORIGINAL CONSTRUCTION. IT STATED "INCLUDING ALL COUNTS FILED AND DISMISSED IN RJC CASE NUMBER 2007-033884," BY ADDING THAT THE STATE, AGAIN BEING CONSIDERED FULLY COMPETENT AND HELD TO A HIGHER STANDARD, KNEW OR SHOULD HAVE KNOWN THAT DUE PROCESS PROHIBITS A PROSECUTOR FROM REFILING CHARGES ONCE DISMISSED FOR INSUFFICIENT EVIDENCE UNLESS THE PROSECUTOR CAN PROVE EITHER, THAT NEW EVIDENCE PREVIOUSLY UNAVAILABLE HAS SURFACED OR, THAT IT CAN SHOW GOOD CAUSE OTHERWISE EXISTS TO JUSTIFY THE REFILING OF THE CHARGES. THE DISMISSED CHARGES/COUNTS IN RJC 2007-033884 WERE ALL DISMISSED ON GROUNDS OF INSUFFICIENT EVIDENCE TO ESTABLISH PROBABLE CAUSE, THE BASIC LEVEL OF A CRIMINAL CHARGE. BY THE PETITIONER NOT BEING EDUCATED IN THE AREA OF LAW AND CONSIDERED A LAYMEN, WOULD ONLY LOOK AT THIS AS A NOTICE THAT IF DEAL IS NOT ACCEPTED IT WOULD MEAN THE OTHER CHARGES WOULD BE FILED AND REFILED. RENDERING A MISREPRESENTATION OF FACTS, FALSE PRETENSE, AND SLIGHT COERSION FOR IF IT CAN, AND WAS TAKEN AS A THREAT OF FURTHER

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CRIMINAL PROSECUTION IF DEAL WAS NOT ACCEPTED. IN THE ADDITION TO FALSE PRETENSE IT SHOWED INEFFECTIVE ASSISTANCE OF COUNSEL FOR DEFENSE NOT CATCHING THE INTENTIONAL MISREPRESENTATION OF FACTS BUT AGREEING TO IT AND ADVISING PETITIONER IN FAVOR OF IT. THE ADDITIONAL STATEMENT ADDED TO THE 'DEAL' ON pg 14/2 STATING " AND ALLOW ME THE OPPORTUNITY TO QUALIFY FOR PROBATION, WHICH WOULD OTHERWISE BE UNAVAILABLE", COULD AND IS CONSIDERED DECEPTIVE CONDUCT BY BOTH THE WORDS AND ACTS OF ADA VILORIA AT SENTENCING HEARING ANAMANTLY FIGHTING AGAINST THE SLIGHT POSSIBILITY OF PROBATION. (pg 44/10-11 pg 48/7-8 & 19-20). (SEE PT. III)

5) DURING THE SENTENCING HEARING ADA VILORIA ATESTED REPEATEDLY TO PETITIONERS HAVING AN EXTENSIVE AND SUBSTANTIAL HISTORY OF INAPPROPRIATE AND CRIMINAL BEHAVIOR SPANNING TEN (10) YEARS OF CRIMES. (SEE 43/29 to 44/1; 45/12; 46/4-6). YET THE STATE ADDED IN PARAGRAPH TEN (10) (pg 14) OF THE 'DEAL' THE FOLLOWING: "I REPRESENT I DO NOT HAVE A CRIMINAL RECORD." SO IN THIS MATTER THE QUESTION IS WHICH CONTENTION AND CLAIM IS THE STATE SIDING WITH. EITHER PETITIONER IS A HABITUAL MASTER CRIMINAL WITH TEN YEARS OF ALLEGATIONS AND ATTACKS THAT THE POLICE HAVE BEEN INVESTIGATING HIM FOR, DEMANDING HIS INCARCERATION. AND YET, BY THAT ARGUMENT, AT SENTENCING, IT MAKES THE ADDITION OF THAT STATEMENT TO BE FRAUDULANT AND A GROSS MISREPRESENTATION OF FACTS AND A BLAINTANT FAILURE TO DISCLOSE FACTS, NAMELY PETITIONERS CRIMINAL HISTORY. OR, THE STATE NAMELY ADA VILORIA IN FACT MADE STATEMENTS SHE KNEW TO BE BOTH FRAUDULANT AND NOT SUPPORTED BY FACTS, RECORD OR BY

EVIDENCE. SO TO ANSWER THE QUESTION OF THE LEGALITY OF ADDING BOTH 'I REPRESENT I DO NOT HAVE A CRIMINAL HISTORY" AND EXTENSIVE COMMENTS TO PETITIONERS CRIMINAL HISTORY BY ADA VILORIA TO THE RECORD IT IS BETWEEN TWO CHOICES. FIRST, ONE BEING INTENTIONAL FRAUDULANT MISREPRESENTATION OF FACTS, A FAILURE TO DISCLOSE RELEVANT FACTS, AND IN GENERAL FRAUD. OR, SECOND, THE COMMENTS OF ADA VILORIA AT SENTENCING KNOWN TO BE FALSE RENDERING IT PERJURY AND INTENTIONAL PREJUDICING PETITIONER IN THE EYES OF THE TRIER IN AN ATTEMPT TO ILLEGALY AND INAPPROPRIATLY INFLUENCE THE SENTENCING OF PETITIONER. BOTH OF WHICH WOULD WARRENT THE PETITIONER RELIEF BY REVERSAL OF THE GUILTY PLEA MEMORANDUM ON THE GROUNDS OF BREACH OF CONTRACT BY MEANS OF FRAUD, ALLOWING THE PETITIONER TO RETURN TO THE PLACE HE HELD PRIOR TO ENTERING THE PLEAS OF GUILTY.

D) GROUND NINE: ACTUAL INNOCENCE AND MANIFEST INJUSTICE

PETITIONER CONVICTION AND SUBSEQUENT INCARCERATION ARE IN DIRECT VIOLATION OF PETITIONERS DUE PROCESS RIGHTS AS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

SUPPORTING FACTS:

1) THE FUNDAMENTAL RULES SURROUNDING A CLAIM OR GROUND BY A PETITIONER OF ACTUAL INNOCENCE IS THAT THEY MUST DEMONSTRATE THAT IN LIGHT OF ALL THE EVIDENCE

IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM. ALSO THAT IN CASES THAT THE STATE HAS FORGONE MORE SERIOUS CHARGES IN THE COURSE OF PLEA BARGAINING, THE PETITIONER'S CLAIM IN PROVING ACTUAL INNOCENCE MUST EXENT TO THOSE CHARGES AS WELL. SO IN THIS GROUND THE COUNTS UNDER ATTACK OF NRS 201.230 AND NRS. 193.330 WILL BE CHALLENGED AS THE ORIGINAL CHARGES. TWO COUNTS OF NRS 200.366 SEXUAL ASSAULT. STARTING WITH COUNT ONE THE INCIDENT INVOLVING ASHLEY V. IT HAS BEEN STATED THROUGHOUT THIS PETITION THE ALLEGATIONS OF ASHLEY TO THE STATE THAT WHILE SHE WAS TWELVE (12) TWO INCIDENTS OCCURED BETWEEN HERSELF AND THE PETITIONER. (PART II pg 71/21 to 72/4; PART III pg 45/19-21; AND PART IV pg 47) THE TIME FRAME THAT ASHLEY IS CERTAIN OF IS THAT BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999 SHE AND I HAD CONSENTUAL SEX (PART II PG. 71/21 to 72/4). BUT IN THIS CASE/CHARGE/COUNT WHERE 1) THERE WAS NO EVIDENCE PRESENTED BY THE STATE THAT A CRIME HAD EVEN OCCURED EXCEPT FOR THE STATEMENT/TESTIMONY OF THE ALLEGED VICTIM ASHLEY. 2) THE STATE FAILED TO PRODUCE ANY PHYSICAL EVIDENCE OF THIS ALLEGED ASSAULT, AND 3) NO OTHER PERSON ACTUALLY WITNESSED THIS ATTACK OCCUR. (IT SHOULD BE NOTED THAT THE PROCEEDING POINT 1-3 APPLY TO COUNT TWO AS WELL). THE ONLY EVIDENCE THAT THE STATE HAD TO PRODUCE WAS THE TESTIMONY OF ASHLEY V. BUT SHE COULD NOT DURING HER TESTIMONY AT THE PRELIMINARY HEARING (PART II PGS 61-86) GIVE ANY DATES WHEN OR HOW SHE MET THE PETITIONER, NOR COULD SHE GIVE ANY DETAILS, OR INFORMATION AS TO ANY OF THE ELEMENTS TO VERIFY A CRIME OCCURRED. NOR VERIFY THE

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CERTAINTY OF HER AGE, EXCEPT TO SAY 'I WAS 12'.

THE EVIDENCE THAT PETITIONER HAS REFERED TO NUMEROUS TIMES PROVING THAT BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999, HE DID NOT RESIDE IN RENO, NEVADA. So IT WOULD BE IMPOSSIBLE FOR ASHLEY TO HAVE SPENT THE NIGHT AT MY HOME AND I DRIVE HER HOME THE NEXT MORNING ON LONGLEY LANE, WHERE THE ALLEGED INCIDENT OCCURED. (PART II PG 73/5 to 74/2). FROM 11/11/1996 UNTIL 2/23/99 PETITIONER WAS IN HYDE PARK, NEW YORK ATTENDING THE CULINARY INSTITUTE OF AMERICA. (PART V PG 89-90) AS WELL AS IN 1998 PETITIONER WAS EMPLOYED AT THE CULINARY INSTITUTE AND ALSO AT MARINERS HARBOR IN RED HOOK, NEW YORK (PART V PG 94). IRS PAPERWORK GOING FROM 2000 WHEN PETITIONER FIRST CAME TO RENO ESTABLISHED EMPLOYMENT AND RESIDENCE VERIFICATION (PART V PAGES 91-99) OVER THE YEARS OF 2000 UNTIL 1997 THE ENTIRE TIME THAT PETITIONER WAS MARRIED TO JENNY DUNCKLEY. DMV RECORD OF THE FORD TAURUS REFERED TO BY ASHLEY (PART II PG. 66/22) BUT THAT VEHICLE WAS NOT PURCHASED UNTIL 6/5/2000 (PART II PGS 86-88). THEN ALSO THAT ON AUGUST 16, 1999 PETITIONER WAS SERVED WITH DIVORCE PAPERS AT HIS RESIDENCE IN FRESNO, CALIFORNIA AT 255 EAST NEES #257 AT 2:45pm (SEE PART V PG. 102-104) ALSO IRS VERIFICATION (PART V PG 93)

ALL THIS DOCUMENTED VERIFIABLE DOCUMENTATION BY BOTH STATE COURTS, FEDERAL AND STATE AGENCIES AND A RESPECTED ACCREDITED COLLEGE PROVE IT IS IMPOSSIBLE FOR PETITIONER TO HAVE COMMITTED ANY CRIME IN RENO BETWEEN AUGUST 14 1998 AND AUGUST 13, 1999. (SEE PART II PG 70/21 to 72/4).

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2) "A PERSON WHO SUBJECTS ANOTHER PERSON TO SEXUAL PENETRATION OR FORCES ANOTHER PERSON TO MAKE A SEXUAL PENETRATION ON HIMSELF OR ANOTHER ... AGAINST THE WILL OF THE VICTIM ... IS GUILTY OF SEXUAL ASSAULT" (NRS 200.366) PENETRATION IS A NECESSARY ELEMENT AS SET FORTH BY THE STATE LEGISLATURE. BY THE ALLEGATIONS OF JESSICA (PART II PG 38/16 to 40/2; PART IV PGS. 52; 87/33 to 88/10; PART IV PAGE 112/49 to 113/20; 113/39-40) PETITIONER FORCED HIS PENIS INTO HER MOUTH AFTER SHE WAS TOLD TO "SUCK MY DICK" (PART II PG. 15/17,18 PART IV PG. 115/44-48) AFTER WHICH SHE CLAIMS SHE BIT HIS PENIS. ASUMED THAT SHE LEFT MARKS. SO THERE IS A ALLEGATION THAT A PENIS WAS SHOVED INTO (PENETRATION) HER MOUTH 'FORCED' (AGAINST THE WILL OF THE VICTIM). WE HAVE SEXUAL ASSAULT. BUT AN UNFORTUNATE FACT OF NATURE COMES TO MIND. DNA. AS WAS STATED BEFORE EARLIER ANY HUMAN CONTACT LEAVES A TRACE, OILS, SKIN CELLS ALL CONTAINING DNA. IT IS VIRTUALLY IMPOSSIBLE TO READ THIS WRIT AND NOT BE LEAVING DNA. SO THEREFORE WITH JESSICA SO CERTAIN THAT A PENIS THE PETITIONERS TO BE PRECISE WAS IN FACT SHOVED INTO HER MOUTH, DNA FROM HER MUST BE PRESENT ON HIS PENIS. EXCEPT THE FORENSIC REPORT DATED MAY 21, 2007 STATES "NO DNA FOREIGN TO THE SOURCE, BRENDAN DUNKLEY, WAS OBTAINED FROM THE GENITAL SWABS" (PART V pg 59). NO DNA AN ASTRONOMICAL IMPOSSIBILITY, UNLESS THERE WAS IN FACT NO CONTACT WITH JESSICA AND THE PETITIONERS PENIS. THE ONLY OTHER EXPLINATION WOULD HAVE TO BE: THAT WHILE PETITIONER WAS WAITING IN HIS VEHICLE IN PLAIN SIGHT HE BATHED AND CHANGED UNDERWARE ALL WITHOUT ATTRACTING ANY

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ATTENTION FROM THE PEOPLE WATCHING HIM OR THE POLICE WHO ARRIVED QUICKLY ON SCENE. NO, THE OBVIOUS TRUTH IS THAT WITH NO DNA AND THE COMMENT BY RPD officer HEGLAR "NO VISIBLE INJURY TO BRENDANS PENIS SHAFT, HEAD OR BASE" (PART IV PG: 52) IT PROVES NO SEXUAL (GENITAL) CONTACT HAD OCCURED LET ALONE THE NECESSARY ELEMENT OF PENETRATION EVEN TO STATE ATTEMPTED WOULD STILL REQUIRE SOME CONTACT IN A SEXUAL NATURE AS JESSICA CLAIMS.

3) AS SHOWN THROUGHOUT THIS ENTIRE PETITION WITH THE OBVIOUS INEFFECTIVENESS OF APPOINTED COUNSEL DAVID C O'MARA, THE MISREPRESENTATION OF FACTS AND INAPPROPRIATE BEHAVIOR OF ADA VILORIA AND DETECTIVE TOM BROOME. BY THE BLATANT VIOLATION OF THE PETITIONERS FOURTH AND FIFTH AMENDMENTS BY DETECTIVE BROOME ILLEGALLY OBTAINING TESTIMONY/STATEMENTS FROM PETITIONER, LEADING TO EVIDENCE AND INFORMATION THAT SHOULD BE DEEMED INADMISSIBLE FRUITS OF A POISONOUS TREE, TO THE STATES LACK OF SUBJECT MATTER JURISDICTION IN COUNT ONE, LACK OF ANY INVESTIGATING ON THE PART OF BOTH THE STATE AND ALSO BY DEFENSE COUNSEL DAVID C. O'MARA, THE INSUFFICIENT EVIDENCE TO SUPPORT ANY OF THE CURRENT CHARGES UNDER ATTACK, BUT KNOWING THAT IT HAD EVIDENCE DAMAGING TO THE STATES CASE FAILING TO EVER BRING IT FOWARD. A OBSENE VIOLATION OF CONTRACT LAW WITH A HUGE BREACH OF CONTRACT. ALL OF THIS ADDS UP TO SERIOUS PREJUDICE TO THE EXTREME DETRIMENT OF THE PETITIONER. WARRENTING IN THE LEAST RELIEF TO SET ASIDE THE GUILTY PLEA MEMORANDUM, DISMISS GROUND ONE FOR ACTUAL INNOCENCE, AND COUNT TWO FOR WITH NO DNA + NO MARKS = NO PENETRATION / CONTACT = NO CRIME. Count Two

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DISMISSED ON GROUNDS OF INSUFFICIENT EVIDENCE TO SUPPORT A CHARGE IN A SEXUAL NATURE.

THIS ALL SHOWS, PROVES BEYOND A REASONABLE DOUBT (WHICH THE STATE LACKED) A HUGE MANIFEST INJUSTICE HAS OCCURED. BECAUSE A CLAIM OF ACTUAL INNOCENCE ALSO REQUIRES FACTUAL INNOCENCE. PETITIONER HAS MET THAT AND ALL REQUIREMENTS TO JUSTIFY THE RELIEF REQUESTED. A LAYMEN SUCH AS MYSELF WHO JUSTIFIABLY RELYED ON INCORRECT ADVISE FROM COUNSEL OR INACCURATE DOCUMENTS FROM THE STATE IN DECIDING TO PLEAD GUILTY TO A CRIME THAT HE KNOWS HE DID NOT COMMIT WILL ORDINARILY CONTINUE TO ASSUME THAT SUCH ADVICE WAS ACCURATE DURING THE TIME OF THE APPEAL. THE INJUSTICE OF HIS CONVICTION IS NOT MITIGATED BY THE PASSAGE OF TIME. HIS PLEA AND SUBSEQUENT GUILTY PLEA MEMORANDUM SHOULD BE TREATED AS A NULITY AND THE CONVICTIONS BASED ON SUCH PLEAS SHOULD BE VOID. BECAUSE OF THE RECORD IN THIS CASE ALREADY UNAMBIGUOUSLY DEMONSTRATES THAT THE PETITIONERS PLEA OF GUILTY TO THE CHARGES IS INVALID AS A MATTER OF CONSTITUTIONAL LAW. PETITIONER AGAIN HUMBLY REQUESTS RELIEF FROM THIS CONVICTION AND TO HELP CORRECT A MANIFEST INJUSTICE.

CONCLUSION

ON MARCH 6, 2008 PETITIONER WAS GIVEN AT THAT TIME THE MOST IMPORTANT DOCUMENT HE WOULD EVER RECEIVE OR SIGN. UNDER THE ADVICE OF WHAT HE

FELT TO BE INFORMED AND EDUCATED, STATING THAT IF HE WENT TO TRIAL HE WOULD MOST ASSUREDLY LOSE! PROBATION WAS AN OPTION IF HE QUALIFIED. EXCEPT PROBATION IS NEVER AN OPTION WHEN THE NRS SAYS SO. RELUCTANTLY SIGNING IT AND BEING TOLD TO SAY YES TO EVERYTHING THE JUDGE ASKS. DOING SO AND FOLLOWING SUCH ADVICE BRINGS US HERE TODAY WITH THIS PETITION FOR POST CONVICTION RELIEF. THERE ARE FOUR CRITERIA THAT EXIST TO DETERMINE IF MANIFEST INJUSTICE HAS OCCURED TO JUSTIFY A REVERSAL OF A GUILTY PLEA: 1) DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL; 2) PLEA AGREEMENT NOT RATIFIED BY THE DEFENDANT, 3) PLEA WAS INVOLUNTARY; OR; 4) PLEA AGREEMENT WAS NOT KEPT BY THE PROSECUTION.

TO ASSERT AND SHOW/PROVE INEFFECTIVE ASSISTANCE OF COUNSEL TWO FACTORS MUST BE SHOWN. FIRST, IS THAT THE CONDUCT AND ACTIONS OF COUNSEL FELL BELOW THE STANDARD OF CONDUCT THAT REASONABLY COMPETANT ATTORNEYS JUDGE THEMSELVES, AND THE SECOND, IS THAT SUCH CONDUCT PREJUDICED THE DEFENDANT AND A REASONABLE PROBABILITY EXISTS THAT BUT FOR COUNSELS UNPROFESSIONAL ERRORS THE RESULTS OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT. A REASONABLE PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE THE CONFIDENCE IN THE OUTCOME. IN PAGES 5 to 27 OF THIS PETITION THERE ARE SIXTEEN DIFFERENT AREAS WHERE COUNSEL FELL BELOW THE 'BAR' SUPPORTED BY (PART IV PGS 1 to 60) HIS PREFORMANCE AT SENTENCING (PART III PG 33-61) AND HIS OBVIOUS UNPREPAREDNESS AT THE PRELIMINARY HEARING (PART II PGS 1-123). ALL HIS ACTIONS AND LACK OF ANY INVESTIGATION, REQUEST FOR MONEY TO COPY FILES (PART IV PG 26, 29, 30) PROVING HIS INEXPERIENCE BY FILING THE

WRONG APPEAL (PART V PAGE 28,29), HIS OBVIOUS LACK OF PREPERAT-
ION FOR THE PRELIMINARY HEARING TO KNOW THE CHARGES AND TO
PREPARE AN ADAQUATE DEFENSE (PART II PGS. 131-136)(SEE DATES). ALL
THIS EVIDENCE, DOCUMENTATION AND INFORMATION CAN NOT SIMPLY
BE THE RESULT OF ANY TACTICAL DECISION ON HIS PART, OR A
STRATEGIC CHOICE, BUT NUMEROUS EXAMPLES OF HIS INEXPERIENCE,
AND INCOMPETANCE TO ACT AS A ADVESARY TO THE STATE AND AS
EFFECTIVE COUNSEL TO PETITIONER. BY HIS ACTIONS HE FAILED GROSSLY
TO BE THE REASONABLY COMPETANT ATTORNEY GUARANTEED BY THE SIXTH
AMENDMENT.

THE ASSISTANCE OF COUNSEL AS CONTEMPLATED BY THE UNITED
STATES AND NEVADA CONSTITUTION CONTEMPLATES THAT COUNSEL DO MORE
THAN JUST ACOMPANY THE ACCUSED TO COURT, BUT ACT AS AN ADVOCATE
WHICH IS CRITICAL TO OBTAIN JUST RESULTS IN OUR ADVISARIAL SYSTEM
OF JUSTICE. DAVID C. O'MARA'S ERRORS AND OMISSIONS WERE SUFFICIENTLY
SERIOUS ENOUGH THAT HE WAS NOT FUNCTIONING AS MY COUNSEL AS
GUARANTEED BY THE SIXTH AMENDMENT, PREJUDICING PETITIONER AND
AFFECTING THE OUTCOME OF THE CASE. BOTH FACTORS OF AN INEFFEC-
TIVE ASSISTANCE OF COUNSEL CLAIM HAVE BEEN MET.

BY THE STATE'S INAPPROPRIATE BEHAVIOR AND INTERJECTION
OF COMENTS NOT SUPPORTED BY RECORD SHOWS AND ALSO
JUSTIFIES THE CLAIM AND FINDING OF PROSECUTORIAL MISCONDUCT
INCLUDING ALL THE ACTIONS OF DETECTIVE TOM BROOME, ADA
VILORIA'S FAILURE TO REMEMBER NO RULE GOVERNING ORAL ARGUMENT
IS MORE FUNDIMENTAL THAN THAT REQUIRING COUNSEL TO CONFINE
REMARKS TO MATTERS IN EVIDENCE STATING MATTERS NOT IN EVI-
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ALL THE COMMENTS (PART III PG 43/24-44/5; 46/4-6; 49/13-16; 90/2-3)

IN ADDITION TO THE BREACH OF CONTRACT, BRADY VIOLATION, LACK OF ANY INVESTIGATION OR DUE DILLIGANCE BECAUSE OF BAD FAITH, ANY SUFFICIENT EVIDENCE TO SUPPORT ANY OF THE CHARGES BROUGHT AGAINST THE PETITIONER. IT ALL ADDS UP TO A GROSS MISCARRIAGE OF JUSTICE, A MANIFEST INJUSTICE. THE STATE HAS BEEN OFFERED TIME AND REQUESTS TO TAKE IT UPON THEMSELVES TO CORRECT THIS SERIOUS PROBLEM OF A MAN OBVIOUSLY INNOCENT BEING IN PRISON. THEY WERE PRESENTED WITH ALL THE NEEDED EVIDENCE BUT STILL FAILED TO CORRECT IT. SO.

