

1 that came into play.

2 This case was very difficult to litigate. The
3 main witness that I had, Mr. Dunckley -- if we went to
4 trial, I probably would have subpoenaed her.
5 Unfortunately, she had been moved to Ohio prior to any
6 trial by Mr. Dunckley. And he adamantly refused to put
7 his wife on the stand who he claimed would have been
8 someone that could have helped him in regards to being an
9 alibi since he claimed that he was on the phone with her
10 during the incident with Jessica in the apartment.

11 And that was very -- I mean, that is a truth. I
12 could not get access to his wife. He did not want me to
13 talk to her. The first time I actually talked to her was
14 I think in an e-mail after sentencing.

15 Q Did the e-mail discuss this alibi at all?

16 A No.

17 Q Okay. Well, let's rewind just a little bit.

18 When was the plea negotiation given to
19 Mr. Dunckley, the first instance?

20 A Well, I'm not sure if he got -- it's probably
21 true that he didn't get the actual document in regards,
22 but this was a long, drawn-out period in which we were
23 discussing the plea because we had to set up Dr. Ing, and
24 that was set up in February. So he knew that he was --

1 needed to set up -- and he was getting letters from me
2 talking about how Mr. Ing would accept him as a client to
3 do these type of things.

4 So you know, this deal did not come like
5 March 3rd and he was entering it on March 6th. There was
6 a significant amount of time that he had with regards to
7 that. And we talked to about it in that regard.

8 I don't know if I gave it to him that morning.
9 If you look at the guilty plea memorandum, is it signed
10 March 6th?

11 MR. HATLESTAD: The record will reflect it was
12 signed on the 6th, Your Honor.

13 THE WITNESS: So that makes a lot of sense in
14 regards to a guilty plea. A lot of times you don't get
15 them until a day or two before the actual sentencing, so
16 we go over it. But we have already -- I've already gone
17 over all his constitutional rights before, before I even
18 acknowledge to the district attorney that he's going to
19 accept the deal.

20 BY MR. HATLESTAD:

21 Q Well, let me be a little more specific.

22 Mr. Dunckley signs the guilty plea memorandum on
23 the 6th. Are you saying that he went over the guilty plea
24 memorandum as a document in itself?

1 A Oh, absolutely.

2 Q That day?

3 A We went over it and I sat down -- I just have
4 this distinct image, now that I've been here, of
5 Mr. Dunckley and I sitting outside on that wooden bench
6 while he read it, and I asked him if he had any questions
7 and specifically made sure that he knew that he waived all
8 of those rights, that he was going to have to accept it
9 and that he was going to have to admit to those charges.

10 Q Okay. Now, Mr. Dunckley has said -- I want to
11 come back to this plea in a minute.

12 Mr. Dunckley has said that you essentially told
13 him how to answer some questions in his plea canvass. Is
14 that true?

15 A Well, he said that I told him to say yes to
16 everything. That's obviously not true. But in order to
17 enter a guilty plea, you have to admit guilt to those
18 charges. And so when I advised him, I said, "You need to
19 tell the Court that you admit your guilt to these
20 charges."

21 He certainly was free to say: No, I'm not going
22 to admit guilt to these charges. That would have charged
23 the Court to not accept the guilty plea. So I don't think
24 that --

1 Q Well, let's put a fine point on it. You're not
2 telling him, are you, to admit to an offense he didn't
3 commit, are you?

4 A No.

5 Q Well, be real clear about that because that's
6 going to be an issue now.

7 A Right. But you never -- you never -- you never
8 tell the client to admit to something that he did not do.
9 But you're entering into a guilty plea, so he's looked at
10 his case and we talked about what these elements are and
11 what the guilty plea provides in regards to what he may be
12 sentenced to, and he has to freely admit to those charges.
13 If he does not admit to those charges, then he goes to
14 trial.

15 Q Well, no. Well, here's the implication. The
16 implication is you're telling him that: The judge will
17 not accept your plea if you don't admit the elements.

18 And the implication is: I wouldn't do it if you
19 hadn't told me to do that. That's what he's testified to
20 in court today: I didn't want to admit to these things
21 and I wouldn't have done it if you hadn't told me to do
22 it.

23 A That's just not true.

24 Q Well, what happened then?

1 A Well, I specifically told him not to take this
2 deal because I thought that he was not going to get
3 probation. And all I told him was if these are what you
4 want to admit to, then you will be admitting to the guilt.

5 But I never told him that if he was not guilty or
6 if the allegations were not true, that he should say yes,
7 those are true.

8 Q Let me come back to the negotiation real quickly.
9 Everything that's contained in this guilty plea
10 memorandum you had gone over with Mr. Dunckley long before
11 the document's presented to him; is that correct?

12 A That's correct. Before he took the deal, I
13 always go over the constitutional rights that the
14 individual has and will be waiving.

15 I also go over the rules in regards to what his
16 sentencing could be and that the judge does not have to
17 agree with any sentencing standards agreed to by the Court
18 (sic).

19 This case was a little bit different because we
20 had the lewdness charges and we also had -- at the time,
21 before the plea, he was charged with sexual assault of
22 Jessica. And so we went over what it would be in regards
23 to making a plea of an attempted sexual assault.

24 And so we went forward, and those are all the --

1 I'm sure there were other issues that were discussed.

2 Q Now, as far as the negotiation itself is
3 concerned, you have indicated, I think, if I understand
4 you correctly, that the negotiation process was ongoing
5 long before the entry of the plea; is that right?

6 A Well, it was ongoing at least -- I think the
7 letters that I have are in the 20s of the February that we
8 started discussing what he needed to do in order to
9 satisfy that plea, so the plea would have started sometime
10 in mid February.

11 Q So you're talking to Viloria and you're talking
12 to your client about a deal in this case sometime in
13 February.

14 A That's correct.

15 Q Several weeks before the plea, right?

16 A That's correct.

17 Q And had the negotiation always been what
18 ultimately boiled down to the deal, or had there been
19 other types of negotiations?

20 A I think Ms. Viloria had given me some other
21 options. I think that if he would have pled to a sexual
22 assault, I think that may have been the first offer. I
23 don't recall.

24 Ms. Viloria is an attorney that I have always

1 found that will always try to negotiate a resolution,
2 especially in sex cases. And she gives an offer and you
3 can either accept it or go to trial with her.

4 And when she gave me her offer, we were going to
5 trial. And so that's how I felt, that we were going to go
6 forward. And then the offer came down as we -- I believe
7 we had continued this trial before, one time before that
8 we were ready to go and did not confirm it for some
9 reason. I don't recall. And now, butting up on the new
10 trial date, and that's when the offer came.

11 Q And then you discussed it with Mr. Dunckley, and
12 he agrees to it because probation is on the table and his
13 view is he's going to get probation in his estimation.

14 A That's correct.

15 Q Despite what you said.

16 A He rejected my recommendation that he not take
17 this deal.

18 Q Okay. Now, aside from talking to Mr. Dunckley,
19 and aside from getting discovery from the State, including
20 the DNA result which you went over with your client, even
21 though you didn't have the hard copy, and aside from
22 getting the documents that he gave you, did you do any
23 other kind of investigation of this case, or was reviewing
24 and studying that material the sum and substance of what

1 you did?

2 A Sure. In regards to the Ashley case, I was very
3 concerned in regards to her testimony, and I firmly
4 believed that that would be a case that we could win. Not
5 win, but we could receive an acquittal because there were
6 a lot of misstatements in her characterizing.

7 And prior to the preliminary hearing, I
8 investigated the Atlantis Casino. As you know, the
9 Atlantis Casino has gone over some remodeling, and the
10 Atlantis used to be a small hotel. And right around that
11 time of the allegations, that's when I thought that the
12 towers, the big long towers had not been put in.

13 And the allegation was that he had --
14 Mr. Dunckley had fingered her on her private parts while
15 she was either going up the elevator or coming down an
16 elevator. So I went and I investigated that and
17 unfortunately found that those towers were built prior to
18 one of the allegations.

19 We reviewed all the transcripts. In regards to
20 the Jessica, there was -- after we reviewed the
21 transcripts, in looking at Mr. Dunckley's statements,
22 there were some concerns in regards to her testimony on
23 how this all occurred because if you recall from
24 Mr. Dunckley's testimony -- and I can't remember if it was

1 the first time when Detective Broome came over to his
2 house, and I think that was the first time that
3 Mr. Dunckley admitted to some kind of sexual contact, or
4 if it was the second time that he went down and was
5 interviewed in regards to it.

6 But there was a lot of conflicting statements
7 because Mr. Dunckley was claiming that he had at first
8 walked into and was trying to help her into the room and
9 she fell. And so he tried to get her up, and she was
10 nonresponsive, so he rubbed her chest. And at that time
11 she awakened and was so happy that she unzipped his pants
12 and gave him oral sex.

13 That of course then changed because, as I recall,
14 Detective Broome said, well -- and what I figured was a
15 normal police tactic, which they always do, is: Well, why
16 is there DNA on your penis? The second time was that
17 Mr. Dunckley said: Well, what happened was, is she fell,
18 she was choking on her throat, so I put my figure in and I
19 swiped it through, saving her, and she woke up and was so
20 happy that she performed oral sex on me.

21 And while they were standing out waiting for the
22 cops and everything, he decided he was going to go to the
23 bathroom. So when he used his hand to hold his penis
24 going to the bathroom, that's when the DNA would have

1 gotten onto his penis.

2 And so those statements were really hard to get
3 around. And obviously the DNA result was going to be --
4 if it -- those -- even if it came back as negative, we
5 were still going to have serious problems because of his
6 previous statements in regards to: Well, the DNA would be
7 on my penis because of the finger swap.

8 And so we reviewed all of those documents. I
9 continually asked for other documents.

10 During the preliminary hearing, I tried -- I had
11 Ms. Jessica give us a detailed description of her
12 apartment, and that conflicted with kind of her testimony
13 because her testimony was that she was already way in the
14 back of the building and there was a door that was a
15 problem.

16 And we were in the process of getting that
17 information from Ms. Vilorio to go in and get a diagram of
18 the building, of the room that she had. That's what we
19 would have -- she -- I can't remember the exact details,
20 but she testified I think that she was in the back of her
21 house where there was a living room. On the right side
22 was -- or on the left side was a door to leave for the
23 balcony, but I think maybe it was the right side or
24 something of that nature. There were some discrepancies

1 of that. I think Mr. Dunckley alluded to there was some
2 discrepancies in her testimony as to the layout of the
3 apartment.

4 Q Okay. Well, given the importance of these
5 statements that Mr. Dunckley gave to Detective Broome, did
6 you consider a motion to suppress?

7 A I did consider a motion to suppress, but I didn't
8 see that there was any -- that he did not voluntarily give
9 them because the method in which he was freely giving
10 statements the night -- when he was not in custody, and
11 then the statements were given while he was at his own
12 home, the first day he was at his home.

13 I think that that was becoming a big issue for
14 Mr. Dunckley at the end because what was happening is that
15 Ms. Vilorio was then now claiming that she was going to
16 bring in other charges on prior bad acts. At that time,
17 we were reevaluating whether the suppression motion would
18 have been available.

19 That's a mischaracterization because I don't
20 think he was involved in any of my discussions of whether
21 or not I was going to or not. So I just didn't feel that
22 it was necessary in this case.

23 Q Well, did you -- you said you considered a motion
24 to suppress but it wasn't necessary. Are you saying that

1 since there's two possible -- maybe more to suppress a
2 statement, this statement that -- the key statement that
3 Mr. Dunckley gave to Broome, the second statement, was it
4 your view, after reviewing everything and conducting the
5 investigation, sufficient depth and scope that
6 Mr. Dunckley's statement was voluntarily under the
7 *Jackson-Deno* standards? Did you think about that?

8 A I thought about whether it was voluntary, yes.
9 And at the time that I -- in the beginning, when we were
10 reviewing that, there was no mention from Mr. Dunckley
11 that -- this is not the first time I heard about the
12 booking sheet being on the desk, but the time that I heard
13 about that was almost within a couple weeks of us entering
14 into the plea.

15 That's why when I was talking about how we
16 reevaluated that, that information was given to me by
17 Mr. Dunckley later, later on in our review of what was
18 going on.

19 So I had no idea that -- and I don't think that
20 would have changed my decision anyway.

21 Q Okay. Well, if the statement is not involuntary,
22 again, given the -- describe the scope and depth of your
23 investigation to decide whether or not he was subjected to
24 a custodial interrogation since the two inquiries are

1 separate and apart.