THE PETITIONER HUMBLY PRESENTS THE PROCEEDING PETITION FOR POST-CONVICTION WRIT of HABEAS CORPUS AND ALL SUPPORTING DOCUMENTATION (PARTS II, III IV, AND V) TO THIS COURT. REQUESTING RELIEF FROM THE ORDER OF CONVICTION (PART III pg 62-63). THE SETTING ASIDE OF THE GUILTY PLEA MEMORANDUM DATED MARCH 6, 2007, INCLUDING THE COUNT OF LEWDNESS WITH A CHILD UNDER 14 ON THE GROUNDS OF ACTUAL AND FACTUAL INNOCENCE. THE GUILTY PLEA MEMORANDUM BEING SET ASIDE ON GROUNDS OF THOSE STATED EARLIER; INEFFECTIVE ASSISTANCE of COUNSEL, PROSECUTORIAL MISCONDUCT, AND BREACH of CONTRACT. PLUS GROUNDS C, D, E, F, G, AND I. PETITIONER HAS ALSO PROVEN COUNT TWO TO BE AN IMPOSSIBILITY AND HUMBLY REQUEST THE REVERSAL OF THAT CONVICTION AND SENTENCE AS WELL. IN THE LAST 74 PAGES PETITIONER HAS PROVEN THAT HE IS INNOCENT OF ANY SEXUALLY BASED CRIME AND THEREFORE WISHES ALL ORDERS of SUPERVISION, REGISTRATION, PAROLE, PROBATION BE ALSO LIFTED. ALLOWING PETITIONER TO RETURN TO THE STATE HE FOUND HIMSELF PRIOR TO THE GUILTY PLEA. AND ANY AND ALL OTHER RELIEF THAT THIS COURT DEEMS APPROPRIATE TO PROVIDE

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IT HAS BEEN STATED BY THE COURTS THAT IN THE AREA OF REVERSAL OF A CONVICTION EVEN IN CASES OF GUILTY PLEAS, IF COUNSEL (EITHER SIDE OF THE AISLE) FAIL TO PRODUCE EXCULPATORY EVIDENCE A REVERSAL OF CONVICTION IS REQUIRED, IF THE OMITTED EVIDENCE, WHEN EVAVLUATED IN CONTEXT OF THE ENTIRE RECORD, CREATES REASONABLE DOUBT AS TO THE DEFENDAN PETITIONERS GUILT THAT DID NOT OTHERWISE EXIST. THIS ALSO PERTAINS TO EVIDENCE NOT INTRODUCED BY THE LACK OF ANY INVESTIGATION ON THE PART OF EITHER THE STATE OR DEFENSE COUNSER.

ALSO IN REGARDS TO THE GUILTY PLEA MEMORANDUM AND GROUNDS B, E, F, G, AND H, THE FEDERAL RULES OF CRIMINAL PROCEDURE 11(f) REQUIRE THAT A GUILTY PLEA OFFERED BY THE STATE TO AN ACCUSED BE SUPPORTED BY A FACTUAL BASIS. THAT GOES HAND IN HAND WITH THE FACT THAT PROSECUTORS MAY NOT BRING CHARGES FOWARD THAT ARE NOT SUPPORTED BY PROBABLE CAUSE AND ARE REQUIRED TO REVEAL TO THE COURT ANY INFORMATION WHICH NEGATES THE EXISTANCE OF PROBABLE CAUSE.

THESE PLUS THE 'GOOD CAUSE' REQUIREMENT TO ALLOW A REVERSAL OF A GUILTY PLEA, THAT BEING BOTH PRONGS OF STRICKLAND V. WASHINGTON HAVE BEEN MET, WOULD WARRENT AND ALSO JUSTIFY THE SOUGHT AFTER RELIEF BY PETITIONER. IN THE ADDITION TO ANY AND ALL RELIEF THIS COURT DEEMS TO BE APPROPRIATE, PETITIONER PRAYS THE COURT GRANT HIM THE REQUESTED RELIEF. ALLOWING THE CORRECTION OF THIS OBVIOUS MANIFEST INSUTICE. FUFFILLING THE GOAL TO FREE NEVADAS CRIMINAL TRIALS FROM THE TAINT OF MISCONDUCT, ABUSE, AND INJUSTICE IRRESPECTIVE OF THE SOURCE.

WHEREFORE, PETITIONER PRAYS THAT THE COURT GRANT PETITIONER RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING. ALSO WHAT RELIEF THE COURT DEEMS APPROPRIATE.

EXECUTED AT Lovelock CORRECTIONAL CENTER, LOVELOCK, NEVADA ON THE 15th DAY OF JULY, 2009

Brendan Thomas Dunckley

BRENDAN THOMAS DUNCKLEY, PETITIONER

BAC. NO. 1023236

Address: L.C.C.
1200 PRISON ROAD
Lovelock, NEVADA 89419

X. CONCLUSION

The Division acknowledges the Instant Offense will constitute the defendant's first felony convictions. However, his conduct in the case before the Court displays a disturbing pattern of predatory behavior which has been ongoing for an extended period of time. In Count II, the defendant observed an opportunity to take advantage of the victim's intoxicated state and sexually abuse her in her own residence. When discovered, Mr. Dunckley attempted to fabricate a scenario which appeared to be believable to the responding officers. He was aware the victim's level of intoxication would cloud her memory and make it difficult for officers to obtain a coherent statement. When initally contacted by officers, he presented himself as a concerned citizen who was only attempting to assist an incapacitated female. During his assault, Mr. Dunckley attempted to establish an alibi by calling his wife while he is in the company of, and sexually abusing the incapacitated female. When questioned by authorities, the defendant provided several versions of events, however, he eventually acknowledged sexual contact with this victim. In Count I, the defendant created a scenario where he groomed a twelve-year-old female over a period of time, utilized his friendship with her parents, and then sexually abused her on two occasions. According to the psychosexual evaluation, the defendant presents as a moderate risk for reoffense. He is determined not to represent a high risk to reoffend based upon a currently accepted standard of assessment. It appears the defendant has invested an inordinate amount of time and planning and executing his aberrant behavior and considerable thought as to his responses if and when confronted by authorities. When his conduct before and during commission of the offenses was scrutinized by the investigating officer, his premeditation became apparent. Taking these factors into consideration, the Division cannot view the defendant as an appropriate candidate for a period of community supervision. Therefore, the following is submitted for the Court's consideration.

III. PLEA NEGOTIATIONS

The State will be free to argue for an appropriate sentence. The State will not file additional criminal charges resulting from the arrest in this case, and/or will refrain from pursuing additional and/or transactionally related offenses including all counts filed and dismissed in RJC case number 2007-033884. I understand that I am entering my plea to Count I as a legal fiction, pursuant to plea negotiations, to allow me to avoid the more serious charge of sexual assault in the original Count I, and to allow me the opportunity to qualify for probation, which would otherwise by unavailable. Full restitution.

XI. CUSTODY STATUS/CREDIT FOR TIME SERVED

Custody Status: Released on bail.

CTS: 3/30/07 - 3/31/07 = 2 days
4/30/07 - 5/01/07 = 2 days
Total = 4 days

XII. RECOMMENDATIONS

FEES

Administrative Assessment: $25.00	**Chemical/Drug Analysis** N/A	**DNA:** $150.00
Domestic Violence: N/A	**Psychosexual fee**: $950.00	**Attorney fee:** $500.00

COUNT I SENTENCE

Minimum Term: N/A	**Maximum Term**: For life with the possibility of parole, with eligibility of parole beginning when a minimum of 10 years has been served.	**Location**: NDOC
Consecutive to/Concurrent With: N/A	**Probation Recommended**: No	**Probation Term**: N/A
Fine: N/A	**Restitution**: N/A	

COUNT II SENTENCE

Minimum Term: 24 months	**Maximum Term**: 60 months	**Location**: NDOC
Concurrent With: Count I	**Probation Recommended**: No	**Probation Term**: N/A

Pursuant to NRS 176.0931, the Instant Offense requires that an additional sentence of Lifetime Supervision be imposed.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

__X__ Pursuant to NRS 239B.030, the undersigned hereby affirms this document contains the social security number of a person as required by NRS 176.145.

Respectfully Submitted,

BERNARD W. CURTIS, CHIEF

Prepared by: James M. Rountree

DPS Parole and Probation Specialist IV
Northern Command, Reno, Nevada

//jr/rpf

DEFENDANT'S STATEMENT

Write in your own words the circumstances of your offense, why you committed the offense, your present feelings about your situation, and why you may be suitable for probation. A copy of this statement will be sent to the judge. Write or print clearly. If using a pencil, please write as dark as possible.

During the last few years I have done things that I never meant to do, Nor at the time ever attempted to hurt anyone. While being a older role model to a younger friend I took advantage of the trust she had in me and completely violated the bond we had as friends. Unfortunatly I should have taken the adult approach to her being attracted to me and stopped it their But, I Allowed myself to be selfish and Act on those feelings not taking into consideration how my actions would affect not only her & myself but those around us both. What I did was wrong and I truely felt horrible about it. Vowing that it would never happen again. And it never did.

IN my whole life I was raised to always help people in need. On one night in MARCH 2007 while Driving Home I saw someone In need of Help. so I followed behind in my car to make sure she Got Home safe. When I realized she needed assistance I helped her into her Apartment. While making sure she was okay she Got Affectionate and tried to "thank" me when she reached down my Pants I did not stop Her Till I realized what was going on as she tried to pull out my penis I Got up and she streamed "rape". She was Drunk And not in A clear state of mind. I was so I NEVER should have let Anything remotely Happen. I Allowed a situation to Get out of control.

Allowing these offenses to happen makes me feel sick Knowing that I had the option to not do Anything but did not stop And think it through. I wish it didn't take possible prison time to see that I need to work out personal issues to Get to the bottom of why these things Happen

Signature Brendan [redacted] Date 3/26/08

(Con't)

Being that prior to the last year I have had very minor brushes with the law & the courts, I have tryed to establish myself a good reputation in the community as an upstanding member of society. I feel that probation would be suitable for the fact I have no history of violence, substance abuse. I made mistakes and am taking responsibility for them. I am the sole financial support to my family and feel that I can be of better use to them providing & working hard to prove that I will never put myself in a situation that makes anyone feel less than they deserve to feel. I know that this is something that I will have to prove every day for the rest of my life.

I would like the opportunity to show everyone that I can make this better by my actions. I know that it is going to be tough but I pray that I can be in my childrens lives. We are a very close family. My children cry when I come home late from work, I can only imagine what will happen if I went to prison.

Therefore I would greatly appreciate the opportunity to prove that I can make a difference. Knowing that at any time I can be put in prison if I violate any conditions of my probation

Brendan Duchey 3/26/08

ROBERT P. STUYVESANT, M.S.W.
Licensed Clinical Social Worker
Licensed Marriage & Family Therapist

PSYCHOSEXUAL EVALUATION/RISK ASSESSMENT

NAME:	**Dunckley, Brendon**
DATE OF BIRTH:	**7/4/1976**
CURRENT AGE:	**31 Years, 9 Months**
ETHNICITY:	**Caucasian, Male**
RESIDENCE:	**Reno, Nevada**
CURRENT STATUS:	**Mr. Dunckley resides in Reno, Nevada; he is scheduled for sentencing on two charges: Lewdness with a Child Under the Age of Fourteen Years; Attempted Sexual Assault.**
DATE OF ASSESSMENT:	**05/21/08; 5/29/08**
DATE OF REPORT:	**6/4/08**
REFERRAL SOURCE:	**State of Nevada, Division of Parole and Probation**

REASON FOR REFERRAL/PRESENTING INFORMATION:

Mr. Dunckley is a 31-year-old Caucasian male charged with Lewdness With a Child under the Age of Fourteen Years, a violation of NRS 201.230, and Attempted Sexual Assault, a violation of NRS 200.366; both felony charges. Mr. Dunckley entered a guilty plea in Washoe County District Court, Reno, Nevada to both charges on March 4th, 2008 and sentencing is scheduled for August 5th, 2008. In regard to the lewdness charge, the guilty plea memorandum states that "on or between August 14th, 1998 and August 13th, 2000, or thereabouts, Mr. Dunckley did willfully and unlawfully commit a lewd or lascivious act upon or with the body of (identified victim), a female child under the age of fourteen years at the time that the said act was committed, in that he engaged the victim in sexual intercourse in Reno, Washoe County, Nevada, and/or put his hand down her pants to fondle her genital area in an elevator at the Atlantis Hotel and Casino, Reno, Nevada with the intent of

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arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child". Regarding the attempted sexual assault charge, the memorandum stipulates that "on March 10th, 2007, he attempted to subject (identified second victim) to sexual penetration against the victim's will, and /or under conditions in which he knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the conduct, to wit, fellatio in Reno, Nevada". The victim in the first offense is identified as an acquaintance, and records indicate she was 12 to 14 years old during the time frame identified in the guilty plea memorandum. The second victim was an adult female, identified as a stranger to Mr. Dunckley. He was arrested March 20th, 2007 for the attempted sexual assault charge. He was detained, posted bail the same day and was released. He was arrested again on March 30th, 2007 on the lewdness charge. He was detained for about twelve hours. At the time of both arrests, he was residing in Reno, working for a parking control company. Mr. Dunckley was married, living with his wife and two young sons. He continues to reside in Reno, with his family, and is employed in the construction industry. Two other females made allegations that Mr. Dunckley had sexually assaulted them. He is not charged from those allegations. He admitted to consensual sex with one of the individuals in 2005, and denied sexual behaviors with the other. The person whom he admitted consensual sex occurring with was an acquaintance, whom he identified as eighteen years old at the time. Mr. Dunckley has no history of prior convictions, or arrests, for sexual offense behaviors.

This is a preliminary risk assessment aimed at developing an estimation for sexual reoffense risk. Static and dynamic factors determined by research to be associated with adults were considered. The overall estimation for reoffense risk is based on these factors. Clinical judgement is incorporated in the process, resulting in a "clinically adjusted actuarial risk assessment." *The overall goal of the evaluation is to provide information as to whether the offender represents a high risk to reoffend sexually based on currently accepted standards of assessment.*

Sources of Information

1. Review of police reports pertaining to referral offenses/court documents stipulating charges and plea.
2. Burns Depression Checklist.
3. Abel Assessment for Sexual Interest Questionnaire
4. Rapid Risk Assessment for Sexual Offense Recidivism.
5. Static 99.
6. Mental Status Exam
7. Sex Offense Self Report Inventory

SOCIAL HISTORY:

Background Information

Mr. Dunckley is a 31-year-old Caucasian male who was born in Carmel, New York, to James and Linda Dunckley. His parents have been married over 33 years, and reside in three places; California, New York, and China. He has a twin brother who resides in China, and an older sister in New York. He had another sister who died in a car accident at age 17. Brendon lived with his family to age 17. His parents owned some nursing homes in New York. Neither parents is reported to have a criminal history, or history of substance abuse. He described stability in family life, and he was always in the care of his parents. He was raised primarily in the Hudson County area of New York . He did not account for a history of physical or sexual abuse, violence or exposure to significant risk factors during his youth. Mr. Dunckley felt his relationship with his parents was close, and the primary trauma was associated with the death of his sister, when he was 21. He described his sister's death as traumatic for the family, stating, "It destroyed the closeness, and separated us". His relationship with his parents became strained following the death of his sister. Mr. Dunckley stated his parents also opposed his decision to stop practicing the Jehovah Witness religion at age 20. He currently has minimal contact with his parents, claiming his religious changes, and problems with their not accepting his relationship with his first wife. His parents are aware of his current legal situation.

Mr. Dunckley completed high school in New York and attended the Culinary Institute of America to become a chef. He graduated from that program in 1999 in Hyde Park, New York. Mr. Dunckley married his first wife Jenny in 1997. They were both twenty years old. They have a ten year old son and nine year old daughter. They met while both were attending the culinary institute, and moved to the Fresno, California area for employment after they completed their training. They divorced in 2000, which he attributed to problems managing work and family life. They have shared custody of their children, though she has primary physical custody. Post divorce, he developed a relationship with a neighbors' sister, Morgan. The moved to Reno for employment in January 2000. He has lived in the Reno area since. Mr. Dunckley and Morgan married in 2001, and have two sons, ages seven and three. They plan to continue the marriage per Mr. Dunckley. His wife does not work outside the home.

Educational Background

Mr. Dunckley graduated high school in 1994 in New York. He described himself as an average student who was an "underachiever". He attained an associates degree from the Culinary Institute of America in 1999. He has no formal education beyond that.

Military History

Mr. Dunckley has not been in the military.

Employment History

Mr. Dunckley is currently employed by Northern Nevada Construction Company, in the disaster management unit. He has been there for five months. For two years previous, he worked in parking control, and from 2000 to 2005 he was employed as a chef at various local hotel/casinos. His current employer is aware of the charge against him.

Substance Abuse History

Mr. Dunckley did not account for significant use of alcohol or substances in his history.

Previous Mental Health Treatment

Mr. Dunckley was diagnosed in March 2008 with obsessive compulsive disorder, and ADHD. He is taking Welbutrin, and participating in outpatient therapy in Reno, with Stephen Ing, MFT, in response to the referral offense.

Legal History

Mr. Dunckley reported no arrest history as a juvenile. As an adult, he was charged in 2005 with petty larceny. He claimed the charge came about when his child, whom he was pushing in a stroller, had taken a DVD from a store shelf unbeknownst to Mr. Dunckley. He was cited, and fined. The referral charges are his only additional arrests as an adult.

Significant Medical History

Mr. Dunckley experienced multiple concussions while participating in hockey during his youth. He did not account for recurring problems associated with those injuries, and reports to be in good health overall.

Relationship History

Mr. Dunckley has been married twice. He married Jenny in 1997, and divorced in 2000. They have a ten year old son, and nine year old daughter, who live primarily with their mother in California. He married his second wife, Morgan, in 2001. They have two sons, ages seven and three. They live together in Reno.

Available Support/Primary Interests

Mr. Dunckley identified his immediate family, spouse, and mother in law as his primary support, along with his employer. His interests include cooking, tennis, roller balding, and spending time with family and a few close friends.

CLINICAL INTERVIEW/ACCOUNT OF REFERRAL OFFENSE/SEXUAL HISTORY

Mental Status

Brendon Dunckley is a 31-year-old Caucasian male who was interviewed in an outpatient setting. He arrived on time and participated in a positive manner. He is of moderate build and height. His memory appears to be intact with no evidence of impaired judgment or thinking. Mr. Dunckley was oriented to person, place, time and situation and affect was appropriate to content. He maintained good eye contact and intellectual functioning appears to be within the average range. He did not account for a history of substance abuse. Mr. Dunckley denied suicidal ideation or interest in absconding. He understood the charges against him.

The purpose and scope of the assessment was explained to Mr. Dunckley. Some of the risks and benefits associated with the evaluation were reviewed. He read and signed an informed consent to participate in the evaluation with results to be forwarded to the State of Nevada, Division of Parole and Probation.

Synopsis of Referral Offense

Mr. Dunckley admits to sexual behaviors with an under age female. The police reports indicated she was 12 to 14 years of age. He admits to two instances that involved fondling and intercourse, and claimed both instances were in 2000, when she was 14. The police reports indicate they took place between 1998 and 2000. Mr. Dunckley was 24 at the time, and claimed he was not aware of her age. He admitted to sexual behaviors with a 24 year old female, identified as a stranger to him, occurring in March 2007. He admits to engaging her in fellatio, while she was under the influence of substances.

Onset/Progression of Referral Offenses

Mr. Dunckley provided his account of both offenses. He claimed to have met the younger victim, in 2000, when she would have been about 14 years of age. Mr. Dunckley claimed she "accidentally" dialed his cell phone number, and his wife spoke with her. From the initial conversation, he claimed he and his wife developed a friendship with her, and her girlfriend. He claimed they also met their parents. He claimed this occurred about eight years ago, in 2008. Mr. Dunckley stated the other younger female called Mr. Dunckley's wife for a ride, as the younger female who was not the victim, and Mr. Dunckley's wife were both pregnant. He stated, "they had the cravings for fast food, so we took them". Mr. Dunckley stated he thought both of the younger females were about 17 years old, and he described a friendly relationship with them. The non-victim 14 year old also made allegations that Mr. Dunckley had fondled her when she was 12 or 13, which he denied, and was not charged.

He stated within a month of meeting them, "I was driving A.(victim in referral offense) home and she was very flirtations, so was I, in 2000. We ended up having sex in my car. Her and the other girl had spent the night at our house". He reported a second instance of sexual behaviors with her.

He stated they were in an elevator at a local hotel-casino alone and he put his hand down her pants. He denied force during both instances, and said she was probably 14 at the time, but he thought she was 17. In her statements to law enforcement, she did not account for force, threats or bribes. Mr. Dunckley stated, "I can't remember what I said to her" prior to the acts occurring. He said he learned she was 14 within a couple weeks of the second instance, from one of her friends. Mr. Dunckley said he admitted the behaviors to his wife within a couple months. He described her as "upset and hurt". He denied additional sexual behaviors occurring with the under age female, however, two of her friends made allegations, which Mr. Dunckley denied and is not charged. Mr. Dunckley said once he realized her age, he had no further contact with her. He was not clear how the allegations surfaced, and was not made aware until after his arrest in March 2007 in the second charge. He believed the offense against the under age youth was reported after one of her friends accused him of sexually assaulting her in August, 2005. He admitted to sexual behaviors with her, stating she was 19. He described intercourse occurring, and she alleged force. The case was closed as the investigator concluded there were inconsistencies in her statements, making the force aspect difficult to prove.

The second charge came about from an incident on March 10th, 2007 that involved a 24 year old female, identified as a stranger. Mr. Dunckley gave the following account of that incident: "On March 10th, 2007, while coming home (he was driving his car) I passed a person staggering on the side of the street who was drunk and falling all over the place. I turned my car to make sure she was okay and safe. My wife was on the phone with me and I followed the woman to an apartment complex, where she fell while going up the stairs to the second floor. It was then that I got out and helped her up. I asked her what her name was. I asked if she knew where she was. Had she done any drugs, and she said weed. I asked how much she had to drink, and she said a lot. I helped her to her to feet and asked which apartment was hers and she pointed and I helped her to the door. I asked if she had a key or it anyone was home. She said her boyfriend was and swatted the door handle and it popped. I then turned to leave. I heard a thud and turned around and saw the door was ajar from her feet. I ran to the door and yelled her name with no response. I entered the apartment and turned her over onto her back. She was not breathing. I saw she was aspirating so I swept her mouth to clear the airway and applied a sternum rub to revive her. She came to and started to cry and talk about slippers and how she lost them and her boyfriend was going to be mad. I told her it was ok, and they were right next to her. All the while the door was still open. She passed out again and I rubbed her again. This time she started to cry again on my shoulder and I put my hand on the shoulder and said it was going to be okay. She then started to be affectionate towards me and I let her. She undid my pants and slid her hand in and took out my penis and proceeded to perform oral sex on me saying is this okay. I said yes at first then realized this was wrong and stopped her and got redressed (just my zipper), and started to leave. She freaked out and stated to yell rape, rape. I got out and called the police to come. All this took place in about 2-5 minutes. Shortly after, the police arrived." He stated he gave the same account to the investigator. He denied use of force, but said he was aware she was under the influence. The police report identified her blood alcohol content at .23. Mr. Dunckley felt he used poor judgement in allowing the sexual behavior to occur. The police report indicated she made statements that she had bit his penis aggressively. His penis was examined by investigators, and no bruising was found.