2 A It's my recollection that -- well, the first
3 statement that he gave, he was -- he actually waited in
4 his car, and I think that --

5 Q Well, let's put a fine point on it. Mr. Dunckley
6 has stated very clearly here that he did not feel free to
7 leave at that second interview. There's no question the
8 first one is coming in.

9 A Yeah.

10 Q That one is coming in. I don't even think
11 Mr. Story is going to contend it wouldn't. Maybe he will.

12 But the second one, Mr. Dunckley very clearly
13 stated in this courtroom today under oath that he thought
14 he was in custody. That's my word. He used different
15 words.

16 A Right.

17 Q So what investigation did you do to alleviate the
18 possibility that he was actually subject to a *Miranda*
19 violation in this case and, therefore, that statement is
20 out?

21 A Well, we reviewed those tapes because I believe
22 that one was an audio, and I don't recall -- I really
23 don't recall what Mr. Dunckley said in that specific
24 testimony with Detective Broome at the sex crime unit, so

1 I can't really recall why I felt that there was no
2 custodial charge. He was asked to go down there, from
3 what I remember, and I think --

4 Q Hold on. He was voluntarily there. There's no
5 question --

6 A I think he was entitled, if he wanted to leave at
7 any time.

8 Q He's voluntarily there. Is he indicating to
9 you -- and this is the point. This could be the case.
10 This is the issue.

11 If this statement is out, his case is so much
12 stronger. You got no DNA.

13 A He never --

14 Q Wait. You got no DNA. You got an incredible
15 victim on one count, another victim whose story can't be
16 backed up because there's no physical evidence, and then
17 we have these damaging admissions he makes.

18 If they're subject to motion to suppress, your
19 case is perceptibly better.

20 So my question to you, as a reasonably competent
21 lawyer with some experience in these matters, is: Did you
22 consider a *Miranda* violation in this case?

23 A It's my recollection that we did consider a
24 *Miranda* violation in this case at two different periods of

1 time, and we concluded that the statements were made
2 voluntarily and there was --

3 Q Not voluntary. Custodial.

4 A I was going to say: and that he was not under
5 any custodial arrest.

6 Q And that's based on your review of the tape and
7 talking to Ing, right?

8 A That is correct.

9 Q And he had not at this point said anything about
10 the issue --

11 A That came in the second time that we were
12 evaluating, but that became moot at the time that he said
13 that he was going to accept the deal.

14 Q All right. Did you conduct any kind of
15 investigation to authenticate the documents that
16 Mr. Dunckley eventually gave you?

17 A The documents were provided to the district
18 attorney's office. The key documents that we had in the
19 beginning was his culinary.

20 Q What is that?

21 A It's his culinary transcript.

22 Q Oh, the culinary school.

23 A Yeah, the culinary school.

24 Q Okay.

1 A And this was also -- those documents were
2 provided to Ms. Vilorio, which I think necessitated
3 another -- because my discussions with her was: Look, you
4 have nothing on Count I. My client wasn't here. Here is
5 the proof.

6 And throughout the period of time, I kept on -- I
7 told Mr. Dunckley that the document was not a certified
8 copy and I was under the impression that he was going to
9 get me a certified copy, but I didn't really need that to
10 be a certified copy because when I was in discussions with
11 Ms. Vilorio, there was really going to be no objection to
12 those documents coming in.

13 And Mr. Dunckley was very good because I told
14 him, look, we have these documents, but then I distinctly
15 remember him saying that he has other documents in regards
16 to his defense. And so I told him to give them to me.

17 And again, I had to actually write him a letter
18 many weeks later saying: Where are these documents?

19 And so we finally obtained I believe some tax
20 records that would also have shown that he was not in the
21 area during that period of time.

22 Q Well, had your investigation uncovered
23 information to suggest that he could have been here prior
24 to August 13th of 2000?

1 A I think that there was -- I think that he
2 testified -- yeah. I think there was evidence that he was
3 here for a period of time, and I believe he just testified
4 today that he was here in 2000. And I don't recall what
5 day, but I believe it was early 2000 that he moved here,
6 like January of 2000. But I can't -- I don't recall.

7 But he testified -- I do recall him testifying
8 this morning that he had moved here in 2000, and he also
9 talked about a Ford Taurus. I think that was bought in
10 July of 2000 or -- I can't remember the Taurus car.

11 Q Okay.

12 A I mean, he probably has the DMV record in his
13 file. So that would be -- that may be able to refresh my
14 recollection.

15 Q And the Taurus is a crime scene for Ashley.

16 A That's my -- well, there was the allegation in
17 regards to the Taurus sex, but there was also her making
18 statements that while she was ascending or descending into
19 the elevator that he had fondled her private parts.

20 MR. HATLESTAD: Okay, that's all. Thank you,
21 Mr. O'Mara.

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CROSS-EXAMINATION

BY MR. STORY:

Q Good morning.

A Good morning, Mr. Story. How are you this morning?

Q I'm great. You?

A Good.

Q If I understand the time of this correct, this sexual assault charge occurred about the time there was advertisement or common knowledge about Brianna Denison.

A That's correct.

Q Did that influence you in any way?

A Yes, it did.

Q Did you talk to Mr. Dunckley about the Brianna Denison case?

A I don't think -- yes, I did, but I expanded on the Brianna Denison case as well.

Q Why do you think Brianna Denison had any impact whatsoever on Mr. Dunckley's case?

A It was really not about the Brianna Denison case. As an attorney, I have to look the facts of this case, and I have to look at what the judge normally does in these type of cases. I have to look at what the district attorney would allow us to do in regards to

1 trying to figure out what is the best method of going back
2 doing this case.

3 I felt that the Brianna Denison case would be
4 very hard because it was in the papers and I thought that
5 if we went to trial, that would have some effect on our
6 ability to receive an acquittal on the lewdness with a
7 child case.

8 Q Did you inform Mr. Dunckley of that?

9 A Yeah. We talked about the fact that when you
10 look at jurors, you have to look at the community as a
11 whole, and the fact that as we were going through this
12 process, the Brianna Denison case may have some effect.
13 But I didn't say that -- I said it would have an effect.

14 Q Now, if I understood you correctly, you were part
15 of the Jack Alian group.

16 A That's correct.

17 Q And how many cases did you have at this
18 particular time? Do you recall?

19 A Open or how many cases have I done?

20 Q That you were actually working.

21 A Oh, probably three or four. The cases that I
22 handled with Jack Alian's cases were -- at this time I was
23 getting away -- or the Jack Alian group was being -- at
24 this time the Jack Alian group was being discarded or

1 whatever. I can't think of the word, but they were
2 setting up a new program with an administrator; and
3 therefore, they were going to reclassify all of the cases.
4 So I started to get out of the Jack Alian group in regards
5 to the adult courts, so I was not taking that many.

6 Q Do you practice civil law also?

7 A I do.

8 Q How much of your practice is civil?

9 A My civil practice is probably about 65 percent.

10 Q How busy were you in your civil practice at this
11 particular time?

12 A I had one big case that was going on at that
13 time, but I wasn't very busy. There was no time that I
14 was working past 9:00 to 5:00 on any day.

15 Q So there was nothing in your practice that
16 prevented you from working with Mr. Dunckley.

17 A Quite the contrary. I worked quite a lot on this
18 case to try to figure out a method of resolving this case
19 and getting it prepared for trial.

20 Q How were you paid on this case?

21 A I was paid on a flat fee.

22 Q So it didn't matter whether you put in one hour
23 or 1,000 hours, you were still paid the same; is that
24 correct?

1 A In regards to the pay, yes. It did not matter
2 how much I worked.

3 Q Did the Alian group allow you to petition the
4 Court to hire an investigator?

5 A I think I could have. If I needed an opportunity
6 to investigate, that may have been something I could have
7 done.

8 Q Did you do that?

9 A I did not feel it was necessary because I
10 conducted my own investigation.

11 Q And what did you do in terms of your own
12 investigation?

13 A In regards to the investigations, I like to go
14 out to the scenes of the alleged crimes, look those over,
15 review everything in that regard.

16 In a lot of cases, when there's no testimony by
17 the victims, we try to go and interview the victims and
18 have them come in.

19 In this case, we had the transcripts in regards
20 to that, and so we felt -- I felt that that would have
21 been sufficient for me to be able to use those transcripts
22 to poke any holes in their testimony at trial.

23 Q Did you cross-examine these victims at the
24 preliminary hearing?

1 A Yes, I did.

2 Q Did you believe them?

3 A Did I believe them?

4 Q Yes.

5 A The girl -- the lewdness charge, I felt that we
6 had a chance of acquittal.

7 The Jessica girl, I felt that she was very good
8 on the stand. I did find some things that I thought that
9 we would go over. It was very unclear.

10 She claimed that she was forced into having
11 sexual intercourse with Mr. Dunckley, but she was like
12 20 feet away from him when she testified that he was in
13 the doorway when he -- excuse my language, but he said,
14 "Suck my dick." And that's what she believed, that she
15 would then walk forward and began to give him oral
16 gratification.

17 Q Is this the young woman with the high blood
18 alcohol content?

19 A Yes, that's correct. Yeah. My understanding, it
20 was past .2. And so I felt that that was going to be
21 something we would be able to use in regards to her
22 actually making the affirmative walk to actually give
23 sexual gratification.

24 Q At the time you took this case, you had done

1 three or four other cases of sexual assault; is that
2 correct?

3 A I can't recall. I started taking cases in 2006
4 with the Jack Alian group. At that time, I probably had
5 taken three or four, maybe a few more sexual assault
6 cases. I had done many, many more adult cases.

7 Q Are you a sole practitioner?

8 A At the time of this case, I had -- I was in
9 practice with my brother and my father.

10 Q Did you discuss this case with any other
11 attorney?

12 A I probably discussed it with especially my father
13 numerous times. And I also have a very good network of
14 criminal defense attorneys that I frequently discuss cases
15 with and processes.

16 I take very -- I take pride in the fact that most
17 cases, I'm pretty solid, and I try to find everything I
18 can to make sure my client gets the representation he
19 deserves. And that's what I believe I did in this case.

20 Q After reviewing this case, looking backward, do
21 you think there's anything else you could have done on
22 Mr. Dunckley's behalf?

23 MR. HATLESTAD: I'm going to object. That's not
24 relevant.

1 THE COURT: Sustained.

2 BY MR. STORY:

3 Q You said you met with Mr. Dunckley numerous
4 occasions. Do you recall how many times?

5 A Mr. Dunckley, it was very hard to get ahold of
6 him and have him come in. So I finally was able to get
7 ahold of him to come in and actually watch the tapes
8 because the tapes were not very good for him, and I needed
9 him to watch them and give me information.

10 He also came in couple other times so that we
11 could discuss various issues, but I had no idea -- I mean,
12 this was a few years ago, so I don't recall what we
13 actually discussed.

14 I just want to say that I discussed the plea deal
15 with him. I want to say that I discussed the process with
16 him right after the preliminary hearing where he was able
17 to pick up the discovery.

18 Q Did you approach Kelli Anne Vilorio, or did she
19 approach you about a plea deal?

20 A She approached me about the plea deals, both of
21 them. It was my understanding that we were going to
22 trial. The only way -- the only way I would have
23 approached a DA for a plea deal is if my client said: Get
24 me probation. And I don't know if I -- I don't know if

1 that ever happened in Mr. Dunckley's case.

2 Q Now, did you discuss probation with Mr. Dunckley?

3 A Yes.

4 Q Did you believe probation was available with this
5 lewdness with a minor?

6 A I believed that, in our discussions, that we were
7 going to go back and use the law in regards to when
8 probation was available at the time of the alleged
9 offense.

10 Q And that was a discussion you had with the DA,
11 Vilorio?

12 A That's correct.

13 Q Okay. And did she tell you whether or not she
14 thought probation was available?

15 A That was a concern and that was -- the
16 availability of probation for the lewdness and the
17 availability of probation of taking the case from a sexual
18 assault to an attempted sexual assault was the reasons why
19 the plea was entered.

20 Q Even with probation available, from your
21 perspective, you still thought that trial was more
22 appropriate?

23 A There was no question in my mind that if
24 Mr. Dunckley accepted this deal, was what I told him, that

1 probation was not going to be granted to him.

2 Q Why do you say that?

3 A Why do I say that?

4 Q Yes.

5 A Well, I took into consideration the charges that
6 were there. There was a lewdness charge with a child. I
7 took into consideration that there was a sexual assault,
8 attempted sexual assault. I took into consideration the
9 propensity of the judge that we were going to be in front
10 of and what would happen. And I took into consideration
11 my experience in regards to what had happened as well as
12 discussing with other attorneys this matter.