Mr. Dunckley admitted during this evaluation to having intercourse, and fondling an under age female. He believed when the behaviors occurred she was 14 years of age, and he was 24. At the time, he thought she was about 17. He also admitted to having an adult female, who was intoxicated and/or under the influence beyond her ability to consent, engage in fellatio against him on one occasion. He admitted being accused of sexual assault in 2005 by a 19 year old female acquaintance. He admitted to having intercourse with her one time, and described the act as consensual. He is not charged for that instance.

Additional Sexual Offense History

Mr. Dunckley did not account for additional sexual offense behaviors, or sexual relations with under age youth beyond what has been reported.

Sexual History

Mr. Dunckley did not report having been sexually victimized. His first sexual experience was at age 19 with an adult female. He did not report sexual experiences with males. Since age 18, he estimated having over twenty different sexual partners. He did not report sexual relations with prostitutes. He has viewed some adult pornographic material on the Internet, which he described as occasional. He did not report a history of deviant sexual behaviors.

Cognitive Distortions/Motivational Factors to Referral Offense

From an acute perspective, Mr. Dunckley was in a situation that allowed opportunity to act on sexual arousal with an under age youth, and a person under the influence of substances. He acted impulsively, exhibiting problems with regulation of arousal, and may have approached the situations from an entitled perspective. Prevailing factors are linked to ongoing relationship challenges, divorce, blended family challenges, history of impulsivity, history of promiscuity. He viewed both victims in the referral offense as cooperating. He stated, "Had I known how old the first victim was I wouldn't have done it. The second one was me being stupid".

Perception of Victim Impact

Mr. Dunckley believed both victims were harmed, as he described having taken their sense of security away. Insight, however, was limited and somewhat superficial.

RESULTS OF INVENTORIES/TESTS

On the **Burns Depression Checklist** which screens for endorsement of symptoms generally associated with depression, Mr. Dunckley's overall responses point to the presence of some symptoms generally associated with depressed mood. The moderate symptoms were a sense of guilt, indecisiveness, poor self image, appetite changes, sleep changes, loss of libido. Symptoms occurring somewhat included sadness, discouragement, low self esteem, inferiority, and loss of

motivation. He denied suicidal impulse on this scale.

On the **Sex Offense Self Report Inventory,** he described the referral offenses as "sexual intercourse with a minor in 2000 in my car. She was 14. Attempted sexual assault , I allowed a drunk woman to perform oral sex and I knew better". He denied additional sexual offense behaviors, and indicated he was 100% responsible for the offenses, writing "I was the adult and the sober one. They did not deserve any of it, nor did they ask to be treated so". He wrote the primary reason for the offenses was "Very poor judgement and impulsivity".

Abel Assessment for Sexual Interest Questionnaire Mr. Dunckley completed the Abel Assessment for Sexual Interest Questionnaire which summarizes a self reported history of sexual behaviors and experiences, and sexual health concerns. There are also scales that screen for sexual fantasies/arousal, cognitive distortions, social desirability, a danger registry and self reported history of accusations, arrests and convictions for sexual offense behaviors. Mr. Dunckley did not complete the objectively measured sexual interest category, in that he has no substantiated history of sexual behaviors involving prepubescent children (there is some question about the age of the first victim, as she may have been as young as 12). In regard to self reported history of deviant sexual behaviors, Mr. Dunckley reported a history of sexual affairs, on ten occasions, from age 21 to 30. This is described as sexual relations with someone outside his primary relationship. He identified his partners as adult females, and claimed no recurring fantasies of such behaviors. He did not report additional deviant sexual behaviors, including use of pornography or having sexually molested a child. There were no additional sexual health concerns identified, and he did not indicate having been the victim of sexual abuse. On the sexual behaviors and fantasies scales, he reported no arousal to any of the behaviors listed, though his responses were neutral to the following: exposing himself in a public place; masturbating in public without being seen; fetishes; frottage; voyeurism; writing obscene notes; sexual affairs; sex with adults who are strangers; phone sex; use of pornography and Internet sexual materials. He reported sometimes having fantasies about having sexual affairs, and sex with strangers. He denied sexual arousal to, or sexual fantasy about touching a child. On the Cognitive Distortion Scale which screens for attitudes tolerant of sexual behaviors with children, Mr. Dunckley scored in the 8% range which is well below the range to be considered problematic, and does not indicate attitudes tolerant of adults engaging in sexual behaviors with children. On the Social Desirability Scale, which measures a persons unwillingness to admit to any violation of common social mores, such as impatience, or feelings of anger, he scored in the 50% range which is a problematic score, but not a high score. There is some indication of problems with attempts at responding truthfully to others regarding topics unrelated to sexual deviance. The Danger Registry did not yield any concerns, as he did not self report attraction to, fantasies about, or sexual interest in children since he turned 18 years of age. To the question about sexually molesting a child, Mr. Dunckley indicated he has been accused, has sexually touched a child, but the child was a willing participant. He reported two investigations or arrests and no convictions for a sexual crime.

CLINICAL IMPRESSIONS/ESTIMATION OF REOFFENSE RISK/RECOMMENDATIONS

Clinical Impressions

Mr. Dunckley is a 31-year-old Caucasian male charged with Lewdness With a Child under the Age of Fourteen Years, a violation of NRS 201.230, and Attempted Sexual Assault, a violation of NRS 200.366. Mr. Dunckley entered a guilty plea in Washoe County District Court, Reno, Nevada to both charges on March 4th, 2008 and sentencing is scheduled for August 5th, 2008. The guilty plea memorandum states that on or between August 14th, 1998 and August 13th, 2000, or thereabout, Mr. Dunckley did willfully and unlawfully commit a lewd or lascivious act upon or with the body of (identified victim), a female child under the age of fourteen years at the time that the said act was committed, in that he engaged the victim in sexual intercourse in Reno, Washoe County, Nevada, and/or put his hand down her pants to fondle her genital area in an elevator at the Atlantis Hotel and Casino, Reno, Nevada with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child. The plea further stipulates that on March 10th, 2007, he attempted to subject (identified second victim) to sexual penetration against the victim's will, and /or under conditions in which he knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the conduct, to wit, fellatio, in Reno, Nevada. The victim in the first offense is identified as an acquaintance, and records indicate she was 12 to 14 years old during the time frame identified in the guilty plea memorandum. The second victim was an adult female, identified as a stranger to Mr. Dunckley. He was arrested March 20th, 2007 for the attempted sexual assault charge. He was detained, posted bail the same day and was released. He was arrested again on March 30th, 2007 on the lewdness charge. He was detained for about twelve hours. Two other females made allegations that Mr. Dunckley had sexually assaulted them. He is not charged from those allegations. He admitted to consensual sex with one of the individuals in 2005, and denied sexual behaviors with the other. The person whom he admitted consensual sex occurring with was an acquaintance, whom he identified as eighteen years old at the time. Mr. Dunckley has no history of prior convictions, or arrests, for sexual offense behaviors.

Mr. Dunckley admitted during the evaluation to having intercourse against, and fondling an under age female. He believed when the behaviors occurred she was 14 years of age, and he was 24. He also admitted to having an adult female, who was intoxicated and/or under the influence beyond her ability to consent, engage in fellatio against him on one occasion. He admitted being accused of sexual assault in 2005 by a 19 year old female acquaintance. He admitted to having intercourse with her one time, and described the act as consensual. He is not charged for that instance.

In considering both acute and prevailing or stable dynamic factors, from an acute perspective, Mr. Dunckley was in a situation that allowed opportunity to act on sexual arousal with an under age youth, and a second person several years later, who was under the influence of substances. He has demonstrated problems with regulation of emotions and impulsivity in general, and more specifically, sexual arousal. His sexual history points to a promiscuous lifestyle, that may have reinforced a sense of entitlement in regard to sexual behaviors. Feeling or thinking from an entitled perspective when it comes to sexual behaviors makes it easier to dismiss cues from others, thereby diminishing empathy. Prevailing factors are linked to ongoing relationship challenges, divorce,

blended family challenges, history of impulsivity, and a promiscuous lifestyle. He viewed both victims in the referral offense as cooperating. He stated, "Had I known how old the first victim was I wouldn't have done it. The second one was me being stupid". The younger victim from the offense several years ago was an acquaintance, whom Mr. Dunckley and his wife had developed a relationship, along with some of her friends. The second victim was a stranger. The second instance which occurred in March, 2007, was against a woman who was under the influence, with a blood alcohol level over .20. Mr. Dunckley was aware of her state, and acted opportunistically, using the situation to his advantage under the guise of being helpful.

Opportunity to Reoffend Sexually

Mr. Dunckley engaged in sexual behaviors with an under age youth, several years ago. She was an acquaintance. He self reported two instances, one led to intercourse, and a second incident involved fondling her in a public place (elevator). He has no substantiated history of sexual behaviors with other under age youth, though there have been allegations. Opportunity for recurrence is evident, based on his being in the community, which creates access to other under age youth. The second instance involved a stranger, and creates high risk for reoffense opportunity, as there is evidence that his modus operandi is not limited to acting out sexually against only individuals he is familiar with.

Initial Diagnostic Impressions

AXIS I: V61.21 Sexual abuse of a child, perpetrator; 302.9 paraphilia nos
AXIS II: Deferred
AXIS III: none
AXIS IV: Current legal charge, relationship challenges
AXIS V: GAF = 60

Reoffense Risk

The risk assessment process is a preliminary estimation for reoffense risk that is strengthened when factors related to sexual reoffense risk for adults are considered. The strongest evidence of factors characteristic of sexual reoffense risk come from follow-up studies that compare the recidivism rate of offenders with certain characteristics. No single risk factor is sufficiently related to recidivism that it can be used on its own, therefore evaluators need to consider a range of risk factors. ***The strongest predictors of sexual reoffense recidivism are variables related to sexual deviance, such as deviant sexual preferences as determined by physiological/objective measures, prior sexual offenses, early on sexual offending history and the diversity of sexual crimes (Hanson, 1997).*** The single strongest predictor has been determined in various studies to be sexual interest in children based on objective measures, and expressed intent to commit a sexual crime. Measures of criminal lifestyle are also significantly related to sexual recidivism. Response to treatment is another factor when considering risk assessment. The most well established risk factors are static, such as prior sexual offenses and dynamic risk factors (acute and stable). The acute factors are those which are immediately associated with the offense, such as being intoxicated and experiencing arousal in the presence of a child. Stable dynamic factors are those which occur over a longer period of time, such

as mood disorder, deviant sexual interest, and alcoholism.

In considering these factors, Mr. Dunckley self reports arousal to adult females, though he victimized an under age female. There is no legal or self reported information of continued sexual interest in under age females. He has admitted to multiple sexual relations outside his primary relationships, often with people he docs not know well. He has a sexual history of promiscuity and impulsivity, which may often leave him in very risk, dangerous, if not illegal sexual situations. He did not report sexual arousal to, or fantasy about sexually touching a child since he turned 18 years of age. The primary concern is two sexual offense related charges, against two victims, in which the behaviors were spread out over a seven year time frame. The second offense involved a stranger, which presents greater risk to the community from a safety and prevention management perspective, though there is no evidence of overt force; the act occurred while she was intoxicated.

On the RRASOR, which provides a reasonable baseline for sexual reoffense risk, but does not include a complete evaluation of the risk factors for recidivism, he was in the low range. His raw score was one, and studies of individuals at five and ten-year follow-up that scored in this range showed recidivism rates of about 7% at five years and 11% at ten years. The lone factor that registered a point was : the victim was not related to him.

The Static 99 is an enhanced version of the RRASOR which incorporates a few more factors: prior sentencing dates; convictions for non-contact sex offenses; index non-sexual violence; prior non-sexual violence; relationship status. The added factors elevated risk slightly, to the moderate-low range based on: unrelated victim; stranger victim.

In considering the risk scales along with clinical judgement, Mr. Dunckley is estimated in the moderate range for sexual reoffense risk. Clinical judgement elevated risk due to reoffense behaviors occurring over an elapsed period of time, and involved an offense against a stranger. Furthermore, his promiscuous and impulsive sexual lifestyle places him at greater risk for further allegations/charges. There is evidence of being indiscriminate in regard to victim selection, meaning his modus operandi is not limited to a particular victim type, age, or preference.

It is the opinion of this evaluator that Mr. Dunckley <u>DOES NOT REPRESENT A HIGH RISK TO REOFFEND SEXUALLY</u> based on current standards for assessment (NRS 176a.110)

<u>Risk Population</u>

Based on historical information, responses to inventories, self reported arousal and objective measures of sexual interest, the identifiable risk population is varied, and can include adult females who are strangers, and under age youth whom he has access to, or has developed a relationship with. Much younger children do not present as immediate risk, in that there is no evidence of sexual interest in younger children.

Amenability to Treatment/Prognosis

Mr. Dunckley presents as a positive candidate for treatment, based on his willingness to openly discuss and explore the factors related to the referral offense; primarily his disclosure of his sexual offense history. He does not present as antisocial or defiant, though there may be some resistance to treatment upon realization of a longer term process. Although there may be some minimization and presence of cognitive distortions that support and maintain the behaviors, these issues can be addressed in the treatment process with Mr. Dunckley. Mr. Dunckley recognizes the need for intervention, and reported having initiated treatment to date.

Recommendations

In the event that Mr. Dunckley is not incarcerated, placing him under the supervision of the probation department would ensure compliance and cooperation with recommendations. If he is released to the community, the following recommendations are respectfully submitted:

1. Mr. Dunckley should be directed to participate in sexual offense specific treatment. Ideally a treatment program that provides individual, group and family-based intervention would be suitable for this situation. Generally speaking, sexual offense specific treatment will focus on: dynamic factors related to the offense behaviors; denial; consequences for the offender; identification of motivating factors; identification/confrontation of the sexual offense cycle and strategies for interrupting the pattern; recognition of cognitive distortions associated with sexual offense behaviors; victim impact; relapse prevention; social and communication skill building; healthy relationship development; strategies for managing emotions/physiological states including sexual arousal; and, victim restitution. Treatment progress reports will reflect such components as having been addressed, while providing measurements for progression through treatment, or lack thereof.

2. Mr. Dunckley should not have access to younger pre-teen or early teenage females, especially if alone or unsupervised. There is no evidence that his children are at risk, however, the family needs to be informed of risk factors, and actively participate in the treatment process (contingent upon consent). A period of electronic monitoring, combined with limited driving opportunities may help reduce reoffense opportunities, as he participates in treatment.

3. Mr. Dunckley should be directed to complete a comprehensive substance abuse evaluation, and adhere to recommendations.

4.It is recommended that treatment and progress reports are made available on a regular basis to the probation department. Treatment may also include continued sexual interest screening and maintenance/disclosure polygraph assessments. Random searches of his residence by the supervising probation department further enhances environmental controls and compliance with treatment and probation terms. Failure to comply with such terms should be considered an immediate risk factor, and responded to expeditiously by the court.

Level of risk does not reflect the harm or trauma associated with the sexual offenses for the victims. Failure to comply with external controls may elevate risk. Studies have shown that those who are noncompliant with terms of probation or treatment contracts demonstrate higher recidivism rates. This is a preliminary estimation for sexual reoffense risk and risk may change based on identification of new factors and lack of adjustment to the stable dynamic factors associated with the offense. This evaluation is time limited.

Robert Stuyvesant, LCSW, MFT
Clinical Member, Association for the Treatment of Sexual Abusers

7/21/08

To whom it may concern,

I have known Brendan Dunkley for over eight years. I met him through a co-worker and he worked as a cook and Food Server for our Food and Beverage department at the Fitzgerald's Hotel casino. He has a stellar reputation as a chef in the community and is known as the cook who can be dropped anywhere and pulls any function together. After being transferred to another property owned by Cashell Group, the Alamo Casino. I was pleasantly surprised in February to see Brendan's capable face show up during a broken pipe incident in the restaurant, which flooded the entire casino crawl space. Brendan was running the team that cleaned, cleared, sanitized and restored our restaurant in less than 24 hours. I turned my keys to the restaurant over to Brendan knowing my stock and equipment were as safe with him as it would be with me.
I was very surprised to hear of the alleged allegation against Brendan. He has been professional and respectful in his actions with me and interactions with my staff both male and female.
Feel free to contact me at cell # (775) 223-1806 or work #(775) 355-8888

Leslie Deach, Food & Beverage Director, Alamo Casino
1950 E. Greg Street
Sparks NV 894321

Leslie Deach

Alamo
CASINO
LESLIE DEACH
Food and Beverage Director

1950 E. Greg Street
Sparks, Nevada 89431

Phone: 775.355.8888
Cell: 775.223.1806
leslie@thealamo.com

089

Iron Skillet

ING Counseling

Steven Ing, M.A., M.F.T.

3500 Lakeside Court, Suite 120
Reno, Nevada 89509
775.329.6002 Tel

August 4, 2008

To: David O'Mara, Esq.
Fax: 323-4082
Re: Brendon Dunckley

Dear Mr. O'Mara,

The following dates document Brendon Dunckley's clinical contact with Steven Ing, M.A., M.F.T. for sex offender specific counseling.

Individual Sessions: 3-03-08
3-26-08
4-29-08

Sex Offender Group Attendance: 4/23/08
4/30 (absent)
5/7
5/14
5/21
5/28
6/4
6/11
6/18 (absent)
6/25
7/2
7/16 (absent)
7/23
7/30

Please contact our office if we can be of any further assistance.

Sincerely,

Sharon Burnside

Sharon Burnside,
Business Manager

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 52383

CR07-1728

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On August 5, 2008, the district court convicted appellant Brendan Dunckley, pursuant to a guilty plea, of one count of lewdness with a child under the age of fourteen years (lewdness) and of one count of attempted sexual assault. The district court sentenced him to serve a term of life in prison with a minimum parole eligibility of ten years for lewdness and to a concurrent term in prison of 120 months with a minimum parole eligibility of 24 months for attempted sexual assault.

Dunckley's sole issue on appeal is whether the district court abused its discretion when it sentenced him to prison rather than to probation, for which he was eligible. Dunckley challenges the district court's decision on two grounds. First, he contends that the district court, influenced by a "mendacious" presentence investigation (PSI) report, incorrectly stated that he was not eligible for probation. Second, he contends that the district court was improperly influenced at sentencing by the State's "unsubstantiated belief" that the plea agreement was made

09-11461

to allow Dunckley to better posture himself at sentencing. We hold that the district court did not abuse its discretion.

Absent a showing that the district court abused its discretion, we will uphold its sentencing decisions. Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1258 (1994). "[W]e afford the district court wide discretion in its sentencing decision. We will refrain from interfering with the sentence imposed so long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004) (citation and internal quotation marks omitted) (internal footnote omitted). Further, we will look "to the record as a whole to determine whether the sentencing court actually exercised its discretion." Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

Eligibility for probation

Dunckley contends that the district court relied on a "mendacious" PSI report to conclude that probation was not available in his case. His allegation focuses on the report's failure to explicitly state that he was eligible for probation and the district court's statement, "I know you pled to something that allows for a lesser offense, but it does not allow for probation." Both arguments are without merit.

Despite the PSI report's failure to explicitly state that Dunckley was eligible for probation, the district court was informed of his eligibility. The PSI report itself alluded to that fact in its "Conclusion," which states that Dunckley was not viewed as "an appropriate candidate for community supervision," thereby implying that it was an option but that the Department of Parole and Probation was not recommending it. In

addition, the district court was explicitly informed that probation was an option in the written guilty plea memorandum, during the plea hearing, and during sentencing.

Furthermore, looking at the record as a whole, the district court clearly imposed prison as a result of exercising its discretion and not because it did not believe there was another option, i.e., probation. The district court did not dismiss probation outright but rather stated that Dunckley's plea for probation would have resonated more with the court had the only charge been lewdness. The court explained why it was rejecting not only Dunckley's request for probation but also the PSI report recommendation for a maximum prison term of 5 years for attempted sexual assault, again clearly exercising its discretion. The 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.

State's comments at sentencing

Dunckley next contends that the district court was improperly influenced by the State's "unsubstantiated belief" that the plea agreement was crafted to allow him to better posture himself at sentencing. Paragraph 7 of the guilty plea memorandum, signed by Dunckley, states in part, "I understand that I am entering my plea to [lewdness] as a legal fiction, pursuant to plea negotiations, to allow me to avoid the more serious charge of sexual assault . . . and to allow me the opportunity to qualify for probation, which would otherwise be unavailable." Further, defense counsel repeated this portion of the agreement nearly verbatim in his opening remarks during Dunckley's change of plea hearing. The State's belief that the plea agreement was crafted to give Dunckley more

sentencing opportunities is therefore substantiated in the record. Dunckley has failed to show how the district court was improperly influenced by the state's comments.

The entire record before this court shows that the district court was aware of the sentencing options available for Dunckley, that it exercised its discretion in imposing terms of imprisonment, and that it was not improperly swayed by impalpable or highly suspect evidence in determining the sentence. We therefore

ORDER the judgment of conviction AFFIRMED.

Parra, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Connie J. Steinheimer, District Judge
O'Mara Law Firm, P.C.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

FILED

2009 JUL 21 PM 2:20

HOWARD W. CONYERS

BY _____ DEPUTY

CASE NO CR07-1728

DEPT. NO 4

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

1023236

Brendan Dunckley,
PETITIONER

v.

JACK PALMER,
RESPONDANT

PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction)

PETITION

1) NAME OF INSTITUTION AND COUNTY IN WHICH YOU ARE PRESENTLY IMPRISONED OR WHERE AND HOW YOU ARE PRESENTLY RESTRAINED OF YOUR LIBERTY: Lovelock Correctional Center, Pershing County.

2) NAME AND LOCATION OF COURT WHICH ENTERED THE JUDGEMENT OF CONVICTION UNDER ATTACK: Second Judicial District Court - Reno, Nevada.

3) DATE OF JUDGEMENT OF CONVICTION: August 17, 2008.

4) CASE NUMBER: CR07-1728.

5) LENGTH OF SENTENCE: Count One (1) is Life Imprisonment with the eligibility of parole begining when a minimum of ten (10) years has been served, and; Count Two (2) imprisonment in the state prison for a maximum of 120 months with eligibicity of parole begining when a minimum of 24 months has been served.

Both counts to run concurrently.

6) ARE YOU PRESENTLY SERVING A SENTENCE FOR A CONVICTION OTHER THAN THE CONVICTION UNDER ATTACK IN THIS MOTION: NO

7) NATURE OF OFFENSES INVOLVED IN CONVICTION BEING CHALLENED: Count One (1) - Lewdness with child under 14 years of age, (NRS. 201.230); Count Two (2) - Attempted Sexual Assault, (NRS. 193.330).

8) WHAT WAS YOUR PLEA? Guilty By means of a DEAL.

9) IF YOU ENTERED A GUILTY PLEA TO ONE COUNT OF AN INDICTMENT, AND NOT GUILTY PLEA TO ANOTHER COUNT OF AN INDICTMENT, OR A GUILTY PLEA WAS NEGOTIATED, GIVE DETAILS: Petitioner plead to Lewdness charge as legal fiction in a lesser charge of original charge of Sexual Assault on a child, and also attempted sexual assault in count two (2). To allow the availability of Probation.

10) DID YOU APPEAL FROM THE JUDGEMENT OF CONVICTION? Yes

11) IF YOU did APPEAL, ANSWER THE FOLLOWING:

a) NAME OF COURT: Nevada Supreme Court

b) CASE NUMBER: 52383

c) RESULT: Order of Affirmance Filed with the clerk of the court on May 8, 2009 (copy Attached)

12) OTHER THAN A DIRECT APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, HAVE YOU PREVIOUSLY FILED ANY PETITIONS, APPLICATIONS, OR MOTIONS WITH RESPECT TO THIS JUDGMENT IN ANY COURT, STATE OR FEDERAL? NO

13) IF ANY OF THE GROUNDS LISTED IN NOS. 18 (a), (b), (c), (d), (e), (f) AND (g), OR LISTED ON ADDITIONAL PAGES YOU HAVE ATTACHED, WERE NOT PREVIOUSLY PRESENTED IN ANY COURT, STATE OR FEDERAL, list BRIEFLY WHAT GROUNDS WERE NOT SO PRESENTED, AND GIVE YOUR REASON FOR PRESENTING THEM.

A) INEFFECTIVE ASSISTANCE OF COUNSEL (Const. AMEND. V, VI, XIV)

B) PROSECUTORIAL MISCODUCT (Const. AMEND. V, VI, XIV)

C) VIOLATION OF MIRANDA RIGHTS (Const. AMEND. IV, V, VI, XIV)

D) DIRECT SUBJECT MATTER JURISDICTION (Const. AMEND. IV, V, VI, XIV)

E) STATES FAILURE TO INVESTIGATE ALLEGATION (Const. AMEND. V, VI, XIV)

F) FAILURE TO HAVE SUFFICIENT EVIDENCE (Const. AMEND. V, XIV)

G) BRADY VIOLATION (WITHOLDING FAVORABLE EVIDENCE) (Const. AMEND. V, VI, XIV)

H) BREACH OF CONTRACT BY MEANS OF FRAUD AND COERSION (Const. AMEND. V, VI, XIV)

I) ACTUAL INNOCENCE AND MANIFEST INJUSTICE (Const. AMEND. V, XIV)

A FEW OF THESE GROUNDS WERE MENTIONED TO COUNSEL, BUT PETITIONER WAS INFORMED ONLY VALIDITY OF CONVICTION COULD BE CHALLANGED ON DIRECT APPEAL. IN ADDITION TRIAL AND APPELLATE COUNSEL WERE THE SAME APPOINTED COUNSEL.

14) GIVE THE NAMES OF EACH ATTORNEY WHO REPRESENTED YOU IN THE PROCEEDING RESULTING IN YOUR CONVICTION AND ON DIRECT APPEAL: DAVID C. O'MARA (NEV. BAR NO. 8599) OF 311 EAST LIBERTY STREET, P. O. BOX 2270, RENO, NEVADA 89505. WAS BOTH TRIAL AND APPELLATE COUNSEL.

15) DO YOU HAVE ANY FUTURE SENTANCE TO SERVE AFTER YOU COMPLETE THE SENTANCE IMPOSED BY THE JUDGEMENT UNDER ATTACK? NO

16) STATE CONCISELY EVERY GROUND ON WHICH YOU CLAIM THAT YOU ARE BEING HELD UNLAWFULLY. SUMMARIZE BRIEFLY THE FACTS SUPPORTING EACH GROUND. IF NECESSARY, YOU MAY ATTACH PAGES STATING ADDITIONAL GROUNDS AND FACTS SUPPORTING SAME.

A) GROUND ONE: INEFFECIVE ASSISTANCE of COUNSEL

THE PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION FOR THE EFFECTIVE ASSISTANCE OF COUNSEL AT 'TRIAL/HEARINGS'. BECAUSE THE ERRORS OF PETITIONER'S COUNSEL FELL AND CONTINUED TO FALL BELOW THE CONSTITUTIONALLY REQUIRED LEVEL OF REPRESENTATION. AS WELL AS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AS SET FORTH IN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. PETITIONER SUFFERED PREJUDICE AND WAS DEPRIVED HIS OPPORTUNITY TO PRESENT A DEFENSE

SUPPORTING FACTS:

1) PETITIONER'S ENTRANCE OF A GUILTY PLEA MEMORANDUM WAS/IS BASED ON UNINFORMED LEGAL ADVISE. THE DEFENSE COUNSEL FAILED TO CONDUCT ANY PRE-TRIAL/PRE-DEAL INVESTIGATION, TO EVEN PURSUE WITNESSES OR EVIDENCE IN SUPPORT OF PETITIONER'S CLAIM OF INNOCENCE. ALL THE WHILE COUNSEL REQUESTED PETITIONER TO OBTAIN AND TO COLLECT 'CHARICTER LETTERS' TO HELP WHEN PETITIONER WENT TO SENTENCING. AT NO POINT WAS ANY LEGAL STRATAGY DISCUSSED, EXCEPT NUMEROUS TIMES COUNSEL INFORMED THE PETITIONER THAT HE COULD BUY PETITIONER ENOUGH TIME TO GET HIS FAMILY EMOTIONALLY AND FINANCIALLY SET AND READY FOR PETITIONER GOING TO PRISON, AND WAIT AND HOPE THAT THE STATE CAME WITH A DEAL. THE ONLY STRATAGY PETITIONER SAW/SEES IS TO SIMPLY SETTLE WITH STATE AND TO CONVICT HIS CLIENT.

COUNSEL NEGLECTED TO REMEMBER THAT IT HAS A DUTY TO "CONDUCT A PROMPT INVESTIGATION OF THE FACTS AND CIRCUMSTANCES OF THE CASE AND EXPLORE ALL AVENUES LEADING TO THE FACTS THAT ARE RELEVENT TO THE MERITS OF THE CASE AND THE PENELTY IN THE EVENT OF CONVICTION. THE INVESTIGATION SHOULD INCLUDE EFFORTS TO SECURE ANY AND ALL INFORMATION IN THE POSSESSION OF BOTH THE PROSECUTION AS WELL AS LAW ENFORCEMENT AGENTS. THE DUTY TO INVESTIGATE EXISTS REGARDLESS OF THE ACCUSED ADMISSIONS OR STATEMENTS TO DEFENSE COUNSEL OF FACTS CONSTITUTING GUILT, OR THE ACCUSED STATEMENTS DESIRING TO PLEAD GUILTY." AS NOTED BY THE AMERICAN BAR ASSOCIATION STANDARDS: DUTY TO INVESTIGATE (STANDARD 4-4.1(a)).

THE INVESTIGATION OF THE CASE, ALLEGATIONS, AND TESTIMONY OF THE 'VICTIMS' IN PETITIONERS CASE IS OF THE UTMOST IMPORTANCE. DUE TO THE SENSITIVE NATURE OF THE CHARGES, AS WELL AS THE ONLY EVIDENCE THE STATE HAD WAS THE TESTIMONY OF ASHLEY V. IN COUNT ONE OF THE ORDER OF CONVICTION. THAT BEING IMPORTANT BECAUSE CREDIBILITY IS THE MAIN BACKING OF THE STATES CASE / CHARGE. SO INTERVIEWING THE 'VICTIMS' INDEPENDENTLY IS CRUCIAL TO BE ABLE TO, IN PETITIONERS CASE AID HIM IN DECIDING TO ACCEPT THE GUILTY PLEA MEMORANDUM. FAILURE TO DO EVEN A BASIC INTERVIEW CAN SERIOUSLY ALTER, IF PETITIONER SHOULD ACCEPT DEAL OR CHALLENGE CHARGE

2) DEFENSE COUNSEL DAVID C. O'MARA WAS PRESENTED WITH EXCULPATORY EVIDENCE TO ESTABLISH BOTH AN ALIBI FOR PETITIONER IN REGARDS TO COUNTS I, II, III AND IV OF THE AMENDED CRIMINAL COMPLAINT DATED APRIL 16, 2007 IN CASE RJC 2007-033884, AS WELL AS TO PROVE ACTUAL AND FACTUAL INNOCENCE. BUT COUNSEL PREJUDICED THE PETITIONER, BY NOT ACTING AS A REASONABLY COMPETENT ATTORNEY, BECAUSE HE DID NOT REQUEST A CONTINUANCE ON THE GROUNDS THAT TIME WAS NEEDED TO ADEQUATLY INVESTIGATE THE NEWLY PRESENTED EVIDENCE. (pg. 3/10 PART II)

SUCH A CONTINUANCE SHOULD IN THE LEAST HAVE BEEN REQUESTED BY COUNSEL, WHETHER IT WAS GRANTED IS NOT RELEVANT, IT WAS NEEDED TO BE ABLE TO PROPERLY, AND INDEPENDENTLY INVESTIGATE ALL THE CIRCUMSTANCES SURROUNDING THE ALLEGATIONS BY THE STATE AS COMPARED TO THE NEW EVIDENCE. HAD THE EVIDENCE BEEN IN THE SMALLEST ASPECT BEEN VERIFIED INDEPENDENTLY TO VALIDATE THIER AUTHENTICITY, IT WOULD HAVE SHOWN SERIOUS FLAWS AND HOLES IN THE STATES CASE. ESPECIALLY SINCE A LARGE PART OF THE STATES CASE/CHARGES WERE BASED ON NOTHING MORE THAN THE WORDS OF ASHLEY V., MICHELLE A, AND JESSICA H. AS WELL AS THE TESTIMONY OF THE LEAD DETECTIVE TOM BROOME (LPD).

THE EVIDENCE, HAD A CONTINUANCE WOULD HAVE BEEN REQUESTED TO VALIDATE EVIDENCE, WOULD HAVE SHOWN: IN REGARDS TO ASHLEY V. SHE STATED

WITH ABSOLUTE CERTAINTY THAT THE INCIDENT IN THE INDICTMENT UNDER COUNTS I, II AND III HAD IN FACT HAPPENED WHEN SHE WAS TWELVE (12) YEARS OLD. (SEE PS. 71/12 PHII). SO THAT WOULD MEAN THAT WITH THE DATE OF BIRTH OF AUGUST 14, 1986, SHE WOULD BE TWELVE (12) MAKING THE PROPER TIME FRAME OF THE INCIDENT BEING AUGUST 14, 1998 UNTIL AUGUST 13, 1999. IF A CONTINUANCE HAD BEEN IN FACT BEEN REQUESTED; THE VERIFIED EXCULPATORY EVIDENCE WOULD SHOW, IT TO BE IMPOSSIBLE TO HAVE BEEN COMMITTED BY THE PETITIONER AS ASHLEY V CLAIMS. DEFENSE COUNSEL WAS PRESENTED WITH THE FOLLOWING DOCUMENTATION PRIOR TO ENTERING THE COURTROOM TO COMMENSE THE PRELIMINARY HEARING ON JULY 2, 2007: COLLEGE TRANSCRIPTS SHOWING PETITIONER WAS ATTENDING THE CULINARY INSTITUTE OF AMERICA IN HYDE PARK, NEW YORK FROM NOV. 11, 1996 UNTIL FEBRUARY 23, 2999; DMV REGISTRATION FOR VEHICLE IN ALLEGATION (PS II 86/90) BEING PURCHASED AND REGISTERED ON JUNE 5, 2000; A SUMMONS OF FAMILY LAW DATED AUGUST 18, 1999; AS WELL AS A PROOF OF SERVICE, SERVED ON PETITIONER AT HIS HOME 255 EAST NESS #257, FRESNO, CALIFORNIA ON AUGUST 16, 1999 AT 2:45 pm. (pgs 102-104)(IV) ALL THESE DOCUMENTS WOULD HAVE PROVEN ACTUAL AND FACTUAL INNOCENCE OF COUNTS I, II, III. OF WHICH PETITIONER CURRENTLY FINDS HIMSELF WITH A CONVICTION TO COUNT II WHICH TRANSFERED INTO COUNT ONE OF THE ORDER OF CONVICTION, PETITIONER IS SERVING LIFE IN PRISON WITH THE ELIGIBILITY FOR PAROLE AFTER

A MINIMUM OF TEN (10) YEARS HAS BEEN SERVED.

OTHER EVIDENCE WOULD HAVE GONE TO PROVE THE CREDIBILITY OF DETECTIVE TOM BROOME TO BE IN SERIOUS QUESTION. PETITIONER HANDED OVER EVIDENCE THAT DETECTIVE TOM BROOME HAD RELEASED CRIMINAL COMPLAINTS TO PETITIONERS EX-WIFE'S (JENNY DUNCKLEY) ATTORNEY MR KENNETH BALLARD ON MAY 25, 2007. THE INVESTIGATING OF THIS EVIDENCE WOULD HAVE SHOWN THAT DETECTIVE IN FACT DID RELEASE CONFIDENTIAL CRIMINA COMPLAINTS TO A THIRD PARTY SIX WEEKS PRIOR TO THE PETITIONER'S PRELIMINARY HEARING. (SEE pgs. III-12B IV) AND THE SUBSEQUENT ENTRANCE OF SAID POLICE REPORTS INTO THE CIVIL CUSTODY 'BATTLE' BETWEEN PETITIONER AND HIS EX-WIFE (SEE pg 127/8 IV). IN ADDITION HAD A CONTINUANCE BEEN REQUESTED AS ANY COMPETANT ATTORNEY WHO IS ACTING AS A DILIGENT CONSCIENTIOUS ADVOCATE FOR HIS CLIENT WOULD HAVE INSISTED ON OBTAINING, IT WOULD HAVE GIVEN COUNSEL ENOUGH TIME TO PROVE THAT IN THE POLICE REPORTS THAT WERE RELEASED BY DETECTIVE TOM BROOME WAS THE 'PROVERBIAL' SMOKING GUN' TO PUT A STOP TO THE STATES CASE ON COUNTS I, II, III AND IV RIGHT THERE AT THE PRELIMINARY HEARING. AS ENTERED IN AS EXHIBIT 'D' ON JUNE 22, 2007 (pg III B IS RPD DRAFT DATED APRIL 19, 2007. THREE DAYS AFTER THE STATE AMENDED THE INDICTMENT TO ADDING THE ADDITIONAL CHARGES THAT REPORT COULD HAVE BEEN USED TO BOTH QUESTION DETECTIVE TOM BROOMES MOTIVES FOR THE RELEASE AS WELL AS TO QUESTION OR PROPERLY CROSS-EXAMINE A KEY

STATE WITNESS, WHO PERSONALLY SPOKE TO PETITIONERS EX-WIFE JENNY DUNCKLEY ON APRIL 18, 2007. (SEE Ex. 128) IN THAT REPORT COUNSEL WOULD HAVE BEEN ABLE TO ALSO IMPEACH THE TESTIMONY OF ASHLEY V. BECAUSE THE REPORT PROVED THAT THE STATE WAS IN POSSESION OF EVIDENCE THAT WAS / IS FAVORABLE TO THE DEFENDANT. IN THE INTERVIEW DETECTIVE TOM BROOME CONFIRMED THE LOCATION OF PETITIONER UP UNTIL THE BREAK UP OF THE MARRAGE BETWEEN PETITIONER AND JENNY DUNCKLEY IN JULY OF 1999. SHOWING DEFENDANT RESIDING IN NEW YORK AND FINALLY IN OAKHURST CALIFORNIA LOCATED IN MADERA COUNTY.

IT WOULD HAVE WARRENTED DEFENSE COUNSEL TO MOVE TO DISMISS COUNTS I, II, III, AND IV ON GROUNDS THAT THE STATE HAD FILED A CRIMINAL COMPLAINT IT KNEW TO BE FALSE BY STATING "ON OR BETWEEN THE 14TH DAY OF AUGUST A.D, 1998 AND THE 13TH DAY OF AUGUST A.D., 2000" (SEE PETITION 6/22-24). OR IN ANOTHER GROUND OF ACTUAL AND FACTUAL INNOCENCE AND PERJURED TESTIMONY. BUT DAVID O'MARA FAILED TO REQUEST THE CONTINUANCE SO WAS NOT ADEQUATELY PREPARED TO ACT AS A ADVASARY TO THE STATE. ULTIMITELY THAT FAULTY AND INEXPERIENCED DECISION ALLOWED A MANIFEST INJUSTICE TO NOT ONLY BE BORN BUT TO THRIVE AND CONTINUE TO LIVE UN-CORRECTED BY EITHER DEFENSE COUNSEL OR BY THE STATE. CONTINUING TO ALLOW A MAN WHO IS INNOCENT BY THE STATES OWN 'REPORT' TO SIT IN PRISON WITH A LIFE SENTENCE. THAT THEY HAVE A DUTY TO CORRECT.

3) COUNSEL ALLOWED PETITIONER TO BE PREJUDICED AT THE SENTENCING HEARING BY THE COMMENTS AND THE INAPPROPRIATE INTERJECTIONS OF MISREPRESENTED FACTS ON THE PART OF ADA VILORIA. COUNSEL ALLOWED THEM TO GO UNCHALLENGED. TRUE DEFENSE COUNSEL DID OBJECT TO THE ALLEGATIONS OF DEFENDANT BEING THE REASON ASHLEY V. IS INCARCERATED (pg 50 /12-17); AND ADA VILORIA'S REFERAL TO THE INCIDENT AND SURROUNDING CIRCUMSTANCES PERTAINING TO COUNT TWO WITH REGARDS TO JESSICA H.'S TESTIMONY AT THE PRELIMINARY HEARING (pg 50 /19-24); ALSO COUNSELING ATTENDANCE WITH STEVEN ING. (pg 51 /5-7); AND FINAL OBJECTION WAS TO THE CONTRADICTING THE REASON COUNT V OF BJC 2007-033884 WAS DISMISSED (pg 51 /8-18) (ALL PART IV)

BUT AT NO POINT DID COUNSEL CORRECT ADA VILORIA'S MISREPRESENTATION OF CRUCIAL FACTS. FOR EXAMPLE ON pg 51 /19-24 ADA VILORIA STATES "MR DUNCKLEY REFERS TO HER THROUGHOUT DR. STUYVESANTS REPORT. SHE IS THE ONE HE ATTACKED ON THE HOOD OF A CAR. WHO HE CLAIMS HAD CONSENTUAL SEX, BUT HE PUT HIS PENIS IN HER MOUTH". BUT THE REPORT OF DR. STUYVESANT PETITIONER ONLY REFERS TO LORA ONLY ONCE (pg 8 IV) A FAR CRY FROM 'THROUGHOUT', PLUS IN THE POLICE REPORT FOR THAT INCIDENT RPD 05-34027 (SEE pg 1-11 IV) NO WHERE IS THERE THE ALLEGATION TO ORAL SEX, OR PETITIONER PUTTING 'HIS PENIS IN HER MOUTH'. COUNSEL FAILED TO OBJECT TO THAT OR TO; ALL THE REFERENCES MADE TO A NON-EXISTANT CRIMINAL HISTORY, EXCEPT IN THE MIND OF ADA VILORIA. (PET pg 43/24-44/6) 46/4-6; pg 49/19-24 pg 50 /23). STATING PETITIONER HAD BEEN ACTIVELY PERSUED

BY THE STATE FOR TEN YEARS BUT 'AVOIDED PROSECUTION BECAUSE OF THE VICTIMS HE HAS CHOSEN" (Ps 46 l7-8) STILL NO OBJECTION BY DEFENSE COUNSEL. (PART III)

ADA VILORIA SHOULD HAVE REMEMBERED, BUT SO SHOULD DEFENSE COUNSEL THAT NO RULE GOVERNING ORAL ARGUMENTS IS MORE FUNDAMENTAL THAN THAT REQUIRING COUNSEL TO CONFINE REMARKS TO MATTERS IN EVIDENCE, STATING FACTS THAT ARE NOT IN EVIDENCE IS CLEARLY IMPROPER. THE CONDUCT AND COMMENTS BY THE PROSECUTOR ADA VILORIA WERE INDEED IMPROPER AND WOULD SERVE NO PURPOSE OTHER THAN TO AROUSE THE EMOTIONS OF THE JUDGE AND TO PREJUDICE THE PETITIONER IN HER EYES AND MIND.

DAVID C. O'MARA AS DEFENSE COUNSEL HAD AN OBLIGATION TO OBJECT TO COMMENTS OR ACTIONS BY OPPOSING COUNSEL WHENEVER THIER EFFECT MAY BE CONSIDERED TO BE PREJUDICIAL OR OTHERWISE DESERVING OF AN OBJECTION OR PERHAPS A REQUEST FOR ADMONITION BY THE JUDGE. FAILURE TO DO SO IN ITSELF COULD BE DEEMED A FAILURE TO UPHOLD THE SPIRIT OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRING EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING AS IN EVERY PHASE TO BE ZEALOUS NOT MERELY PERFUNCTORY OR PRO FORMA REPRESENTATION.

BY COUNSEL ALLOWING THE INAPPROPRIATE AND PERSONAL INTERJECTED COMMENTS AND ALLEGATIONS NOT SUPPORTED BY RECORD OR EVIDENCE AND BY NOT OBJECTING, COUNSEL DISPLAYED EXAMPLES AND BEST EVIDENCE OF HIS INEXPERIENCE, OR INCOMPETANCY, OR INEFFECTIVENESS, OR ALL

THREE. NO MATTER WHICH TERM IS SUPPORTED OR USED., HIS STANDING BY SILENTLY, SATISFIES ONE CRITERIA OF INEFFECTIVE ASSISTANCE OF COUNSEL. NO OTHER COMPETENT ATTORNEY WOULD HAVE STOOD BY AND FAILED TO OBJECT, ALLOWING SUCH OBVIOUS PREJUDICING TO OCCUR TWOARDS THIER CLIENT. THAT WOULD ALSO SATISFY THE SECOND 'PRONG' OF THE STRICKLAND TEST. THAT BEING WAS THE PETITIONER PREJUDICED? WELL THE INAPPROPRIATE COMMENTS AND LACK OF PROTECTION FROM COUNSEL CERTAINLY DID NOT HELP AND/OR BENIFIT PETITIONER. SO AS SET FORTH IN STRICKLAND V. WASHINGTON BOTH 'PRONGS' ARE MET BY THIS ACTION OR LACK THEREOF WARRENTING RELIEF IN THE REVERSIAL OF PETITIONERS GUILTY PLEA MEMORANDUM.

4) PETITIONER WAS DENIED ADEQUATE REPRESENTATION IN REGARDS TO THE IMPORTANCE OF ATTORNEY-CLIENT CONSULTATION. SINCE DAVID C. O'MARA WAS ASSIGNED BY THE COURTS TO REPRESENT PETITIONER ON MAY 7, 2007, COUNSEL FAILED TO CONTACT PETITIONER PRIOR TO THE PRELIMINARY HEARING. THE FIRST MEETING OCCURED TEN MINUTES PRIOR TO THE HEARING ON JULY 2, 2007. WITH THE EXCEPTION OF A FEW BRIEF PHONE CALLS, THE TEN MINUTES IS FAR FROM ADEQUITELY ENOUGH TIME TO ESTABLISH A SOLID "GAME PLAN" LEGALY SPEAKING. CONSIDERING THE IMPORTANCE DUE TO THE FACT THAT OUT OF THE SEVEN CHARGES IN RSC 2007-033884 FIVE OF THEM CARRIED THE POSSIBILITY OF LIFE IN PRISON. YET NO CONSULTATION WAS MADE BEFORE THE PRELIMINARY HEARING. WE LITERALLY WALKED IN BLIND DUE TO THE INADEQUATE PREPARATION OF COUNSEL.