13 Q Now, you said you conducted your own
14 investigation, apparently referred to that; is that
15 correct?

16 A Well, when you have an investigator, you have to
17 rely on them. If I need an investigator, I will get one
18 because if I need someone to testify in regards to
19 anything that I find or anything that investigator finds.

20 Q Now, you testified that you went to the Atlantis;
21 is that correct?

22 A That's correct.

23 Q Did you go to any other crime scene?

24 A I did not go into the building, but I do recall

1 driving -- what had happened with Mr. Dunckley was, I was
2 really concerned -- and I don't remember -- I don't
3 remember all the nature of going, but I was concerned
4 about the fact that there was an allegation that
5 Mr. Dunckley was driving down the street and there was
6 this young girl walking and that she said, "I don't want
7 to get in the car," and that he followed her, and then
8 there was a method of where he parked so he could see her
9 stumbling up the stairs, doing things of that nature.

10 And so I was concerned that whether or not the
11 staircase may have been in the back or whether it was --
12 the front door was in the front, and I don't -- I can't
13 remember what it looks like anymore.

14 But I remember driving over to the apartment
15 complex and looking at the outside area to make sure that
16 the -- either the door to her -- may have been in the back
17 or wouldn't have been seen. I just can't remember.

18 Q Anything else you did to investigate this case?

19 A I reviewed all the information and if there was
20 any -- and continued to ask the district attorney for
21 additional documents.

22 Q Now, you said that Mr. Dunckley provided you with
23 what amounts to alibi evidence, that he wasn't here at
24 that particular --

1 A He provided me a few documents. That's correct.

2 Q Did you do anything to follow up on those
3 documents?

4 A Like what?

5 Q Did you compare the times that those documents
6 showed him to be somewhere else at the times of the
7 crimes?

8 A Absolutely. I believed that that was one of the
9 reasons why he should go to trial in regards to Count I.

10 Q How many times did you talk to him about going to
11 trial?

12 A I have no idea. Three or four times. Even after
13 the fact that he entered his guilty plea, I told him if he
14 wanted me to file a motion to withdraw his guilty plea, we
15 would go to trial. He then acknowledged that I should
16 just try to get him probation.

17 Q What did you do to try to get him probation?

18 A Well, Mr. Dunckley, when he accepted probation,
19 told me that he was going to get a letter of
20 recommendation from Judge Adams, who is the Department 6
21 judge here in the Second Judicial District Court.

22 I also told him to get as many letters as he can
23 from the community because that would show how he was in
24 the community in regards to how he could handle himself on

1 probation. We then set up information in regards to
2 Dr. Ing and I think Dr. Davis. There was another doctor
3 in his evaluation.

4 After that particular point when we received the
5 forms back, the actual information in regards to the
6 reports, I then wrote him a letter saying: Here are some
7 concerns. I need to talk to you about this. Please
8 contact me.

9 And I don't recall him ever contacting me in
10 regards to the psychosexual reports.

11 Q Now, once he pleaded guilty and you talked to him
12 about withdrawal of the pleas, did you have an assessment
13 as to whether or not the judge would allow you to withdraw
14 his pleas?

15 A Yeah. I felt the judge would not allow him to.
16 What I felt is that he would -- my thought was: Let's try
17 to get a continuance and get a better evaluation, or he
18 could file a motion to withdraw. I felt that if he filed
19 his motion to withdraw, we would have to go back to the
20 crimes that were alleged, which were four crimes. One was
21 a sexual assault that was -- had a little bit more umph to
22 it; and second, I thought that if he tried to withdraw
23 because his real argument was that -- Parole and Probation
24 was recommending prison, and I thought that that was going

1 to be a ground that if he made that argument would cause a
2 little bit more concerns to the Court over him not taking
3 responsibility for his actions.

4 Q Now, at some point you received from the DA's
5 office the DNA report; is that correct?

6 A That's correct.

7 Q And what did that DNA report do for
8 Mr. Dunckley's case in your opinion?

9 A Well, it showed that there was no DNA. It was
10 inconclusive, is what I thought, is what I recall.

11 Q Did you provide Mr. Dunckley a copy of that DNA
12 report prior to him entering the plea?

13 A I have no idea.

14 Q Did you talk to him about it prior to entering
15 plea?

16 A Absolutely. And I phrase that -- I'm not sure if
17 I phrased it as there was no DNA, but we discussed,
18 because we had not gotten it yet, throughout the period of
19 time what ramifications that would actually have on his
20 case if it did come back as not conclusive.

21 And while it would have been very helpful to us
22 in trial, it still was not going to be the smoking gun
23 that was going to let him off because we had all these
24 other statements and we had her testimony as well.

1 There was some damaging things in that regard,
2 and I discussed it with him. And I said even if it comes
3 back negative, these are our problems that we're going to
4 have in trial. And he still wanted to take this case to
5 trial -- I mean, still wanted to take the deal.

6 Q Did you ever consider whether or not you should
7 have either of the victims -- any of the victims
8 psychologically examined?

9 A I don't believe I would have been able to on
10 the -- yes, I did evaluate whether or not evaluation -- a
11 psychological evaluation would have been available.

12 Q Did you do that?

13 A We did not ask for that, no.

14 Q Why not?

15 A I don't recall. I don't think that I would have
16 been able to in regards to the adult child -- or the
17 adult, and I'm not sure if I would have been able to meet
18 the standards, the *Abbott* standards of the psychological
19 evaluation for the child. So it was never done.

20 Q Have you ever seen a written report of the
21 allegations for Ashley?

22 A I have no idea. Is there a report in the
23 discovery?

24 Q Apparently not.

1 MR. STORY: Thank you. No further questions.
2 MR. HATLESTAD: No, thank you, Your Honor.
3 THE COURT: May this witness be excused?
4 MR. HATLESTAD: Yes, Your Honor.
5 MR. STORY: Yes, Your Honor.
6 THE COURT: You may step down.
7 THE WITNESS: Thank you, Your Honor.
8 THE COURT: Mr. Hatlestad, is there any --
9 MR. HATLESTAD: Nothing further, thank you.
10 THE COURT: Mr. Story?
11 MR. STORY: No further evidence, no, Your Honor.
12 THE COURT: Okay. We have three minutes for
13 argument. I don't know if you can get done in 15 minutes.
14 MR. STORY: Mr. Dunckley informed me that he
15 really needs to use the restroom.
16 THE COURT: Okay. Well, I have another criminal
17 hearing with an in-custody at 1:00 o'clock. It could go
18 on from 1:00 to 2:00, and then we'll be back on the record
19 at 2:00 in this case.
20 MR. STORY: Thank you, Your Honor.
21 THE COURT: Okay. Court's in recess.
22 (The noon recess was taken at 11:43 a.m.)
23
24

1 RENO, NEVADA, FRIDAY, JUNE 3, 2011, 2:06 P.M.

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3
4 THE COURT: Thank you. Please be seated.
5 Counsel?