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5) TRIAL COUNSEL FAILED TO ACT ON BEHALF OF HIS CLIENTS BEST INTEREST BY NOT ENTERING A MOTION TO BIFURCATE THE CHARGES OF COUNT ONE AND OF COUNT TWO OF THE ORDER OF CONVICTION. DUE TO THE FACT TO ALLOW THE CHARGES TO BE TRIED TOGETHER WOULD BE PREJUDICIAL TO THE PETITIONER. IN ADDITION THE VAST TIME FRAME BETWEEN THE ALLEGATIONS AND CHARGES WOULD WARRENT A SEVERANCE OF THE CHARGES. ANY COMPETANT KNOWLEDGEABLE ATTORNEY WOULD HAVE SEEN THE NEED TO DO SUCH. ALSO FOR THE FACT THAT THE STATE WOULD ATTEMPT TO BOOTSTRAP THE CASES TO ALLOW THE EVIDENCE IN ONE COUNT TO CLOUD THE LACK OF ANY EVIDENCE IN THE OTHER, AND VISA VERSA.

6) THE PETITIONER WAS PREJUDICED BY THE ACTIONS OF COUNSEL IN REGARDS TO BOTH HIS FAILURE TO INTERVIEW EITHER ASHLEY V. OR JESSICA H.. FOR WITHOUT A INDIPENDENT INTERVIEW HOW COULD COUNSEL HAVE MADE BEST USE OF SUCH MECHANISMS AS EFFECTIVE CROSS-EXAMINATION". BUT COUNSEL BY FAILING TO INTERVIEW OR REQUIRE THE 'VICTIMS' TO UNDERGO PSYCHOLOGICAL EXAMINATIONS AGAIN SHOWED HIS PERSONAL LEGAL STRATEGY TO HAVE NO NEED TO CROSS EXAMINE THE WITNESSES/VICTIMS BECAUSE HE HAD NO INTENTION ON GOING TO TRIAL. ALL HIS CONDUCT AND ACTIONS PROVE HE WAS SIMPLY WAITING FOR A DEAL, TO CONVICT HIS CLIENT. FAR CRY FROM THE EFFECTIVE ASSISTANCE OF COUNSEL ACTING AS A SUPPORTING AND GUIDING HAND THROUGH THE ADVERSARIAL 'MINE FIELD' CALLED THE JUDICIAL SYSTEM, THAT ALL CITIZENS OF THE UNITED STATES ARE GUARENTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

7) DEFENSE COUNSEL FAILED TO ACT AS A ADVOCATE FOR HIS CLIENT BY NOT EFFECTIVELY CROSS-EXAMINING DETECTIVE TOM BROOM IN REFERANCE TO HIS RELEASING ALL THE CRIMINAL COMPLAINTS IN CONNECTION TO RSC CASE NUMBER 2007-033884, TO KENNETH BALLARD'S LAW OFFICE ON MAY 25, 2007. AT NO POINT DID COUNSEL USE THE EVIDENCE OF THE RELEASE OF THE REPORTS TO SHOW ISSUES OF CREDIBILITY AND POSSIBLE EXISTING ANIMOSITY OR UNDERLYING HOSTILITY TWOARDS THE PETITIONER. BECAUSE THERE IS NO VALID OR JUSTIFIABLE REASON TO HAVE RELEASED CONFIDENTIAL CRIMINAL COMPLAINTS IN REFERANCE TO CHARGES, THAT HAVE YET TO BE FOUND TO ESTABLISH, OR POSSESS PROBABLE CAUSE TO WARRENT THEM BEING BOUND OVER FOR TRIAL. THE PETITIONER AT THE POINT OF RELEASE WAS STILL ENTITLED TO THE OPINION OF INNOCENT UNTIL PROVEN GUILTY. (PART II PG 10-11)

SO AN EFFECTIVE ADVASARY TO THE STATE WHO IS DILIGENTLY FIGHTING TO CLEAR THE RECORD IN BEHALF OF HIS CLIENT WOULD HAVE SEEN NOTHING MORE THAN A MALICIOUS ATTEMPT ON THE PART OF DETECTIVE BROOME TO HARM AND JUDICIALY INJURE THE PETITIONER IN A CIVIL MATTER IN A COMPLETLY DIFFERENT STATE. NAMELY A CIVIL CUSTODY HEARING AT WHICH KENNETH BALLARD REPRESENTED PETITIONERS EX-WIFE. THERE WAS NO SUPPENA FOR THE REPORTS, AS PETITIONER WOULD HAVE BEEN ISSUED A COPY BEING THAT HE IS PRO PER IN THE REFERENCED CASE. SO THERE IS

NO OTHER REASON THAN TO INTENTIONALLY HARM AND PRESUDICE THE PETITIONER. THAT VERY ACTION ALONG WITH HIS FAILURE TO ISSUE THE PETITIONERS MIRANDA RIGHTS AT THE INTEROGATION ON MARCH 20, 2007 AT R.P.D. SEX CRIMES UNIT, OR HIS BLANTENT DISREGARD FOR PETITIONERS RIGHT TO HAVE A LEVEL OF PRESUMPTION OF PRIVACY IN HIS OWN HOME. BY DETECTIVE TOM BROOME SERRETLY RECORDING A CONVERSATION WITH PETITIONER IN HIS OWN HOME. VIOLATING BOTH HIS FIFTH AMENDMENT AND FOURTH AMENDMENTS RIGHTS. ALL THESE ISSUES AND VIOLATIONS OF PETITIONERS DUE PROCESS RIGHTS WERE BROUGHT TO THE ATTENTION OF DEFENSE COUNSEL DAVID C. O'MARA. BUT AT NO POINT DID HE BRING ANY OF THESE SERIOUSLY RELEVANT VIOLATIONS UP AT THE CROSS-EXAMINATION ON JULY 2, 2007 PRELIMINARY HEARING (SEE PGS 110-116 II). NOR AFTERWARDS. HE FAILED TO ENTER A MOTION TO SUPPRESS PETITIONERS STATEMENTS AND INTERVIEW / INTEROGATION ON GROUNDS OF FOURTH AND FIFTH AMENDMENT VIOLATIONS, ANY ATTORNEY PRACTICING ABOVE THE STANDARD LEVEL OF CONDUCT WOULD HAVE SEEN GROSS ISSUES IN THE ADMITANCE OF DETECTIVE TOM BROOMES TESTIMONY AS WELL AS HIS HANDLING OF ALL INTERVIEWS WITH THE ALLEGED VICTIMS AND ALL RELEVANT EVIDENCE. BY HIS SHOWING MALICE, AND DISPLAYING A OBVIOUS DISTAIN FOR THE PETITIONER IT CASTS A LARGE SPOTLIGHT OF DOUBT AS TO HIS CREDIBILITY IN REGARDS THE CASE, AND HIS HANDLING OF IT. YET COUNSEL FEEL EXTREMLY SHORT IN PURSUING AN ADEQUATE CROSS-EXAMINATION

8) Counsel for defense, David C. O'Mara, showed a large lack of legal knowledge by initialing and incouraging / recommending client to inital, and also to allow the addition of the line " INCLUDIN ALL COUNTS FILED AND DISMISSED IN RJC CASE NUMBER 2007-033884" (p. III 13/ par. 7) to the Guilty Plea Memorandum. When adequate knowledgeable legal counsel would have and should have known that Due Process Prohibits the Refiling of charges that have been Dismissed by the courts on the grounds of insufficien evidence. Unless the prosecution can prove that new evidence previously unavailable has surfaced, or if they (the state) can show that good cause exists to justify the refiling of the charges.

David C. O'Mara was present at the Preliminary Hearing on July 2, 2007, so he was aware that all the counts and charges dismissed in that case were done so for lack of the state to prove probable cause with insufficient evidence. The state failed to show or prove the most basic requirement of a criminal charge. Now with being present, and to assume he has the adequate legal expertise needed to defend a criminal defendant, why did he allow both the addition of the line and his signature and his client to be added to that deal. Except an experienced attorney would have known the addition to be a misrepresentation of law and a obvious attempt to give the petitioner a false sense of benifit.

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9) COUNSEL FAILED TO EVER PRESENT PETITIONER WITH ANY TYPE OF DEFENSE STRATAGY. ALL THE WHILE SIMPLY WAITING FOR A DEAL, AS IS OBVIOUS BY HIS FEELING NO NEED, RELEVANCE, OR DESIRE TO PREFORM THE MOST BASIC TRIAL PREPERATION, THAT OF INTERVIEWING OR INVISTIGATING THE STATES CASE AND WITNESSES. BY APPLYING THAT STYLE OF 'STRATAGY' IT DID NOTHING BUT WORK IN FAVOR OF THE STATE AND THE DETRAMENT OF PETITIONER. BY THE DEFENSE COUNSEL ACTING IN SUCH A MANNER TO LACK ANY STRATAGY IT ACTED MORE ADVESARIAL TO THE PETITIONER THAN TO THE STATE HIS PROPER 'TARGET.' THE ACT OF NOT EVEN ATTEMPTING TO FIGHT THE CASE HE FAILED AND DEPRIVED THE PETITIONER OF HIS RIGHT TO ADEQUATLEY FIGHT HIS CASE.

ADEQUATE AND EFFECTIVE COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS IMPLY THAT COUNSEL CAN NOT SIMPLY STAND BY AND DO NOTHING. BY JUST GOING THROUGH THE MOTIONS CAN AMOUNT TO A CLEAR VIOLATION OF PETITIONERS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND ALSO THAT OF DUE PROCESS, AS WAS THE CASE HERE.

10) COUNSEL DAVID C. O'MARA'S ACTIONS PREJUDICED PETITIONER BY HAVING THE STATES 'OFFER' OR GUILTY PLEA MEMORANDUM SINCE FEBRUARY 28, 2008 BUT FAILED TO INFORM PETITIONER UNTIL THE MORNING OF MARCH 6, 2008 THE MORNING OF THE HEARING TO CONFIRM TRIAL. BY THE

DELAY ON THE PART OF COUNSEL, EITHER BY NEGLIGENCE, OR INTENT IT DENIED THE PETITIONER THE ABILITY TO MAKE A FULLY INFORMED AND EDUCATED DECISION. TO ALLOW THE PETITIONER THE ADEQUATE TIME NEEDED TO MAKE SUCH A SERIOUS AND WEIGHTED DECISION. PREVENTING THE PETITIONER THE NECESSARY OPTION TO TAKE IT HOME AND FULLY DISCUSS AND WEIGH THE PROS AND CONS OF THE ACCEPTANCE OR REJECTION OF THE 'DEAL' WITH PETITIONERS WIFE, WHO HAD A SUBSTANTIAL STAKE IN THE ULTIMATE OUTCOME OF THE CASE. YET A MERE THIRTY (30) MINUTES IS FAR FROM ENOUGH TIME, WHEN LIFE IMPRISON HANGS IN THE BALENCE

BUT COUNSEL CLAIMED OR ATTEMPTED TO COVER-UP THIS INADAQUATE REPRESENTATION ON HIS PART BY ADDING THE COMMENT "WE DISCUSSED NUMEROUS TIME BEFORE YOU SIGNED THE GUILTY PLEA MEMORANDUM WHAT THE RAMIFICATIONS WOULD BE IF YOU PLEAD GUILTY PURSUANT TO THE DISTRICT ATTORNEY'S OFFER" (Letter 3/9/09 SEE pgs 36-38 Ⅴ). BUT THAT FEEBLE ATTEMPT TO COVER UP HIS INCOMPETANCE BY NOT EVEN PRESENTING PETITIONER WITH THE DEAL UNTIL THE LAST POSSIBLE MOMENTS PRIOR TO COURT. SO WHEN WAS THERE ADAQUATE TIME TO "DISCUSS NUMEROUS TIME"?

COUNSEL'S FAILURE IN THIS ACTION BY LITERALLY WAITING TILL THE LAST MOMENTS COUPLED WITH THE AS OF YET NON-EXISTANT LEGAL STRATAGY ALL CUMULATED INTO THE PETITIONER BEING DENIED THE ABILITY TO MAKE AN ADEQUATE INFORMED DECISION.

11) STILL ANOTHER EXAMPLE OF COUNSELS DEFICIENT, PROFUNCTORY, PRO FORMA REPRESENTATION OF SIMPLY GOING THROUGH THE MOTIONS, IS SHOWN BY HIS OBVIOUS FEELING THAT THE PETITIONERS CASE DOES NOT DESERVE HIS COMPLETE FOCUS AND ATTENTION. ANY OTHER ZEALOUS ADVOCATE WOULD NEVER FILE AN AFFIRMATION WITH THE WRONG CASE NUMBER REFERENCED ON IT. LET ALONE THREE (3). BUT THAT IS EXACTLY WHAT DEFENSE COUNSEL O'MARA DID. ON SEPTEMBER 8, 2008 IN THE 'NOTICE TO APPEAL' FOR CASE NUMBER CR07-1728, HIS FILED AFFIRMATION HAD THE CASE NUMBER CR07-1096. (pg 1-6 V) AGAIN ON OCTOBER 13, 2008 WHEN FILING THE 'REQUEST FOR ROUGH DRAFT TRANSCRIPTS' THE ATTACHED AFFIRMATION DID NOT HAVE CR07-1728 WHICH WAS PETITIONERS CASE NUMBER BUT REFERENCED CR03-P0380 YET ANOTHER COMPLETLY DIFFERENT CASE. THAT ONE WAS FOUR YEARS OLD. A FINAL EXAMPLE OF HIS CLEAR LACK OF ATTENTIVE BEHAVIOR IS FROM THE VERY NEXT DAY WITH THE FILING OF THE 'NOTICE OF ROUGH DRAFT TRANSCRIPT REQUEST' FILED WITH THE NEVADA SUPREME COURT IN CASE NUMBER 52383, BUT THE AFFIRMATION ATTACHED TO THE NOTICE WAS REFERENCED TO CASE NUMBER 52330.

ONE SUCH MISTAKE CAN BE UNDERSTOOD, BUT THREE SEPERATE ERRORS SHOWS CARELESSNESS AND GROSS NEGLAGANCE TO SEE THAT THE CASE IS IN FACT HANDLED IN A PROFESSIONAL STANDARD ABOVE THE BAR AND FREE FROM REPROACH USED TO JUDGE THE COMPETANT LEVEL OF BASIC PREFORMANCE NEEDED AND EXPECTED TO BE SHOWN DOWN TO THE MINUTE DETAILS REQUIRED OF ATTORNIES.

DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL. BECAUSE OF APPELLATE COUNSEL'S ERRORS, WHICH FELL BELOW THE STANDARDS FOR THE EFFECTIVE ASSISTANCE OF COUNSEL, PETITIONER IS IMPRISONED IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

12) APPELLATE COUNSEL WAS INEFFECTIVE FOR ONLY SUBMITING A ONE TOPIC - TWO AND A HALF PAGE BRIEF. NOT COVERING THE OBVIOUS MISCONDUCT ON THE PART OF ADA VILORIA AT THE SENTENCING HEARING - BY HER INTERJECTING HARMFUL PREJUDICIAL COMMENTS IN REGARDS TO PETITIONERS CRIMINAL HISTORY THAT DID / DOES NOT EXIST. (pg 43&44/1-5; ps. 46 / 49/13;16 AND 50/23), WHERE THE STATE CLAIMED THE PETITIONER IN FACT HAD AN EXTENSIVE AND EXCESSIVE HISTORY OF ATTACKS AND INAPPROPRIATE BEHAVIOR, AVOIDING PROSECUTION BECAUSE OF THE VICTIMS HE HAS CHOSEN' (pg. 46/7-8) (PART III)

COUNSEL O'MARA FAILED TO BRING UP ANY OF THE ILLEGAL INTENTIONAL PROSECUTORIAL INTERFERING PREJUDICING THE PETITIONER AND THE SUBSEQUENT SENTENCING EVEN WENT AS FAR AS TO SAY 'I DONT BELIEVE YOU HAVE ANY APPEALABLE ISSUES IN THIS CASE.' (SEE pg 25 V) IT IS RELEVANT TO NOTE THE DATE OF THAT LETTER, BEING AUGUST 6, 2008 JUST ONE DAY AFTER THE PETITIONER WAS SENTENCED. WARRENTING THE QUESTION

JUST HOW HARD DID PETITIONERS COUNSEL LOOK TO SEE AND REVIEW THE CASE FOR ACTUAL APPEALABLE ISSUES? THAT IS SIMPLY ANOTHER EXAMPLE. HIS CONDUCT AND ACTIONS FELL BELOW THE BAR OF STANDARDS, TO OVERTLY IGNORE SUCH AN OBVIOUS VIOLATION THAT IS PRACTICALLY SLAPPING ANY COMPETANT ATTONEY IN THE FACE, SHOWS DAVID C. O'MARA'S INCOMPETANCE, AND FAILING TO REACH THE BAR OF STANDARD CONDUCT. NOT EVEN CONSIDERING IT AS A GROUND IS A OBVIOUS LACK OF KNOWLEDGE AND EXPERIENCE. EVEN IF IT WAS REJECTED AS A GROUND AFTER FILING IT IN AN APPEAL, AT LEAST THE ATTEMPT WOULD HAVE BEEN MADE. BUT THAT CAN NOT BE SAID FOR THIS CASE, WE WILL NEVER KNOW. ALL THE WHILE COUNSEL CONTINUED TO IGNORE HIS DUTY TO ADEQUATLEY FIGHT AS AN ADVOCATE FOR THE PETITIONER, HIS CLIENT.

13) APPELLATE COUNSEL DAVID C. O'MARA'S ACTIONS FELL BELOW THE STANDARD LEVEL OF COMPETANCE AND KNOWLEDGE THAT ATTORNEYS PRIDE THEMSELVES IN MAINTAINING IN REGARDS TO AN INCOMPETANT ERROR NO REASONABLY COMPETANT ATTORNEY ACTING AS A DILIGENT CONSCIENTIOUS ADVOCATE WOULD HAVE MADE. THE AGREGIOUS ERROR TO TAKE NOTE OF IS THE FACT THAT COUNSEL RUSHED TO FILE AN APPEAL HE KNEW LACKED ANY MERIT AS PREVIOUSLY COMMENTED ON, A PERFECT EXAMPLE OF HIS OBLIVIOUS KNOWLEDGE THAT IS NEEDED TO REPRESENT PETITIONER PROPERLY IN AN APPEAL WAS DISPLAYED ON NOVEMBER 19, 2008, WITH COUNSEL'S

FILING OF THE FAST TRACK APPEAL WITH THE NEVADA SUPREME COURT. (SEE Pg 28/29 V)

THE FILING SHOWS INADAQUATE KNOWLEDGE OF LAW IN REGARDS TO SENTENCES, CRIME, SEVERITY, AND APPEALS. AS NOTED IN NEVADA RULES OF APPELLATE PROCEDURE (NRAP) RULE 3C (a)(1) IT STATES:

"(a) ... UNLESS A COURT OTHERWISE ORDERS, AN APPEAL IS NOT SUBJECT TO THIS RULE IF:

(1) THE APPEAL CHALLENGES AN ORDER OR JUDGEMENT IN A CASE INVOLVING A CATAGORY 'A' FELONY, AS DEFINED IN NRS 193.130 (2)(a), IN WHICH A SENTANCE OF DEATH OR IMPRISONMENT IN THE STATE PRISON FOR LIFE WITH OR WITHOUT THE POSSIBILITY OF PAROLE IS ACTUALLY IMPOSED"

ANY REASONABLY COMPETANT, EDUCATED AND KNOWLEDGABLE ATTORNEY WOULD HAVE KNOWN THAT A FAST TRACK APPEAL IS NOT THE PROPER AVENUE FOR THE CASE AT BAR. BUT THAT COSTLY MISTAKE COST THE PETITIONER VALUABLE TIME, THAT WAS TOLLING FOR AN APPEAL. IT TOOK THE NEVADA SUPREME COURT TO CORRECT AND TO EDUCATE THE COUNSEL AS NOTED IN THE LETTER TO PETITIONER DATED JANUARY 23, 2009 WHERE COUNSEL SAYS " BECAUSE YOUR SENTENCE WAS FOR A LIFETIME SENTENCE, THE COURT RETURNED YOUR FAST TRACK APPEAL AND REQUIRED ME TO FILE A FULL BLOWN APPEAL BRIEF." (SEE pg 35 V) WHEN APPEALING A SENTENCE CARRING LIFE 'TO LEARN AS YOU GO' IS NOT WHAT THE CONSTITUTION MEANT BY EFFECTIVE ASSISTANCE OF COUNSEL.

14) IT SHOULD BE NOTED THAT APPELLATE COUNSEL AND 'TRIAL' COUNSEL WERE ONE AND THE SAME, COURT APPOINTED CONFCICT ATTORNEY DAVID C. O'MARA. THAT IS RELEVANT TO BRING UP FOR PETITIONER WAS CONSIDERED TO BE INDIGENT BY THE COURTS WHEN HE WAS NOT IN CUSTODY. SO WHY WOULD COUNSEL FEEL THAT THE SUBSEQUENT INCARCERATION HAD CHANGED OR IMPROVED PETITIONER'S FINANCIAL STATUS.

WHEN PETITIONER ASKED COUNSEL FOR COPIES OF HIS FILE TO AID AND ASSIST IN THE APPEAL, THE COUNSEL RESPONDED NUMEROUS TIMES NOT WITH THE REQUESTED DOCUMENTATION BUT A LETTER REQUESTING / DEMANDING THAT PETITIONER PROVIDE HIS OFFICE WITH ONE HUNDRED DOLLARS ($100.00) IN ORDER TO SUPPLY PETITIONER WITH THE REQUESTED DOCUMENTATION. (SEE pgs. 2629, 30 V). ALSO COMMENTING THAT COUNSEL HAD PREVIOUSLY PROVIDED THE DOCUMENTS FOR PRELIMINARY HEARING AND DISCOVERY. WHEN PETITIONER WAS NOT IN CUSTODY. IN CUSTODY THE ONLY WAY THAT THE PETITIONER CAN OBTAIN THE NEEDED DOCUMENTS WAS FROM COUNSEL.

BY THE COUNSELOR REFUSING TO PROVIDE ANY REQUESTED DOCUMENTS, HE PREJUDICED THE PETITIONER FROM HAVING AN ADAQUATE SAY AND PARTICIPATION IN HIS APPEAL. NAMELY LEAVING IT TO THE FULL DISCRETION OF COUNSEL WHO HAS ALREADY PROVED HIS GROSS INCOMPETANCE.

15) COUNSEL FAILED TO RAISE ANY ISSUES ON APPEAL THAT PETITIONER HAD VOICED A CONCERN FOR IN A

LETTER TO COUNSEL DATED FEBRUARY 5, 2008. (SEE PS 9,10 V).
PETITIONER RAISED CONCERNS AS TO THE MATTER OF
THE STATE TO SUCCESSFULLY TOLL THE STATUTES OF LIMITATION
AS SET FORTH IN NRS 171.095 UP UNTIL ASHLEY V.'S
TWENTY-FIRST (21) BIRTHDAY. NOTING THAT TO ALLEDGE THE
CRIME BEING COMMITTED IN A 'SECRET MANNER' THE
STATE HAS A DUTY TO PROVE THAT FACT BY A PREPONDERANCE
OF EVIDENCE. OR IN OTHER WORDS THAT A CRIME TO GO UND-
ISCOVERED AND BE CONSIDERED. DONE IN A 'SECRET MANNER'
SO LONG AS SILENCE IS INDUCED BY THE WRONGDOERS THREATS
OR COERSION.
AT THE ORIGINAL AMENDED CHARGES FILED ON APRIL
16, 2007 IN RJC CASE NUMBER 2007-033884 COUNT VII (7)
WAS SEXUALLY MOTIVATED COERSION. BY MR. CLIFTON'S OWN
COMMENTS THE STATE HAD NO EVIDENCE TO PROVE THE CHA-
RGE OF SEXUALLY MOTIVATED COERSION, SO IT WAS SUMARIALLY
DISMISSED. (SEE PS 117-18/2/19TT). SO PETITIONER ALEDGED TO COUNSEL
THAT ONCE THE STATE DISMISSED THE CHARGE OF COERSION THE
STATUTE OF LIMITATIONS IN NRS 171.095 CEASED TO BE THE
STATUTE OF LIMITATION AT BAR AND SUBSEQUENTLY NRS 171.085
BECAME THE STATUTE OF LIMITATIONS OF PRECIDENT. SO WITH
THAT BEING THE CASE THE STATE HAD THREE - FOUR YEARS
TO BRING A COMPLAINT / INDICTMENT FOWARD WITH COUNTS I, II,
III AND IV. BECAUSE THEY FAILED TO DO SO BY 2001-2003
IT PROVED THAT THOSE COUNTS WERE PROSECUTORIALLY BARED BY
THE STATUTES SET FORTH BY LEGISLATURE. BUT COUNSEL FAILED
TO ADD THIS REQUEST. IN HINDSIGHT COMPARED TO THE INADAQUATE
APPELLATE GROUND COUNSEL DID FILE THIS SUGGESTION IN THE

LEAST CARRIED MORE MERIT.

16) PETITIONER CONTINUED TO BE PREJUDICED BY APPELLATE COUNSEL'S DISREGARD FOR THE PETITIONER AND SHOWING HOW IMPORTANT HE FELT THE PETITIONERS CASE TRULY MEANS TO HIM AS A SINGLE ACT OF LAZINESS OR IN THE OBVIOUS ACT OF JUST PLAIN NOT CARING. BY THE LETTER INFORMING PETITIONER OF THE ORDER OF AFFIRMATION BY THE NEVADA SUPREME COURT DATED MAY 12, 2009 (SEE pg 39 IV WAS NOT MAILED UNTIL TEN(10) DAYS LATER ON MAY 21, 2009 (SEE pg 40 IV). COSTING THE PETITIONER VALUABLE TIME OF THE ONE YEAR WINDOW PETITIONER HAS FOR HIS WRIT OF HABEAS CORPUS.

AN INTERESTING CONTRAST WAS WHEN COUNSEL WAS TERMINATED BY LETTER SENT JUNE 8, 2009 (SEE 53-57 IV) HE WASTED NO TIME IMMEDIATLY SUBMITTING A WITHDRAWAL OF ATTORNEY OF RECORD THE SAME DAY HE RECEIVED THE LETTER, HAVING ABSOLUTLY NO TROUBLE FINDING THE MAILBOX THE VERY NEXT DAY. PETITIONER FINDS IT HUMOROUS THAT WHEN IT BENEFITS COUNSEL THE MAILBOX IS NOT HARD TO FIND, TO BAD THAT SAME ZEALOUS BEHAVIOR WAS NOT SHOWN TOWARDS THE ENTIRE HANDLING OF PETITIONERS CASE;

THE SIXTH AMENDMENT IMPOSES ON COUNSEL THE IMPORTANCE OF THE DUTY TO INVESTIGATE. BECAUSE REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL MUST BE BASED ON PROFESSIONAL DECISIONS AND INFORMED LEGAL CHOICES AND ADVICE CAN ONLY BE MADE AFTER AN INVESTIGATION OF ALL THE OPTIONS, FACTS, CIRCUMSTANCES AND LAW PERTAINING TO A CHARGE. ONLY AFTER SUCH

INVESTIGATION CAN IT BE SAID THAT INFORMED, EDUCATED ADVISE WAS GIVEN IN WHETHER TO ACCEPT A DEAL AND TO PLEAD ACCORDINGLY. WITHOUT SUCH INVESTIGATION, ADVISE OF COUNSEL CAN NOT BE CONSIDERED EFFECTIVE AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ALL ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, CAN NOT REASONABLY BE PRESUMED TO BE THE RESULT OF ANY TACTICAL, OR STRATGIC CHOICE WITHIN THE RANGE OF REASONABLE ATTORNEY COMPETANCE. RATHER, THE DEFECTS WERE THE DIRECT RESULT OF COUNSEL, DAVID C. O'MARA'S LACK OF PREPERATION, INVESTIGATION, EXPERIENCE, KNOWLEDGE AND OF SKILL. CUMULATIVE AND SINGULARLY COUNSEL'S FALLING BELOW THE BAR OF WHICH COMPETANT ATTORNEY STANDARDS ARE JUDGED, RESULTED IN BOTH PREJUDICE OF THE PETITIONER AND A MANIFEST INJUSTICE. SPECIFICALLY THE ERRORS ALLEGED IN THIS GROUND DEPRIVED THE PETITIONER OF A FAIR AND JUST TRIAL OR OPTION FOR A TRIAL WITH A CONSTITUTIONALLY RELIABLE OUTCOME AND RELIABLE RESULT.

SUPREME COURT OF THE STATE OF NEVADA

BRANDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA and JACK PALMER, Warden,

Respondents.

Case Nos. 59957 & 59958

APPELLANT'S APPENDIX

Appeal from Denial of Motion to Withdraw Pleas and Denial of Petition for Writ of Habeas Corpus

Second Judicial District

Robert W. Story
Story Law Group
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(775) 284-5510

Attorneys for Appellant Brendan Dunckley

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Attorneys for Respondents the State of Nevada and Jack Palmer

Document	Pages
Amended Information	AA000005-000008
Answer to Petition	AA000184-000186
Findings of Fact, Conclusions of Law and Judgment	AA000361-000367
Guilty Plea Memorandum	AA000009-000015
Information	AA000001-000004
Judgment	AA000032-000033
Motion to Withdraw Guilty Plea	AA000187-000201
Notices of Appeal	AA000348-000368
Opposition to Motion to Strike	AA000202-000204
Order of Affirmance	AA000090-000093
Order Denying Motion to Withdraw Guilty Pleas	AA000353-000354
Petition for Writ of Habeas Corpus	AA000094-000170
Response to Opposition to Motion to Withdraw	AA000205-000218
Supplement in Consideration of Motion to Withdraw	AA000219-000225
Transcript of Arraignment	AA000016-000031
Transcript of Evidentiary Hearing	AA000226-000346

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DATED: June 25, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story .

ROBERT W. STORY, ESQ.
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Story Law Group
245 E. Liberty Street, Suite 530
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Attorneys for Appellant Brendan Dunckley

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:

Terrance P. McCarthy
Counsel for the State of Nevada.

Attorney General
Catherine Cortez Masto

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

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

1/17

DA # 373085

RPD RP07-009446, RPD RP05-034027

FILED

2007 JUL 12 PM 2:42

RONALD A. LONGTIN, JR.

BY J. Ames DEPUTY

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Attorney for Plaintiff

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

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR07-1728

Dept. No. 4

BRENDAN DUNCKLEY,

Defendant.

_____/

INFORMATION

RICHARD A. GAMMICK, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that BRENDAN DUNCKLEY, the defendant above named, has committed the crimes of:

COUNT I. SEXUAL ASSAULT ON A CHILD, a violation of NRS 200.366, a felony, (F1000) in the manner following:

That the said defendant on or between the 14th day of August A.D., 1998, and the 13th day of August A.D., 2000, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully subject ASHLEY V., a female child under the age of fourteen years,

having a date of birth of August 14, 1986, to sexual penetration, against the victim's will or under conditions in which the defendant knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct, to wit, sexual intercourse, in a parking lot at or near Longley Lane, Reno, Washoe County, Nevada;

or in the alternative,

COUNT II. LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, a violation of NRS 201.230, a felony, (F650) in the manner following:

That the said defendant on or between the 14th day of August A.D., 1998, and the 13th day of August A.D., 2000, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, and lewdly commit a lewd or lascivious act upon or with the body of ASHLEY V., having a date of birth of August 14, 1986, a female child under the age of fourteen years at the time that the said act was committed, in that the said defendant engaged the victim in sexual intercourse at or near Longley Lane, Reno, Washoe County, Nevada, and/or put his hand down her pants to fondle her genital area in an elevator at the Atlantis Hotel and Casino, 3800 South Virginia Street, Reno, Washoe County, Nevada, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child;

or in the alternative,

///

COUNT III. STATUTORY SEXUAL SEDUCTION, a violation of NRS 200.364 and NRS 200.368, a felony, (F1010) in the manner following:

That the said defendant on or between the 14th day of August A.D., 1998, and the 13th day of August A.D., 2000, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully, being over 21 years of age, commit an act of statutory sexual seduction with the person of ASHLEY V., having a date of birth of August 14, 1986,, who was then and there under the age of 16 years, in that the said defendant engaged in an act of sexual intercourse with the said ASHLEY V. in a parking lot at or near Longley Lane, Reno, Washoe County, Nevada.

COUNT IV. SEXUAL ASSAULT, a violation of NRS 200.366, a felony, (F1000) in the manner following:

That the said defendant on the 10th day of March A.D., 2007, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully subject JESSICA H. to sexual penetration, against the victim's will and/or under conditions in which the defendant knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct, to wit, fellatio at 1675 Sky Mountain Drive, #827, Reno, Washoe County, Nevada.

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The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

RENO POLICE DEPARTMENT

DETECTIVE T.K. BROOME
OFFICER SCOTT HEGLAR

ASHLEY V., Silver Springs Conservation Camp

JESSICA RAE H.

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By David W. Clifton
DAVID W. CLIFTON
1653
Chief Deputy District Attorney

PCN RPD0726517C
PCN RPD0726524C

07068446

DA # 373085

RPD RP07-009446, RPD RP05-034027

FILED
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Attorney for Plaintiff

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

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

BRENDAN DUNCKLEY,

Defendant.

_____/

Case No. CR07-1728

Dept. No. 4

AMENDED INFORMATION

RICHARD A. GAMMICK, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that BRENDAN DUNCKLEY, the defendant above named, has committed the crimes of:

COUNT I. LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, a violation of NRS 201.230, a felony, (F650) in the manner following:

That the said defendant 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, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully,

unlawfully, and lewdly commit a lewd or lascivious act upon or with the body of ASHLEY V., having a date of birth of August 14, 1986, a female child under the age of fourteen years at the time that the said act was committed, in that the said defendant engaged the victim in sexual intercourse at or near Longley Lane, Reno, Washoe County, Nevada, and/or put his hand down her pants to fondle her genital area in an elevator at the Atlantis Hotel and Casino, 3800 South Virginia Street, Reno, Washoe County, Nevada, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child.

COUNT II. ATTEMPTED SEXUAL ASSAULT, a violation of NRS 193.330, being an attempt to violate NRS 200.366, a felony, (F1000) in the manner following:

That the said defendant on the 10th day of March A.D., 2008, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, and unlawfully attempt to subject JESSICA H. to sexual penetration against the victim's and/or under conditions in which the defendant knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct, to wit, fellatio at 1675 Sky Mountain Drive, #827, Reno, Washoe County, Nevada.

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All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By _____
KELLI ANNE VILORIA
5872
Deputy District Attorney

The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

RENO POLICE DEPARTMENT

DETECTIVE T.K. BROOME
OFFICER SCOTT HEGLAR

ASHLEY V., Silver Springs Conservation Camp

JESSICA RAE H.

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By _____
KELLI ANNE VILORIA
5872
Deputy District Attorney

PCN RPD0726517C
PCN RPD0726524C

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Attorney for Plaintiff

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

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

BRENDAN DUNCKLEY,

Defendant.

Case No. CR07-1728

Dept. No. 4

_____/

GUILTY PLEA MEMORANDUM

1. I, BRENDAN DUNCKLEY, understand that I am charged with the offense(s) of: COUNT I. LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, a violation of NRS 201.230, a felony; or in the alternative, COUNT II. ATTEMPTED SEXUAL ASSAULT, a violation of NRS 193.330, being an attempt to violate NRS 200.366, a felony.

2. I desire to enter a plea of guilty to the offense(s) of COUNT I. LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, a violation of NRS 201.230, a felony~~; or in the alternative~~, COUNT II. ATTEMPTED SEXUAL ASSAULT, a violation of NRS 193.330, being an attempt to violate NRS 200.366, a felony, as more fully alleged in the charge(s) filed against me.

3. By entering my plea of guilty I know and understand that I am waiving the following constitutional rights:

A. I waive my privilege against self-incrimination.

B. I waive my right to trial by jury, at which trial the State would have to prove my guilt of all elements of the offenses beyond a reasonable doubt.

C. I waive my right to confront my accusers, that is, the right to confront and cross examine all witnesses who would testify at trial.

D. I waive my right to subpoena witnesses for trial on my behalf.

4. I understand the charge(s) against me and that the elements of the offense(s) which the State would have to prove beyond a reasonable doubt at trial are that on or between August 14, 1998, and August 13, 2000, or thereabout, in the County of Washoe, State of Nevada, I did, as to Count I. willfully, unlawfully, and lewdly commit a lewd or lascivious act upon or with the body of ASHLEY V., having a date of birth of August 14, 1986, a female child under the age of fourteen years at the time that the said act was committed, in that I engaged the victim in sexual intercourse at or near Longley Lane, Reno, Washoe County, Nevada, and/or put my hand down her pants to fondle her genital area in an elevator at the Atlantis Hotel and Casino, 3800 South Virginia Street, Reno, Washoe County, Nevada, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of myself or the child.

///

I further understand the charge(s) against me and that the elements of the offense(s) which the State would have to prove beyond a reasonable doubt at trial are that on March 10, 2007, or thereabout, in the County of Washoe, State of Nevada, I did, as to Count II. willfully, and unlawfully attempt to subject JESSICA H. to sexual penetration against the victim's and/or under conditions in which I knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the my conduct, to wit, fellatio at 1675 Sky Mountain Drive, #827, Reno, Washoe County, Nevada..

5. I understand that I admit the facts which support all the elements of the offenses by pleading guilty. I admit that the State possesses sufficient evidence which would result in my conviction. I have considered and discussed all possible defenses and defense strategies with my counsel. I understand that I have the right to appeal from adverse rulings on pretrial motions only if the State and the Court consent to my right to appeal. In the absence of such an agreement, I understand that any substantive or procedural pretrial issue or issues which could have been raised at trial are waived by my plea.

6. I understand that the consequences of my plea of guilty as to Count I. are that I may be imprisoned for a period of life in the Nevada State Department of Corrections with parole eligibility after ten years, and that I am not eligible for probation unless a psychosexual evaluation is completed pursuant to NRS 176.139 which certifies that I do not represent a high risk to reoffend based upon

a currently accepted standard of assessment and unless a psychiatric or psychological evaluation is completed pursuant to NRS 176A.110 which certifies that I do not represent a high risk to reoffend based upon a currently accepted standard of assessment. I may also be fined up to $10,000.00. I further understand that I will be required to be on lifetime supervision pursuant to NRS 176.0931.

I further understand that the consequences of my plea of guilty as to Count II. are that I may be imprisoned for a period of two to twenty years in the Nevada State Department of Corrections and that I am not eligible for probation unless a psychosexual evaluation is completed pursuant to NRS 176.139 which certifies that I do not represent a high risk to reoffend based upon a currently accepted standard of assessment and unless a psychiatric or psychological evaluation is completed pursuant to NRS 176A.110 which certifies that I do not represent a high risk to reoffend based upon a currently accepted standard of assessment. I further understand that I will be required to be on lifetime supervision pursuant to NRS 176.0931. The sentence on each count may be concurrent or consecutive to each other.

7. In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The State will be free to argue for an appropriate sentence. The State will not file additional criminal charges resulting from the arrest in this case, and/or will refrain from pursuing additional and/or transactionally related offenses^ including all counts filed and dismissed in RJC Case No. 2007-033564. I understand that I am entering my plea to Count I as a legal fiction, pursuant to plea negotiations,

to allow me to avoid the more serious charge of sexual assault in the original Count I; and to allow me the opportunity to qualify for probation, which would otherwise be unavailable.

8. I understand that, even though the State and I have reached this plea agreement, the State is reserving the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement.

9. I also agree that I will make full restitution in this matter, as determined by the Court. Where applicable, I additionally understand and agree that I will be responsible for the repayment of any costs incurred by the State or County in securing my return to this jurisdiction.

10. I understand that the State, at their discretion, is entitled to either withdraw from this agreement and proceed with the prosecution of the original charges or be free to argue for an appropriate sentence at the time of sentencing if I fail to appear at any scheduled proceeding in this matter OR if prior to the date of my sentencing I am arrested in any jurisdiction for a violation of law OR if I have misrepresented my prior criminal history. I represent that I do have a prior criminal record. I understand and agree that the occurrence of any of these acts constitutes a material breach of my plea agreement with the State. I further understand and agree that by the execution of this agreement, I am waiving any right I may have to remand this matter to Justice Court should I later withdraw my plea.

11. I understand and agree that pursuant to the terms of the plea agreement stated herein, any counts which are to be

dismissed and any other cases charged or uncharged which are either to be dismissed or not pursued by the State, may be considered by the court at the time of my sentencing.

12. I understand that the Court is not bound by the agreement of the parties and that the matter of sentencing is to be determined solely by the Court. I have discussed the charge(s), the facts and the possible defenses with my attorney. All of the foregoing rights, waiver of rights, elements, possible penalties, and consequences, have been carefully explained to me by my attorney. I am satisfied with my counsel's advice and representation leading to this resolution of my case. I am aware that if I am not satisfied with my counsel I should advise the Court at this time. I believe that entering my plea is in my best interest and that going to trial is not in my best interest.

13. I understand that this plea and resulting conviction may have adverse effects upon my residency in this country if I am not a U. S. Citizen.

14. I offer my plea freely, voluntarily, knowingly and with full understanding of all matters set forth in the Amended Information and in this Plea Memorandum. I understand everything contained within this Memorandum.

15. My plea of guilty is voluntary and is not the result of any threats, coercion or promises of leniency.

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16. I am signing this Plea Memorandum voluntarily with advice of counsel, under no duress, coercion, or promises of leniency.

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 this 6th day of March, 2008.

DEFENDANT

TRANSLATOR/INTERPRETER

Attorney Witnessing Defendant's Signature

Prosecuting Attorney

07068446

Code No. 4185

COPY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE J. STEINHEIMER, CHIEF DISTRICT JUDGE

-oOo-

STATE OF NEVADA, Plaintiff, vs. BRENDAN DUNCKLEY, Defendant.	Case No. CR07-1728 Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

MOTION TO CONFIRM TRIAL

THURSDAY, MARCH 6, 2008

RENO, NEVADA

Reported By: BECKY VAN AUKEN, CCR No. 418

APPEARANCES:

For the Plaintiff: KELLI A. VILORIA
Deputy District Attorney
75 Court Street
Reno, Nevada 89520

For the Defendant: O'MARA LAW FIRM
BY: DAVID C. O'MARA, ESQ.
311 E. Liberty Street
Reno, Nevada 89501

Parole and Probation: LAURA PAPPAS

RENO, NEVADA, THURSDAY, MARCH 6, 2008, 9:03 A.M.

-oOo-

THE COURT: Brendan Dunckley.

MS. VILORIA: Kelli Viloria on behalf of the State.

MR. O'MARA: Good morning. David O'Mara on behalf of Mr. Dunckley. He's present in court today.

THE COURT: There's an amended Information in this file. It's also the time for a motion to confirm.

Do you want to go forward on the amended Information?

MR. O'MARA: No, Your Honor. We have reached an agreement -- oh, yes, Your Honor.

THE COURT: Okay. Then I'll hand you a copy of the Amended Information. You can review it with your client.

MR. O'MARA: Thank you, Your Honor.

We have received a copy of the Amended Information. Mr. Dunckley's name is correctly spelled on line 12. It states, Count I, lewdness with a child under the age of 14 years, a violation of NRS 201.230, and

attempted sexual assault, a violation of NRS 193.330. We waive the formal reading of this amended Information.

THE COURT: Are you ready to go forward and enter a plea?

MR. O'MARA: Yes, Your Honor. I have provided you with the original of the Guilty Plea Memorandum that was signed. Mr. Dunckley desires to enter a plea of guilty to the offense of lewdness with a child under the age of 14 years, a violation of NRS 201.230, a felony, and Count II, attempted sexual assault, a violation of NRS 193.330, being an attempt to violate NRS 200.366, a felony.

Mr. Dunckley understands that the consequences of his plea of guilt to Count I is that he may be imprisoned for a period of life in the Nevada Department of Corrections with parole eligibility after ten years and that he is not eligible for probation unless he satisfies NRS 176.139, which certifies that he is not a high risk to reoffend based upon current standards, and a psychiatric or psychological evaluation to be completed pursuant to NRS 176A.110. He also could be subject to a $10,000 fine, and he understands that he'll be under lifetime supervision.

He also understands the consequences of his plea

of guilty to Count II, which is set forth in the Guilty Plea Memorandum, that he would be -- could be imprisoned for a period of 2 to 20 years in the Nevada State Prison, and he's also not eligible for probation unless he satisfies the same psychosexual and psychological evaluations as set forth in Count I.

In exchange for his plea of guilty, Your Honor, the State and counsel and Mr. Dunckley have agreed to recommend the following:

The State will be free to argue for an appropriate sentence. The State will not file additional criminal charges resulting from the arrest in this case and/or will refrain from pursuing additional and/or transactionally-related offenses, including all counts filed and dismissed in Reno Justice Court, Case No. 2007-033884.

He understands that in entering his plea to Count I, it is a legal fiction, pursuant to the plea negotiations, to allow him to avoid the more serious charge of sexual assault in the original Count I, and this also allows him the opportunity to qualify for probation, which would otherwise be unavailable.

THE COURT: Is that a complete statement of the negotiations?

MS. VILORIA: It is, Judge. Thank you.

THE COURT: Mr. Dunckley, do you understand these plea negotiations?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: Do you have any questions about them?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you comfortable with the representation you've received from counsel so far?

THE DEFENDANT: Yes, Your Honor, I am.

THE COURT: Did you read the Guilty Plea Memorandum?

THE DEFENDANT: Yes, Your Honor, I have.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have any questions about the document?

THE DEFENDANT: No, ma'am.

THE COURT: Do you have any questions about the modifications to the typed document?

THE DEFENDANT: No, ma'am.

THE COURT: And did you initial all of those changes?

THE DEFENDANT: Yes, ma'am, I did.

THE COURT: Did you sign the document?

THE DEFENDANT: Yes, ma'am, I did.