6 MR. STORY: Thank you, Your Honor. I'll be very
7 brief. First, we'd like to thank you for taking the time
8 and being very attentive to our arguments.

9 As I suspect you're probably already aware, the
10 real argument here is the one you heard from Mr. Dunckley.
11 It appears to have a great deal of traction, and I'm not
12 going to repeat it. He was very articulate. One of the
13 best oral arguments I've ever heard, and it was from a
14 nonlawyer.

15 I would encourage the Court to really look at
16 what he had to say. He appears to be correct. And if he
17 is correct, it would be injustice not to allow him to
18 withdraw that plea.

19 The other claims, it's sort of part of this
20 petition because we have raised this as part of the habeas
21 petition, but since Mr. Dunckley represented himself, I
22 was instructed not to get involved in that part of it. If
23 it goes up on appeal, it's my intention to take it because
24 I think it is a meritorious argument.

1 The other grounds are ineffective assistance of
2 counsel. You heard from Mr. Dunckley that he would not
3 have entered into this plea had he had all of the
4 information prior to entering the plea that he had after
5 he was in prison.

6 Mr. O'Mara refuted some of that but also agreed
7 to some of that. He hadn't provided the DNA evidence. He
8 said he talked about it. Mr. Dunckley denied that, but he
9 didn't have a copy of the DNA evidence.

10 Mr. Dunckley said, I think fairly accurately,
11 that he was not a sophisticated litigant at the time that
12 he entered the plea. He relied on his attorney. And his
13 attorney, under the case of *Warner vs. State*, 102 Nev.
14 635, is absolutely obligated to do an investigation as
15 when you're involving with a lewdness with a minor under
16 the age of 14. And that's exactly this case.

17 Now, Mr. O'Mara said that he had gone to these
18 places and looked around. That's not in the -- this is a
19 very serious charge, as you're aware of. You sentenced
20 him to ten to life.

21 He should have been entitled and his attorney
22 should have gotten a real live investigator that knew
23 exactly what he was doing, went out and interviewed every
24 one of the witnesses, looked at every one of the crime

1 scenes himself.

2 Mr. O'Mara is an attorney. He's not an
3 investigator. For that reason alone, Mr. Dunckley was
4 denied his 6th Amendment right to an effective attorney.
5 The Supreme Court has said if you don't conduct an
6 investigation in a lewdness with minor case, it denies
7 your client his rights under the system to an effective
8 attorney. That's exactly what happened in this case.

9 Mr. O'Mara was deficient in a couple of other
10 respects. I think he used the Brianna Denison case to
11 scare Mr. Dunckley, and apparently it worked. That's not
12 a reason not to go to trial.

13 We in the judicial system are well aware that
14 juries are pretty capable of separating stuff they hear
15 outside the jury box and stuff they hear inside the jury
16 box. Just because an attractive young woman was raped and
17 murdered and it made headline news for a long period of
18 time is not a reason to take a meritorious case to trial.

19 This case, one of the victims had a .226 BA.
20 Mr. Hatlestad agreed that at least one of the victims was
21 unreliable. This was a triable case, should have gone to
22 trial, and Mr. Dunckley testified that he simply relied on
23 his attorney for that advice.

24 THE COURT: But the attorney says he told

1 Mr. Dunckley not to take the plea.

2 MR. STORY: That's what the attorney says.
3 That's not what Mr. Dunckley says.

4 The attorney doesn't want an ineffective
5 assistance of counsel wrap on him. He's got to work. Of
6 course, Mr. Dunckley doesn't want to spend the rest of his
7 life in prison, either. So there's potential credibility
8 issues here. Attorneys are always much more convincing
9 than their clients.

10 But Mr. Dunckley's position is: I wouldn't have
11 taken the deal, one, if you had told me all of the
12 evidence, if I had known there was DNA evidence that
13 exonerated me or at least made it much more likely to go
14 to trial, I'd have gone to trial.

15 He has some kids, so he took a plea because he
16 thought he might get probation.

17 Frankly, I do think the strongest argument of the
18 whole bunch is the argument of illusory plea bargain. If
19 probation isn't available and you take the deal because
20 you think you're going to get probation, you have got an
21 illusory contract. But, as I said, Mr. Dunckley was
22 articulate about that point.

23 THE COURT: But the attorney was very clear he
24 argued and told Mr. Dunckley that it was a low probability

1 that he would get probation. Whether he was right or not
2 about whether probation is available, that argument I
3 understand. But assuming that that argument is not
4 viable, that probation were available, the attorney,
5 Mr. O'Mara, testified vehemently that he told his client
6 he wouldn't get probation. Yes, it's available, but
7 you're not going to get it. This judge, with these facts,
8 is not going to give it to you.

9 MR. STORY: You're absolutely correct. That's
10 exactly what he said.

11 THE COURT: So why is there an argument that your
12 client wouldn't have pled guilty if he thought he was
13 going to go to prison? He was told he was going to go to
14 prison.

15 MR. STORY: Because the only way he's going to go
16 to prison if he doesn't plead guilty is if Kellie Anne
17 Vilorio convicts him of some of those crimes.

18 There is evidence in the file that shows that
19 Mr. Dunckley didn't do some of those crimes, or at least
20 can make a very straight-faced, logical, and coherent
21 argument.

22 If the argument is if one of the victims says, He
23 made me perform oral sex, and they take a DNA sample from
24 Mr. Dunckley to show that there's none of her DNA there,

1 he's got a great argument at trial. He would have gone to
2 trial had he had that information. That's his complaint
3 about ineffective assistance.

4 Had his attorney gone out and done the
5 investigation or actually hired an investigator, which he
6 had the right and the responsibility I think to do --
7 Mr. Dunckley provided him with a great deal of information
8 that showed he wasn't even in the jurisdiction during the
9 time frame that some of these crimes were alleged to have
10 occurred. The investigator could have come up with
11 additional witnesses to bring into court. He would have
12 had an excellent defense.