THE COURT: Are you aware that you have a right to plead not guilty, have a trial by jury, be confronted by the witnesses against you, bring witnesses here on your own behalf, and testify or not testify at that jury trial?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you have a right against self-incrimination, you may assert that right by refusing to testify, and the State must prove you guilty beyond a reasonable doubt??

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you aware you'll be giving up all of these rights if you plead guilty?

THE DEFENDANT: Yes, ma'am, I am.

THE COURT: I'm going to ask the clerk to read the charge to which you're pleading, and then I'll ask if you understand it.

(Whereupon, the Information was read by the clerk.)

THE COURT: Is there anything about those charges you do not understand?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand Count I is a legal fiction?

THE DEFENDANT: As far as what a legal fiction is?

THE COURT: Yes. What is it about Count I that's a legal fiction?

THE DEFENDANT: That per the agreement, we're changing the original count down to a lower one and pleading guilty to that so that probation can be an option.

THE COURT: Are all the facts and circumstances the same?

THE DEFENDANT: Yes, ma'am.

THE COURT: It's just that it's a lewdness instead of a sexual assault?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you do what it says you did in the charge?

THE DEFENDANT: Yes, ma'am.

THE COURT: And what about Count II?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that charge?

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: Did you do what it says you did in that charge?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has your attorney told you the possible maximum penalties?

THE DEFENDANT: Yes, ma'am, he has.

THE COURT: I know he told me that he had, but now you have to tell me what those are in your own words.

What is the penalty for Count I?

THE DEFENDANT: The first count is a felony carrying a sentence of no less than 10 years to a life sentence, eligible for parole after 10 years in the Nevada State correctional facilities.

Count II will carry a felony, as well as Count I will carry a lifetime supervision, and Count II will carry a felony with no less than two years served in the Nevada State correctional facilities with a maximum of 20 years, as well as carrying a lifetime supervision penalty as well, and a fine in the first count of up to $10,000.

THE COURT: Okay. And a fine in the second count?

MS. VILORIA: There is no fine.

THE COURT: Okay.

Now, do you understand, with regard to Count I, it's a penalty, a maximum penalty of life in prison?

THE DEFENDANT: Yes, ma'am.

THE COURT: But you would be eligible for

probation after you served 10 years.

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: And do you understand that with regard to Count II, it's a maximum penalty of 20 years, but you could be eligible for probation -- for parole at a date that I give you, but it could be no less than two years?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, do you understand that probation is not available on these charges unless you are certified by a professional pursuant to NRS 176.139 to not represent a high risk to reoffend as to both counts?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Do you understand that with regard to lifetime supervision, that even if you completed your term of sentence, you've satisfied all your obligations, if you violated the terms of your lifetime supervision, you would be subject to being back in prison?

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: Do you understand that's totally up to me whether I run these charges concurrent or consecutive?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you understand I'm free to

sentence you up to and including the maximum allowed by law?

THE DEFENDANT: I do.

THE COURT: Has anyone made any threats to get you to enter these pleas?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone told you that you would be guaranteed probation or any other particular result?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any promises or representations to you to get you to enter these pleas that you haven't told me about?

THE DEFENDANT: No, ma'am.

THE COURT: Do you have any doubt about what you're doing here today?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand that you have a jury trial scheduled for March 24th, and by pleading guilty, that trial is off?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand this is a permanent entry of plea?

THE DEFENDANT: I do, Your Honor.

THE COURT: You can't tell me in a week or two

that you didn't understand what was happening. You have to tell me that now.

THE DEFENDANT: I do, Your Honor.

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

THE DEFENDANT: I do.

THE COURT: With everything I've asked and you your answers, do you still wish to go forward?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you doing so of your own free will?

THE DEFENDANT: Yes.

THE COURT: How do you plead to Count I?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to Count II?

THE DEFENDANT: Guilty.

THE COURT: The Court finds that your pleas are voluntary, that you fully understand the nature of the offenses charged and the consequences of your pleas. Therefore, I will accept your pleas of guilt and we'll set a date for sentencing.

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.

THE COURT: Counsel approach.

(A sidebar was held off the record.)

THE COURT: Okay. What are the conditions of Mr. Dunckley's release? Is he out on bail?

THE DEFENDANT: Yes, ma'am.

THE COURT: And what's your bail set at?

THE DEFENDANT: I don't remember. It's been a year, Your Honor. I don't remember off the top of my head.

THE COURT: We have two bails posted. One may be

in the Reno Justice Court case.

It looks like it's 15,000 and 18,500, which seems somewhat sufficient to me with regard to the bail. But I am going to modify the terms and conditions of his release to include Court Services supervision.

If you are going to do some sort of treatment, then you need to do that and report that to Court Services. And I want you reporting at least once a week to Court Services so we know where you are and what you're doing.

You must abstain from the use, possession, and control of alcohol between now and the date you're sentenced, and you can't use controlled substances.

So I just want to make sure you understand these special conditions of your release. Do you?

THE DEFENDANT: I do, Your Honor.

THE COURT: Okay. Then that will be the order, and I'll see you back at sentencing the clerk is about to give.

THE CLERK: August 5th at 9:00 o'clock.

THE COURT: Between now and that date it's your responsibility to make appointments with the Division of Parole and Probation, to complete the evaluation. It's further your responsibility to see that the psychological

evaluation is conducted timely. And stay in touch with Court Services.

MS. VILORIA: Your Honor, can we vacate the trial date for March 24, '08?

THE COURT: That will be the order.

(Proceedings concluded.)

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STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

I, BECKY VAN AUKEN, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, 10/16/2008.

Becky Van Auken

BECKY VAN AUKEN, CCR No. 418

CODE 1850

FILED

AUG 11 2008

HOWARD W. CONYERS, CLERK
By: DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

BRENDAN DUNCKLEY,

Defendant.

Case No. CR07-1728

Dept. No. 4

/

JUDGMENT

The Defendant, having entered a plea of Guilty, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Brendan Dunckley is guilty of the crime of Lewdness with a Child Under the Age of Fourteen Years, a violation of NRS 201.230, a felony, as charged in Count I of the Amended Information, and Attempted Sexual Assault, a violation of NRS 193.330, being an attempt to violate NRS 200.366, a felony, as charged in Count II of the Amended Information; and that he be punished by imprisonment 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 that he be punished by imprisonment in the Nevada Department of Prisons for the maximum term of one hundred twenty (120) months with the minimum parole eligibility of twenty-four (24) months, for Count

II, to be served concurrently with sentence imposed in Count I; with credit for four (4) days time served, and by submission to a DNA Analysis Test for the purpose of determining genetic markers. Defendant is further ordered to pay a Twenty-Five Dollar ($25.00) administrative assessment fee, a One Hundred Fifty Dollar ($150.00) DNA testing fee, and a Nine Hundred Fifty Dollar ($950.00) Psychosexual Evaluation Fee to the Clerk of the Second Judicial District Court.

It is further ordered that the Defendant serve a special sentence of lifetime supervision to commence after any term of imprisonment or after any period of release on parole.

Dated this 5th day of August, 2008.

Connie J. Steinheimer

DISTRICT JUDGE

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

STATE OF NEVADA, Plaintiff, vs. BRENDAN DUNCKLEY, Defendant.	Case No. CR07-1728 Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

SENTENCING

August 5, 2008

RENO, NEVADA

Reported By: LISA A. YOUNG, CCR No. 353

APPEARANCES:

For the Plaintiff: KELLI ANNE VILORIA
Deputy District Attorney
Reno, Nevada

For the Defendant: DAVID C. O'MARA
Attorney at Law
Reno, Nevada

Parole and Probation: LUPE GARRISON

EXHIBITS	MARKED	ADMITTED
A - Report from Eng Counselling	5	5
B - Letter from Alamo Casino	5	5

RENO, NEVADA, TUESDAY, AUGUST 5, 2008; 9:00 A.M.

-oOo-

THE COURT: Brendan Dunckley.

MS. VILORIA: Morning, Your Honor. Kelli Anne Viloria on behalf of the State.

MR. O'MARA: David O'Mara on behalf of Mr. Dunckley.

THE COURT: This is the time set for sentencing. I am in receipt of the presentence report dated July 17th, 2008.

I also have a document which was received by the Court Clerk that has not been considered by the Court that has been filed in.

Counsel, do you want the Court to consider the document?

MS. VILORIA: The State does, Your Honor.

MR. O'MARA: Your Honor, I don't think it has any bearing on this case. But Mr. Dunckley can certainly tell you why this has happened with regards to his child support and the Sushi Club and we have no objection to the State introducing it.

THE COURT: Then the Court will review the document.

Okay. You had an opportunity to review the presentence report with your client?

MR. O'MARA: Your Honor, we have reviewed the presentence report dated July 17th of 2008 with a few corrections. Defense attorney is David O'Mara who is conflict

counsel and not deputy public defender.

Also, under Category A and Category B in the charged Information, the penalties for these charges should have included that he may be in prison for a period of time and that he is not eligible until a sexual evaluation is completed which certifies that Mr. Dunckley does not represent a high risk to re-offend.

That language and the language that was part of the guilty-plea memorandum was not included in the presentence report. I want to make the Court aware of the fact that probation in both of these charges is available in this case. While the laws have changed since the period of time when the charge one began, it does not allow probation any more. So I would like the Court to take that into consideration.

Other than that, we have no other corrections, Your Honor.

THE COURT: Okay. You may proceed with argument.

MR. O'MARA: Okay. First, I would like to introduce and have admitted two documents. One document is a letter from a Leslie Dietsche (phonetic), if I may approach. Let me grab the other document.

THE COURT: Why don't you grab everything, and the Clerk will mark it all at one time.

MS. VILORIA: I have seen a copy of these, Judge.

MR. O'MARA: There is also another copy from Eng Counseling setting forth information about Mr. Dunckley's clinical contact with Steven Eng as a sexual offender.

THE CLERK: Exhibits A and B marked.

(Exhibits A and B were marked for identification.)

THE COURT: Okay. Exhibit A is a report from Eng Counseling, and there is no objection to its admission so I will admit it. And Exhibit B is a letter from Alamo Casino and no objection so I will admit that.

(Exhibits A and B were admitted into evidence.)

MR. O'MARA: Your Honor, in regards to the Eng Counseling, which is Exhibit A, you will notice that there are numerous attendances by Mr. Dunckley for sexual-offender counseling. He had individual sessions on March 3, 26 and April 29th of this year.

He goes on to group attendance with Mr. Eng on 4/23. You notice how the 4/30 has an absence? That was because he went to his individual counseling the day before. Those are the dates in which he did not attend group attendance because it was the same week.

Mr. Dunckley informed me the 6/12 was a work emergency. He basically went on a weekly basis to Eng Counseling.

What we are going to ask for today, Your Honor, is

that you not follow the recommendations of the Parole and Probation and actually award or not award but grant Mr. Dunckley the opportunity to be on probation for both of these charges.

One of the reasons is that when we were going through negotiations in the settlement, that was one of the main reasons to give him the opportunity. As you recall about five months ago when we were in here during the change of plea, we set it out five months to give him an opportunity to go to these counseling sessions.

From the letter, you can see he started his counseling sessions prior to the entry of the guilty-plea memorandum which I believe was done on the 6th of March. He went religiously to those counseling services.

He is really taking hold and finding out what is making him do these bad things. He is trying to take responsibility for his actions. I believe these therapy sessions are working toward making him a better person and someone who will be, at least, someone who will be a benefit to our society.

As you can see from the letter from the Alamo Casino, Mr. Dunckley has been a good person to his employers and other people with regards to stepping up and doing things when not everybody would do it with regards to helping and cleaning the floor and things like that when there was a broken pipe when he

wasn't required to do that. I think there are good things involved that we need to look at in that regard.

Also, I have today Mr. Dunckley's mother in law who would like to make a statement. Her name is Pam McFerren M-c-f-e-e-r-e -- I apologize. M-c-f-e-r-r-e-n. And she would like to make a statement, Your Honor, to the Court to ask for probation as well.

THE COURT: You want her sworn, Ms. Viloria?

MS. VILORIA: No, ma'am.

THE COURT: You can come forward and stand next to Mr. O'Mara.

MS. MCFERREN: I'm Brendan's mother in law, Pam. I have known him for eight and a half years. He and my daughter have quite a special relationship. He has four children, two by a previous marriage. He is the soul provider of his home, his family. That includes with my daughter, his wife, their two children, my grand children. And, also, child support for his first two children by a previous marriage.

He also has helped me financially as well as physically when I have needed help off and on over the years.

I have noticed the counseling that Brendan is getting has been very effective. I have noticed when he comes back from his meetings with his counsellor, he is a lot more calm. His demeanor is a lot more calm. As calm as you can be under these

kind of circumstances. I believe it has been effective with him.

I feel that he really should continue with that, and it's been very helpful so far.

And I would like to ask for probation for him and the continued counselling so that he can be with his family which is a very important thing.

As you know, families don't stick together too much in these times. And it's very important especially to those little boys.

THE COURT: Okay. Thank you.

MR. O'MARA: Your Honor, in going over, it's true Mr. Dunckley has four children, 10, 9, 7 and 3 which is set forth in the presentence report. I think, you know, we have heard a lot today in other cases and things like that. I think in this case it really is true that this is really a sad case for everyone involved.

It's not only sad for the two victims that Mr. Dunckley committed these crimes against, but it is also sad for the kids and his wife that are now going to have to deal with these types of situations. And in light of these four kids, he does have child support he needs to continue.

I think that in this case we really have to think outside the box in sentencing. And it comes down to a lot of

this coming from -- one of these cases is really old. And there is a whole different type of sentencing structure at this point in time. And now we are looking at a sentencing structure in this system where we are looking at these cases differently.

I think if we look outside the box and really say how can we properly make sure that Mr. Dunckley takes responsibility for his action and so-called punishment for the crimes he committed but also give him the opportunity to rehabilitate himself and provide for those people so that other people, like his kids and wife, are not victimized by his behavior. I think his mother in law said it really well, in fact, when he takes these therapy classes he is a different person.

Sometimes that's what people need. They need control over their lives such as a probation to tell them they need to go to probation and have a job and do these things. And I think when we jump to the conclusion, let's throw this person away, put him in jail for the rest of his life, if we do that, then we are not helping anybody in this case.

I think that if we look at Mr. Stivensen's (phonetic) recommendations, it talks about he specifically, in bold letters, says Mr. Dunckley does not represent a high risk to re-offend sexually. He goes on to say Mr. Dunckley presents as a positive candidate for treatment.

Treatment process with Mr. Dunckley, treatment should

be the process with Mr. Dunckley. He recognizes the need for intervention. I think that assessment is correct. I think if we allow Mr. Dunckley to be on probation, he will get the treatment he needs.

There are certain recommendations that I think are clearly appropriate in this case, Your Honor, and will help do what we need to do to take care of the punishment of Mr. Dunckley as well as rehabilitate him so these incidents do not occur.

Those recommendations are set forth on page six of his report. I would like the Court to consider those as well.

Your Honor, the report says Mr. Dunckley is not applicable to probation. He does not have a high risk to offend, so he does qualify for probation.

If the Court is inclined to do some type of jail term in this-- prison term in this thing, we ask that you really do think outside the box and give him an opportunity to prove himself, even in prison.

There are two counts. We can suspend the first count of the ten-year maximum and hold that over Mr. Dunckley's head to allow him the opportunity to go into prison and do something with his life and get himself out in a few years instead of ten years when his kids basically are grown up and past their teenage years.

I think probation-- we are requesting you allow probation in this case, but if you do not find probation is appropriate, we do ask that you, at least, give him the opportunity to go to prison on maybe one count. Hold the other count above his head and sentence him according to the sentence of probation which is two to five years on Count II, Your Honor.

I think Mr. Dunckley's statement at the back page really sums it up about how remorseful he is and he did is want an opportunity to be with his kids, pay his child support and move forward and take responsibility of the two incidents that caused him to be put in this position.

With that, I respectfully request that you allow for probation.

THE COURT: Ms. Viloria?

MS. VILORIA: Judge, first of all, I want to state that paragraph 11 of the guilty-plea memorandum allows me to discuss with you any counts that were dismissed or any other cases that were charged or uncharged which were either dismissed or not pursued by the State at the time of sentencing. That's important because you need to realize here who you are sentencing today.

Hopefully today is going to be the end of Brendon Dunckley and what we have to deal with him.

This has been ten years of inappropriate conduct, ten

years of sexual attacks mostly on young woman who were 12 years old or mentally ill and intoxicated cultivating into the final account with the stranger attack with a woman who was .226 that the defendant saw walking down the street, drunk and falling down.

We did craft this creative plea bargain so this defendant 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 guilty.

The Court needs to know that your concern and the State's concern are that the community have to be safe. And if Brendon Dunckley is given probation, it will not be.

The factual corrections that I need to make on the presentence investigation report in page six on March 21, 2007 when -- this is omitted so I'm just adding it in. When the detectives went to talk to Brendon Dunckley and he denied he had done anything, nothing happened, and when he ultimately changed, yes, he performed fellatio on me as a way of thanking me for getting her back in the apartment, that only came about after the detectives said to him why are we going to find her DNA on your penis?

The original story that this defendant crafted to police is that while she was laying there unconscious she started to throw up and he reached into your mouth to clear her

tongue and follow that had gone to the bathroom and touched his penis while urinating and that would be the story of why you have DNA.

This defendant is sophisticated in the sense that he uses his wife as an alibi during the attacks so his wife is brought into the picture where she says, I was on the phone with him the whole time. There is no way this could have occurred. What the full investigation showed is there was a few minutes where he said I need to call you right back in about five minutes and the rape happened and he called his wife back. It wasn't a true alibi.

This has been ten years. That's important for you to know. There are not two victims, there are three. Jessica H. Laura S, and also Ashley.

What concerns me is when you look at the evaluation that that Dr. Stivensen (phonetic) reports, everything is on self-admitted conduct. And Dr. Stivensen (phonetic) sort of congratulates the defendant by that saying, Look, he came forward with all these other incidents of sexual conduct. But he calls Ashley 14 years old at the time when we all know she was 12.

He is not being forthcoming, and the Court needs to recognize that because Dr. Stivensen (phonetic) didn't say he is a low risk to re-offend. He deemed him a moderate risk to

re-offend. And that's based on the self-given information from this defendant.

Judge as a parent -- from the recitation of all the facts you see on everything, and, basically, how we ended up solving the ultimate case is because the detectives and law enforcement have been on this defendant's tail for years.

The defendant avoided any type of prosecution because of the victims he has chosen.

Ashley V. is in prison right now. A good part of it is because she turned to drugs and alcohol as being molested by this defendant when she was little girl.

We created this allegation or this plea bargain so that this defendant could ask you for probation, but the Court needs to acknowledge Jessica, our last victim, is the one who is a complete stranger to this defendant, didn't know anything, literally woke up on her back in the floor of her apartment right by the door with him shoving his penis in her mouth.

He comes to you today and brings witnesses to say he is a good provider. We need to think about his children. We can't put him in prison. I ask you one question, why wasn't he thinking of that when he was trolling for his next sexual assault victim?

Things have finally caught up with him, and that's why we are here today. And the Division has appropriately asked the

Court to give him life in prison with the possibility of parole after ten years.

I do recognize following the day of this plea bargain, and I would note for the Court not a day sooner, that the day after he entered his plea of guilty he began his sex offender treatment.

And the Court is concerned as is the State whether or not all of this is posturing himself for some sort of beneficial sentence or a good outcome for you today.

The reality is I have looked at the evaluation, and there are a couple things in there that are alarming to me and I want to point them out to you.

Beginning at page seven, the paragraph under perception of victim impact. One of the things that Dr. Stivensen (phonetic) noted that Mr. Dunckley believed both victims were harmed--again, there were three victims--as he described taking their since of security away inside, however, was limited and somewhat superficial.

On page 11, Judge, it says, In considering the risk scales along with clinical judgment, Mr. Dunckley is estimated in the moderate range for sexual re-offense risk. Clinical judgement elevated risk is there due to re-offense behaviors occurring over an elapsed time and involved with an offense against a stranger.

His promiscuous and impulsive sexual lifestyle places him at greater risks for further allegations and charges. There is evidence of being indiscriminate in regards to victim selection, meaning, his modus operandi is not limited to a particular victim, type, age or preference.

The fact that an evaluator would put that in there shows you the level of gravity of danger of this defendant. And my concern is that the community is flat at risk.

He also states on page 12 under the amenability to treatment and prognosis, the second full sentence, He, being Brendan Dunckley, does not present as an antisocial or defiant, though, there may be some resistance to treatment upon the realization of a longer-term process.

Why that is important, Judge, is if this defendant is, in fact, doing a posturing to present walk the walk and do all he needs to do to present good in Court today, then anybody, any woman, whether it's a 12 year old or 28 year old that comes within his way is a risk.

The State cannot risk that, Judge. The community cannot risk that.

This defendant has shown himself to be deserved a grant of a prison sentence. The life in prison is appropriate.

He should be commended for the effort he has made, and that's why when the Division recommends a concurrent sentence on

the attempted sexual assault charge, it could be appropriate here. I think the Division has short sold that count a little bit because that's, really, the more egregious count. The whole sexual assault nature of this should not be a two to five sentence. It should be a 20-year sentence.

This defendant deserves to go to prison and life time supervision and everything else that the Division recommends is appropriate.

I just am concerned, frankly, Judge that nobody get caught up on focussing on the children that are involved in this case. Those are all people that should have been thought of before this defendant decided to act on his impulse and attack and escalate in violence. What's happened over the years, Judge, every time he has raped somebody or inappropriately touched someone and gotten away with it, he has gone up to the next level.

The 12 year old is a friend of the family. A little girl who befriended his wife who then became his victim number one. There were victims in between there. Including the Laura, the mental-health victim. We couldn't pursue the case because of her mental-health issues. She was all part of this final case where once we ended up getting the allegations with this defendant with Jessica and we started seeing a pattern of conduct, similarity in defenses, every single time his statement

was to the law enforcement was, Yes, I shouldn't have sex with this girl. It was bad judgment. And he just for years and years, for ten years, has been able to get away with it to the point where he is escalating where he is trolling where he sees drunk women falling down drunk on the street, he formulates the thought in his mind, followed her in the house, and in a very opportunistic and predatory manner attacked her. That deserves ten years in prison, minimum.

MR. O'MARA: If I can just respond to a few things before Mr. Dunckley addresses the Court.

THE COURT: Okay.

MR. O'MARA: First of all, there is no evidence whatsoever that this charge caused Ms. Ashley -- I'm not sure what her last name is. Ashley to go into drugs and use alcohol and that's why she is in prison. There is no evidence of that. And I understand that the D.A. wants to paint a huge horrible picture of Mr. Dunckley and--

THE COURT: I won't consider that argument.

MR. O'MARA: It is also important that her description of what happened on that night by Jessica was not as that she woke up on her back past out. Her description in the Justice Court when she testified was that she was standing up and she made the affirmative step of walking toward Mr. Dunckley to perform the fellatio.

This just goes to the point of the D.A. not having all the facts and telling you different stories. It has nothing to do with Mr. Dunckley not taking responsibility of his action. The Court should be aware that is the testimony.

Also, in regards of him going to counseling, it was done before the guilty plea was entered into which was March 6th. His counseling started on March 3rd.

I want the Court to be aware that Mr. Dunckley was charged with those allegations against the individual Laura. Laura did not show up at the preliminary hearing even though the District Attorney said she was more than willing to be there and they contacted her. We went-- we had three or four hours of testimony over in the Justice Court. She still did not show up.