13 He didn't take that deal because his attorney
14 didn't offer him the information ahead of time. Had he
15 had that DNA report ahead of time, that in and of itself
16 would have been sufficient grounds or sufficient reason
17 for Mr. Dunckley to say, no, I'm not going to take the
18 deal; let's go to trial.

19 In fact, you heard Mr. O'Mara say we'd run up
20 against trial one other time. They were prepared to go to
21 trial. Mr. Dunckley was prepared to go to trial.

22 He's got four kids. He had to make a really
23 sound decision. What am I going to do for my family? If
24 I can get probation and I don't have any evidence to --

1 enough evidence to exonerate me, I'm going to take my
2 chance at probation.

3 Had he known about the DNA, however, he wouldn't
4 have taken the deal. And that's ineffective assistance of
5 counsel.

6 An attorney has an absolute obligation to let the
7 client decide: Do I go to trial? Do I not go to trial?
8 And the only way he can do that intelligently is put all
9 the cards on the table and say: All right, Brendan,
10 here's the evidence against you.

11 THE COURT: There is a disagreement about that,
12 though.

13 MR. STORY: That's correct.

14 THE COURT: Mr. O'Mara said he did tell him.

15 MR. STORY: That's correct; there is a
16 disagreement.

17 So with that, we would request that the Court
18 grant the petition for habeas corpus.

19 He's not asking to be exonerated for this. He
20 just wants to go to trial. The evidence is there to
21 disprove these claims. He wants to go to trial. He
22 doesn't think he got a fair shot from his attorney. He
23 wasn't effectively represented. For those reasons, he
24 should have his habeas petition granted. Thank you.

1 THE COURT: Thank you.

2 Mr. Hatlestad?

3 MR. HATLESTAD: Thanks, Your Honor.

4 I agree with at least part of what Counsel said
5 about *Warner*, but there's a prejudice prong. It's not
6 simply a failure to investigate. We had to hear what the
7 investigation would have in fact shown.

8 And although the test from *Hill vs. Lockhart* is
9 the reasonable probability that the defendant would not
10 have plead guilty, the reasonableness of the probability
11 depends on what would have been shown had the
12 investigation been done. That's what we're lacking here.

13 The other problem with this case, as Counsel
14 pointed out, and I think you anticipated to some extent,
15 is we have a credibility test here.

16 We have Mr. O'Mara who testified in this case
17 without any contradiction. He was never impeached with
18 any statement. He's apparently made no prior statements
19 to anyone that are on the record.

20 But what we have on the other hand is
21 Mr. Dunckley. And Mr. Dunckley, by his own admission, has
22 lied numerous times in this case. He lied to police. He
23 lied to Mr. Ing. He lied during his change of plea
24 hearing. It appears he lied during his sentencing

1 hearing. And he made a lie when gave his statement in
2 allocution, his handwritten statement that's part of the
3 presentence investigation report. All of those things are
4 untrue.

5 And then he comes in today, which I thought was a
6 very good point, that if there's no DNA and the motion to
7 suppress is granted, that puts a different complexion
8 particularly on the Jessica case.

9 You pull out the transcript, and despite what
10 Mr. Dunckley said this morning about him being told he's
11 not free to leave, you can look at page 121 of his
12 statement which is part of his exhibits. Right after the
13 interview starts, he says:

14 "Broome: You know you're not under arrest;
15 you're free to leave?

16 "I know.

17 "Anytime you want. So we talked about
18 yesterday, and you just know. You informed
19 everything to Morgan. She knows
20 everything."

21 So when Mr. Dunckley comes in here today and says
22 there's a police booking sheet in front of my face and I'm
23 told from the get-go that I'm not free to leave, that is
24 just a lie. That's completely repealed by his own

1 exhibit. It's right here.

2 "You know you're not under arrest. You're
3 free to leave?

4 "I know."

5 What are we supposed to do with that? I mean, at
6 every junction in this case that's critical, he just made
7 a mistake and failed to tell the truth.

8 Has Mr. O'Mara been shown to have done that? No.
9 His account is different than Mr. Dunckley's, but
10 Mr. Dunckley's presentation seems to be a contrivance set
11 for the context. That was his explanation of the
12 statement to Broome. That was his explanation to the
13 change of plea: I was told I had to say certain things.
14 I came into the sentencing hearing and said things so I'd
15 get the deal.

16 All of these things seem to be contrived so that
17 he can get result that he wants. And that's exactly what
18 we have here.

19 So without with regard to the enumerated claims
20 of error in this case, it seems to me that there's been a
21 failure of proof on prejudice.

22 We could say from a matter of argument we could
23 conceive that perhaps Mr. O'Mara didn't do a sufficiently
24 in-depth investigation, but it's not entirely clear what

1 the scope of a reasonable investigation in this case would
2 have revealed. There's been no showing that Mr. O'Mara's
3 investigation was incomplete, nothing showing that even if
4 an investigator had been appointed and hired, that person
5 would have uncovered additional information.

6 And then we have to come back to Mr. O'Mara who
7 says: I knew about results of the DNA test, and I went
8 over them with my client. And my client's attitude was:
9 I want to take my chances on probation because I think I'm
10 going to get it.

11 That's what it really boils down to.

12 My initial thought when I read the case was,
13 okay, now, we have a credibility problem perhaps with
14 Ashley. How would she have weathered cross-examination?
15 Well, we don't know because she's not here. So perhaps
16 the lawyer was ineffective or the performance was
17 unreasonable by not going out and talking to her.

18 But we don't have the next question, which is:
19 What would be the outcome of that investigation? That's
20 what's lacking here. And likewise with Jessica.

21 So that sort of takes away the credibility
22 problem with the victims because we don't know how they
23 would testify under cross-examination.

24 So, okay, if we take out the DNA, then we have a

stronger case. But Mr. Dunckley, in his statement to Detective Broome, has already admitted there was oral contact. So what do we do with that? Well, we have to have an explanation for why there's no DNA evidence found in the specimen, and he provides the explanation himself. It may have been wiped off. So now that begins to evaporate.

Then we are left with the statement. And again, if you have got no DNA, you've got a suppressed statement, then the case for the defense looks better.

But as I suggested to Mr. O'Mara, there aren't grounds for motion to suppress in this case. Nothing to indicate that his statement was involuntary in any way. He's at the police station for the second time voluntarily.

And he's told, as I said before, from the beginning, despite what he says, the transcript, his exhibit: "You're free to leave." "I know." So we don't have custody.