It's disingenuous for the District Attorney to say it was because of her mental stability, and we don't know or have any documentation showing she had any mental stability. To place that on Mr. Dunckley, it's inappropriate to bring up in the sentence.

MS. VILORIA: Objection. I absolutely made a representation as an officer of the Court as to that being the issue. And you are allowed to think about her.

Mr. Dunckley refers to her throughout the report to Dr. Stivensen (phonetic). She is the one who he attacked on the hood of a car who he claims was consensual but he put his penis

in her mouth.

I don't why we are acting like she is not a victim. She did not show up at the prelim. We did not go forward with that, and it is because of her mental-health issues. I am making that -- and he knows that based on all the discovery provided. I don't know why he is saying that's disingenuous. It's not. It's the facts of the case.

MR. O'MARA: Well, we will let that stand. With what-- if that's what she understands, that's what she understands.

THE COURT: Does it make a difference?

MR. O'MARA: It doesn't. I'm just trying to set forth --

THE COURT: Your client has admitted to the behavior with her?

MR. O'MARA: Yes, my client has admitted to the two charges that are involved in this case. But I just wanted to make the Court away of those three or four different things so we know what we are dealing with regards to thinking outside of the box in this case to figure out some type of sentencing that is appropriate which will allow for the punishment for the crimes that were committed as well as allow for the rehabilitation and acknowledgment of trying to get Mr. Dunckley back into society and being a productive part of your society

instead of just saying, We are trying to give you probation. And let's see what we can do. And go out there and get some type of treatment and go from there. We will come to sentencing. We will take that into consideration.

I would like to introduce another document in that regard. It's an e-mail between myself and Ms. Viloria that really talks about--

MS. VILORIA: I'm going to object. This is outside the context of negotiations. This is not appropriate for sentencing. I'm going to object.

THE COURT: What is the appropriateness of negotiations being admitted?

MR. O'MARA: I'm going through-- she has brought up the fact he is just posturing, Your Honor --

MS. VILORIA: Judge, my statement is we don't know whether he is or not. That's something we need to take a view at it.

MR. O'MARA: Your Honor, if I can complete my sentence, in the purpose of this, Your Honor, is to show that when we were in negotiations of this case, that Ms. Viloria was going to take into consideration what he did during this five-month period. This was an e-mail that basically said I understand you will not agree to probation if it is not recommended.

But in this case, as we discussed that there would be factors in which she would take into consideration that she would look at to maybe consider probation at this time.

THE COURT: Are you alleging that she has violated her negotiations?

MR. O'MARA: No, no, no. Not at all. I'm just trying to paint the picture of what was happening during that period of time. And her statement in regards to, We don't know if he is posturing goes directly to this. He was doing this because that's what was asked of him--

THE COURT: I don't think that's her statement. Her statement was talking about the whole period of time he has been in counseling, whether or not it was going to last indefinitely or whether or not he was posturing prior to sentence.

MS. VILORIA: That's right.

MR. O'MARA: We have made a circle of where we are going in that regard, and that is fine, Your Honor.

With that, Your Honor, again, I request probation in this is, and I will let Mr. Dunckley address the Court.

THE COURT: Okay. I'm going to hear from the Division of Parole and Probation first.

MR. O'MARA: Okay.

MS. GARRISON: Well, Your Honor, in listening to both sides of the argument, Your Honor, one of the things that was

brought up was the fact that they didn't want to make his two sons, I believe, victims in this matter because of his behavior. I believe, Your Honor, he already has done that by his behavior.

They are going to grow up knowing the type of person their father is, and that's not going to go unnoticed by them.

Your Honor, I believe that the recommendation as stated is appropriate. I believe that he was opportunistic regarding the victims that he chose.

My concern, as well as Ms. Viloria has stated, I was reading the psycho-sexual evaluation and the one that stood out in my mind was that he, according to the evaluator, seemed to have glossed over, it seems like, the culpability or the damage or the harm he did to the victims. Even though he did acknowledge he did damage them in some manner.

The Division is going to stand by the recommendation, Your Honor. We have four days credit for time served.

THE COURT: Thank you.

Mr. Dunckley, the law affords you an opportunity to be heard. I have read your written statement. Do you have anything you would like to say at this time?

THE DEFENDANT: Your Honor, the State is doing their job. I moved to Reno in the Spring of 2000. The allegations were made against me from 1998.

I took the plea as opposed to going to trial to

prevent the victims from pursuing further.

Ms. Viloria states that I made the comment of saying that the victim Ashley was 14 because of the time that I had known her, which was the summer of 2000 when I met her, she indicated to me that she was 14. As a matter of fact, when we met, she indicated she was 17. Upon finding out later her true age, myself and my wife stopped contact all together with her. It doesn't change the fact of what I did.

Posturing, whatever it may be called, I took the deal as opposed to going to trial because I wanted to prevent any further harm to the victims.

I can't say I know what they are going through because I can't. It's not my place to assume I know what they feel.

I know what I did, and I know what I took from them. I took their sense of respect, of certainty. I can't give that back.

I have attended treatment programs. I made it a point to try and attend victim impact panels at one of the local churches here.

When the Division and the State state that I glanced over, it's not my place to say how I affected them. I can only assume what happened.

And with regards to my children, I agree. They are victims as well, as is my wife, as is my mother in law and

everyone who knows me. And my reputation of being who I am as an upstanding citizen, I took their trust a way, too.

Being a father is the most important thing to me in the world. And knowing I'm a horrible example kills me more than anything you can punish me with, Your Honor. I ask that I be given the chance to show my children that people can make differences in their life and make a change.

I pride myself that when my wife was pregnant I never missed a single doctors appointment. I never missed an appointment. I'm a dad through and through. Somewhere along the line, I lost that. I disrespected my family and more importantly I disrespected my family.

I love my family more than anything in the world. I took this deal to prevent any further harm for them and for the victims. I just ask to have the opportunity, if it's possible, to continue to be a part of my children's life.

My wife didn't have a father growing up, and all she ever wanted was a husband and a father to raise her children.

I'm the sole provider of my family. I have two children who I owe money to, and I try being a single income household and single income father, it is hard to get money to them. I try and keep stable employment, and when I'm getting laid off or working, I'm always working.

Your Honor, all I ask is for the opportunity to show

that I can do better. And I can be better at this. I screwed up, and I admit the fact I made mistakes and I hurt people. I want to prove that it won't happen again. And if it does, which I pray it never will, because I'm getting treatment every week. I'm keeping support with the people I need support from. I have medication to deal with my inability to make correct calm decisions as opposed to being spontaneous.

I don't know what more I can say to Your Honor.

I throw my heart to you to allow me to be a part of my children's lives, and I understand the fact I have hurt people. But at the same time, the last five months have been such an awakening to see why I allowed myself to do that and why I felt it was okay to disrespect my bonds of my marriage and my children who I brought into this world.

They don't deserve what I put them through, but that's something I will have to deal with the rest of my life and so will the victims.

I ask you give me the opportunity, Your Honor, to be there and to prove that there is good. And I can make a difference. And I can be productive to society and a benefit. I learned so much from the victim impact panels and counseling. It's something I want to pursue further to help people who are in that situation. They need me to be the dummy to beat up, I have no problem with that either. But I just ask that you give

me that opportunity, Your Honor, to prove that I can do this and not just the five months that I proved I can stay out of trouble and make my appointments and meetings and go above and beyond but continued to be allowed to do that, Your Honor.

THE COURT: Mr. Dunckley, perhaps your plea would have more resonance with me with regard to the issue that you had with the friend of the family, even though it was a very young girl, and even though you argue you thought she was 17, I have heard that many times. That argument for treatment if it was an isolated incident may well resonate with me.

However, the latest victim. I'm not talking about the victim in between you are not charged with. I'm very concerned with your latest victim. I agree with Mrs. Viloria. I don't think that the sentence is recommended even by the Division is appropriate given your behavior.

You picked someone you didn't know, and you committed a sexual assault on her.

I know you pled to something that allows for a lesser offense, but it does not allow for probation.

It is the order of this court you pay $25 administrative assessment fee, $150 in DNA testing fees. I think you have already submitted to a DNA analysis test. So you won't have to submit again, but you also will have to pay the $950 in psycho-sexual fees.

I am sentencing you as to Count I to life in prison with the possibility of parole after ten years has been served.

As to Count II, I'm sentencing you to 120 months in prison with minimum parole eligibility of 24 months. That will be allowed to run concurrent to Count I.

You must pursuant to NRS 1760931 submit to lifetime supervision.

And is that with regard to Count II only?

MS. VILORIA: No, it's to both counts, Judge.

THE COURT: As to both counts at any time you are released from custody or released from parole.

You will be given credit for four days time served. You are remanded to the custody of the Sheriff for transportation to the warden.

(Whereupon the proceedings were concluded.)

-o0o-

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, LISA A. YOUNG, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 11th day of August, 2008.

/s/ Lisa A. Young
LISA A. YOUNG, CCR 353

Nevada Department of Public Safety

Division of Parole and Probation

Presentence Investigation Report

The Honorable Connie Steinheimer
Department IV, Washoe County
Second Judicial District

Date Report Prepared: July 17, 2008

Prosecutor: Kelli Viloria, DDA
Defense Attorney: David O'Mara, DPD

PSI: 281424

I. CASE INFORMATION

Defendant: Brendan Dunckley
Date of Birth: 7/4/76
Age: 32
SSN: 098-60-5492
Address: 1570 Sky Valley #B202
City/State/Zip: Reno, NV 89523
Months/Years: 3 months
Phone: (775) 379-7668
Driver's License: 0001025012
State: NV
Status: Valid
POB: Carmel, NY
US Citizen: Yes
Notification Required Per NRS 630.307: No

Case: CR07-1728
DA #: 373085
PCN: RPD0726517C
P&P Bin: 1001831490
FBI: 704876JC6
SID: NV 04156735
Resident: Yes
Offense Date: CT. I Between 8/14/98 and 8/13/00
CT. II 3/10/07
Arrest Date: CT. I: 3/30/07
CT. II: 3/22/07
Plea Date: 3/6/08, by plea of guilty.
Sentencing Date: 8/5/08

II. CHARGE INFORMATION

Offense: CT. I Lewdness With a Child Under the Age of Fourteen Years (F)
NRS: 201.230 **Category:** A
NOC: 00191
Penalty: For life 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.

Offense: CT. II Attempted Sexual Assault (F)
NRS: 193.330/200.366 **Category:** B
NOC: 02222
Penalty: By a minimum term of 2 years and a maximum term of 20 years Nevada Department of Corrections.

III. PLEA NEGOTIATIONS

The State will be free to argue for an appropriate sentence. The State will not file additional criminal charges resulting from the arrest in this case, and/or will refrain from pursuing additional and/or transactionally related offenses including all counts filed and dismissed in RJC case number 2007-033884. I understand that I am entering my plea to Count I as a legal fiction, pursuant to plea negotiations, to allow me to avoid the more serious charge of sexual assault in the original Count I, and to allow me the opportunity to qualify for probation, which would otherwise by unavailable. Full restitution.

IV. DEFENDANT INFORMATION

Physical Identifiers:
Sex: M **Race:** W **Height:** 5'7" **Weight:** 185
Hair: Brown **Eyes:** Hazel
Scars: None noted.
Tattoos: None.
Aliases: None noted.
Additional SSNs: None.
Additional DOBs: None.

Social History: The following social history is as related by the defendant and is unverified unless otherwise noted:

Childhood: At the time of interview, the defendant reported he was physically abused by his mother. When he was a child, Mr. Dunckley related his mother would break wooden spoons on his buttocks when spanking him.

Immediate Family Members: The defendant reports his parents reside in California. One sister resides in New York. Another sister resides in California. Mr. Dunckley stated his brother resides in the nation of China.

Marital Status: Married.

Prior Marriages/Long Term Relationships: Two reported.

Children: Four, ages 10, 9, 7 and 3.

Custody Status of Children: The defendant stated his two oldest children reside with his former wife in California. His two youngest children reside with him and his present wife.

Monthly Child Support Obligation: $397.00 per month. The defendant estimated he was approximately $1,200.00 in arrears.

Employment Status: Employed, Northern Nevada Construction.

Number of Months Employed In The 12 Months Prior To Instant Offense: 12

Income: $17.00 per hour. **Other Sources:** None reported.

DEFENDANT INFORMATION (Continued)

Assets: Unspecified amount in his vehicle.

Debts: The defendant reported debts of $30,000.00 in student loans and $20,000.00 in medical bills. He reported additional debts of $10,000.00 in miscellaneous bills.

Education: High school graduate, 1994. The defendant graduated the Culinary Institute of America in New York in 1999.

Military: N/A

Health and Medical History: At the time of interview, the defendant reported no health concerns.

Mental Health History: On May 21st and 29th, 2008, the defendant was evaluated by Robert Stuyvesant, MFT, with respect to this offense and pursuant to the dictates of NRS 176.133/176.135. The findings of the psychosexual evaluation are attached and reflect the following:

DSM IV:

Axis I: V61.21 Sexual abuse of a child, perpetrator; 302.9 paraphilia nos
Axis II: Deferred
Axis III: None
Axis IV: Current legal charge, relationship challenges
Axis V: GAF = 60

Risk of Dangerousness to the Community: In considering the risk scales along with clinical judgement, Mr. Dunckley is estimated in the moderate range for sexual reoffense risk. Clinical judgement elevated risk due to reoffense behaviors occurring over an elapsed period of time, and involved an offense against a stranger. Furthermore, his promiscuous and impulsive sexual lifestyle places him at greater risk for further allegations/charges. There is no evidence of being indiscriminate in regard to victim selection, meaning his modus operandi is not limited to a particular victim type, age or preference.
It is the opinion of this evaluator that Mr. Dunckley *DOES NOT REPRESENT A HIGH RISK TO REOFFEND SEXUALLY* based on current standards for assessment (NRS 176a.110)

Identification of Risk Population: Based on historical information, response to inventories, self reported arousal and objective measures of sexual interest, the identifiable risk population is varied, and can include adult females who are strangers, and under age youth whom he has access to, or had developed a relationship with. Much younger children do not present as an immediate risk, in that there is no evidence of sexual interest in younger children.

Amenability to Treatment: Mr. Dunckley presents as a positive candidate for treatment, based on his willingness to openly discuss and explore the factors related to the referral offense; primarily his disclosure of his sexual offense history. He does not present as antisocial or defiant, though there may be some resistance to treatment upon realization of a longer term process. Although there may be some minimization and presence of cognitive distortions that support and maintain the behaviors, these issues can be addressed in the treatment process with Mr. Dunckley. Mr. Dunckley recognizes the need for intervention, and reported having initiated treatment to date.

DEFENDANT INFORMATION (Continued)

Gambling History: At the time of interview, the defendant reported no problematic gambling concerns.

Substance Abuse History: Mr. Dunckley reported he smoked marijuana on one prior occasion and his alcohol consumption was non problematic.

Gang Activity/Affiliation: None reported.

V. CRIMINAL RECORD

CONVICTIONS: 1 **FEL:** 0 **GM:** 0 **MISD:** 1

INCARCERATIONS: 0 **PRISON:** 0 **JAIL:** 0

OUTSTANDING WARRANTS: None.
WARRANT NUMBER AND JURISDICTION: N/A
EXTRADITABLE: N/A

SUPERVISION HISTORY:

CURRENT: 0 **Probation Terms:** 0 **Parole Terms:** 0

PRIOR TERMS:

Probation: 0	**Revoked:** 0	**Discharged:** 0	**Honorable:** 0	**Other:** 0
Parole: 0	**Revoked:** 0	**Discharged:** 0	**Honorable:** 0	**Other:** 0

Adult:

Arrest Date:	Offense:	Disposition:
7/27/05 Reno Municipal Court	Petty Larceny (M)	Per defendant convicted (M), fined $300.00.
3/22/07 Reno NV P.D.	Burglary Sexually Motivated (F) Sexual Assault (F) **CR07-1728, CT. II**	**Instant Offense**
3/30/07 Reno NV P.D.	Sexual Assault on a Child (F) Lewdness with Child Under 14 years (F) **CR07-1728, CT I**	**Instant Offense**

In addition to the above, records reflect the defendant was arrested on April 30, 2007 by the Reno Police Department for assault with no disposition being available.

VI. OFFENSE SYNOPSIS

Count. II

On March 10, 2007, officers of the Reno Police Department were dispatched to a residence on Sky Ranch in reference to a disturbance call which involved a woman screaming in the caller's background. Upon arrival, officers observed a large group of people standing in front of an apartment building and a female setting on the curb of the road crying hysterically. The female was stating she had been sexually assaulted. One of the bystanders advised the officers the defendant, Brendan Dunckely, was the person the female had accused of the assault.

Officers contacted the defendant who was setting in a white van. Upon being questioned, the defendant advised the officers he had been driving through the parking lot on his way home when he observed the crying female stumbling in the parking lot. Mr. Dunckley related the female appeared intoxicated and he had stopped to assist her. He went on to state the victim appeared intoxicated and he continued to watch her as she fell on a stairway. He had then parked his van and gone to assist the victim up the stairs and into her apartment. As he and the victim reached her apartment he had asked her if she had a key and she replied that she did not. The victim then fell against the door of her apartment and it opened. The victim then fell to the floor onto a pile of clothing. The defendant reported the victim was unconscious at this point and he administered a sternum rub and checked her pulse. This action awoke the victim and he had asked her what her name was and how much alcohol she had consumed. Mr. Dunckley reported the victim had spoken to him and then again lost consciousness. He again rubbed her sternum and she awoke and began screaming at him and asking him who he was. The defendant reported he was on his cell phone speaking with his wife at the time of the occurrence and she had told him to leave the area. He had then left the victim and as he did the victim began to follow him and eventually attacked him. Mr. Dunckley stated he then went to the parking lot of the complex and asked an unidentified male to assist him. He related he was able to get away from the victim and went to his van where he ended the phone conversation with his wife and call the Reno Police Department non emergency number to report the incident. In checking the defendant, officers observed a red mark on his neck area.

Officers then spoke with the victim who reported she was arguing with her boyfriend and had decided to go for a walk. As she was walking to her apartment she noticed she was being followed by a van driven by a male who wanted her to get in the van. She had declined his offer and continued walking. The next thing she recalled, was waking up with the male who was driving the van attempting to force his penis in her mouth. She advised the officers that she had bitten the males penis at least four times when he had his penis in her mouth. Due to the victims apparent intoxication, an officer administered a PBT which revealed a blood alcohol content of .226%. At his point, officers requested the defendant submit to swabs of his penis for DNA analysis and also requested he submit to a visual inspection of his penis for injuries. The defendant was compliant with the officers' request. No visible injuries were noted to the defendant's penis.

As a result of the report, an investigation ensued and on March 12, 2007, the detective assigned recalled a prior sexual assault investigation in 2005 where defendant Dunckley was listed a suspect. The detective noted similarities in the two cases in that both victims had been drinking excessively and Mr. Dunckley was extremely cooperative with officers. In both instances, the defendant had been on the phone with his wife at the time of the reported offenses.

OFFENSE SYNOPSIS (Count. II): (Continued)

On March 19, 2007, the detective met with the victim in this offense and she was questioned. The victim reported she had been drinking and had become involved in an argument with her boyfriend. She had left her boyfriend's location and was walking back to her apartment when she noticed she was being followed by a van. She recalled going up the stairs to her apartment. She then entered her apartment and when she turned around, Mr. Dunckley was standing in her apartment's open doorway. She related the defendant had then told her to perform oral sex and believing she had no recourse, she complied. The victim stated she had bitten the defendant's penis when he put it in her mouth. At this time the detective collected an oral swab from the victim for comparison purposes.

On March 21, 2007, the defendant was contacted at his residence. When questioned, the defendant related the same information he had provided to the original responding officers. The detective then asked the defendant how the victim's saliva had ended up on his penis. Mr. Dunckley then advised the detective that when the victim had awoken the second time, she had removed his penis from his pants and performed oral sex upon him. The defendant stated he knew this was wrong and stopped the victim. He reported the victim had become angry and attacked him. The detective then requested the defendant respond to the police department on March 22, 2007, for an additional interview. The defendant complied and when questioned on this occasion, he reported the sexual contact with the victim on March 10, 2007 was consensual. Mr. Dunckley related he had observed the victim staggering while walking in the parking lot of the apartment complex. He had offered her a ride and asked her if she was ill. The victim had told him she had an argument with her boyfriend and continued walking toward an apartment staircase. She then fell on the stairs and the defendant parked his van and assisted the victim to her apartment. When they reached her apartment door, the victim knocked it open and fell on the floor. The defendant saw that the victim was unconscious and woke her up. At this point, the victim put her arms around him and became affectionate. He then backed away from the victim and she again passed out. He woke her a second time and on this occasion the victim removed his penis from his pants and said she wanted to thank him. She then passed out again. When the victim awoke the third time, the defendant reported she looked "possessed." She then accused him of raping him and he left her apartment. The detective asked the defendant how the victim managed to get his penis out of his pants if she was too intoxicated to stand up and he responded that it was a "bad judgement call." The defendant was reminded of the similarities in this case with the prior report which listed him as a suspect where the victim reported being forced to perform oral sex upon him while she was intoxicated and he responded that it was just a "stupid judgement call." When the victim came onto him, he made a "split second mistake." Upon conclusion of the interview, the defendant was arrested and booked accordingly.

Count. I

During the course of investigating Count II, the detective interviewed several other females who had contact with the defendant in the past. During the course of the interviews, the detective was advised of the name of a female who had been sexually abused by the defendant when she was a child. Further investigation revealed this victim was presently incarcerated in the Nevada Department of Corrections.

On March 29, 2007, the detective traveled to this victim's place of incarceration and she was interviewed. Upon being questioned, this victim reported that when she was twelve years of age, she and another juvenile female had gone with defendant Dunckley and his wife to the Atlantis Casino for dinner. After the dinner, the victim had mentioned to the defendant that she had never been in an elevator which allowed the view of the Reno area. This victim reported she and the defendant had entered an elevator alone. As the elevator ascended, the defendant pushed her into a corner of the elevator and put his hand down her pants.

OFFENSE SYNOPSIS (Count. I): (Continued)

This victim related a second encounter with the defendant and stated it had occurred when Mr. Dunckley was driving her to her residence. She reported at the time she was twelve years of age and was living with her parents near Longley Lane. The victim stated that upon arrival in the parking lot of her parent's apartment complex, Mr. Dunckley had parked his vehicle and had begun kissing her. She stated the defendant had sexual intercourse with her in his vehicle. The detective asked the victim if the act was forced upon her and she stated it was not, however, she stated "but I was only twelve years old." The victim went on to relate the defendant had told her not to say anything about the incident and that he would "teach her stuff." After the assault, the victim stated she avoided any further contact with the defendant. After receiving this information, the detective attempted to locate the defendant at his residence but was unsuccessful. On March 30, 2007, the defendant responded to the Reno Police Department where he was taken into custody and booked accordingly.

VII. CO-DEFENDANT'S/OFFENDER'S INFORMATION

N/A

VIII. DEFENDANT'S STATEMENT

The defendant was interviewed at the Division of Parole and Probation on March 26, 2008. At that time he submitted a statement for the Court's review.

IX. VICTIM INFORMATION/STATEMENT

(VC2175351) The victim in Count I has failed to respond to communication from the Division. Therefore impact and losses are unknown.

(VC2175350) The victim in Count II has failed to respond to communication from the Division. Therefore impact and losses are unknown.