So we have no involuntary statement. We don't have a *Miranda* problem. So we have a statement that's going to be introduced to the jury, and we're going to have the testimony of two victims who may or may not have been impeached. And assuming they could've been, we don't

1 know on what topics because we haven't heard from them.

2 So for me, I respectfully submit to the Court
3 what's essentially a failure of proof on both prongs of
4 the *Hill* test, and the petition should be denied.

5 THE COURT: Counsel?

6 MR. STORY: Your Honor, I think the Court has a
7 full grasp of the problem in front of it. The only
8 request I'd make is that you simultaneously rule on both
9 the petition and the motion so that the appeal is clean,
10 assuming one party or the other is likely to appeal this
11 petition. So I would request they come out at the same
12 time if possible.

13 THE COURT: Okay. And you are going to represent
14 Mr. Dunckley on the appeal?

15 MR. STORY: My experience with the Supreme Court
16 they will make me, yes.

17 THE COURT: Well, since you know that
18 Mr. Dunckley wants to appeal if he has an adverse ruling,
19 you're under an obligation if you have told him you're
20 going to appeal to actually do it. I just want to make
21 sure we don't miss any deadlines.

22 MR. STORY: I won't. My practice is to appeal
23 the second day I get the ruling, so I'm not even close to
24 the 30 days. I'll take care of that, Your Honor.

1 THE COURT: Okay. Well, I'm going to look at the
2 statutory construction again. You're right: Mr. Dunckley
3 had a great argument, and so I want to read it over again,
4 and then I'll contact Counsel about my ruling. So I'll
5 take it under submission at this time.

6 Anything further?

7 MR. STORY: Nothing, Your Honor.

8 THE COURT: Okay. Court's in recess.

9 (Proceedings concluded at 2:22 p.m.)
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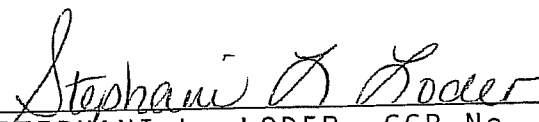
1 STATE OF NEVADA)
2 COUNTY OF WASHOE)
3

4 I, STEPHANI L. LODER, Certified Shorthand
5 Reporter of the Second Judicial District Court of the
6 State of Nevada, in and for the County of Washoe, do
7 hereby certify:

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

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

15 DATED: At Reno, Nevada, this 5th day of
16 July, 2011.

17
18 
19 STEPHANI L. LODER, CCR No. 862
20
21
22
23
24

1 Code: 2515
2 ROBERT W. STORY, ESQ., Bar No. 1268
3 STORY LAW GROUP
4 245 East Liberty Street, Suite 530
5 Reno, Nevada 89501
6 Telephone: (775) 284-5510
7 Facsimile: (775) 284-0800

8 Attorneys for Petitioner Plaintiff Brendan Dunckley

9
10
11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
12
13 IN AND FOR THE COUNTY OF WASHOE
14

15 BRENDAN DUNCKLEY

16 Petitioner,

17 vs.

18 STATE OF NEVADA, et al.,

19 Respondents.

Case No. CR07-1728

Dept. No. 4

20 **NOTICE OF APPEAL**

21 Petitioner Brendan Dunckley hereby appeals to the Nevada Supreme Court the Order
22 Denying Motion to Withdraw Guilty Pleas entered on December 29, 2011, and attached as Exhibit 1.

23 **AFFIRMATION**

24 **Pursuant to NRS 239B.030**

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

27 December 30, 2011.

28 STORY LAW GROUP

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

Attorneys for Petitioner Brendan Dunckley

EXHIBIT INDEX

Exhibit 1	Declaration of Robert W. Story, Esq.	1 page
Exhibit 2	Order Denying Motion to Withdraw Guilty Plea	2 pages

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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.

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEAS

This matter came before the Court on Dunckley's Motion to Withdraw Guilty Pleas. In his Motion, Dunckley alleged that his pleas are invalid because he was not advised that probation was not available for the crime of lewdness with a child under fourteen years, and attempted sexual assault, and the Court compounded the error by advising him that probation was available.

Since Dunckley committed the crime of lewdness with a child under the age of fourteen years, as alleged in Count I, between August 1998 and August 2000, the law in effect at that time controls. During that time frame probation was available for the offense of lewdness with a child under the age of fourteen years. *See* 1997 Statutes of Nevada, pp. 2504-5; *see also* 1997 Statutes of Nevada, pp. 1187, 2509; *see also* 1999 Statutes of Nevada, pp. 565, 1192. As a result, the Court finds and concludes that probation was available and correctly advised Dunckley

1 accordingly when advising him of the consequences of his pleas.

2 Furthermore, probation was also available for the crime of attempted sexual assault, as
3 alleged in Count II, which occurred in 2008. As above, the law in effect when the crime was
4 committed controls. During that time frame probation was available for the offense of
5 attempted sexual assault. See NRS 176A.100(1); NRS 176A.110(1), (3)(a). As a result, the Court
6 finds and concludes that probation was available and correctly advised Dunckley accordingly
7 when advising him of the consequences of his pleas.

8 Finally, the Court notes that Dunckley, at various locations in his moving papers, also
9 alludes to the ineffective assistance provided by his trial lawyer, David O'Mara, who, it is
10 alleged, misinformed him about the availability of probation. As noted above, probation was
11 available in this case, on both counts. It necessarily follows that Mr. O'Mara, by informing
12 Dunckley of the availability of probation, did not provide ineffective assistance.¹

13 It is therefor the judgment and order of the Court that Dunckley's Motion to Withdraw
14 his Guilty Pleas is denied.

15 DATED this 23 day of December, 2011.

16
17 Conie J. Steinheimer
18 DISTRICT JUDGE
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25 ¹The Court also notes that Dunckley filed a Petition for Writ of Habeas Corpus (Post-
26 Conviction), which was litigated at the same time as his motion. The former will be addressed
in a separate order. Accord, NRS 34.830.

BAHesson

From: eflex@washoecourts.us

Sent: Friday, December 30, 2011 10:35 AM

To: bahesson@storylaw.net

Subject: NEF: STATE VS. BRENDAN DUNCKLEY (D4): Notice/Appeal Supreme Court: CR07-1728

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

PROOF OF SERVICE OF ELECTRONIC FILING

**A filing has been submitted
to the court RE:**

CR07-1728

Judge:

CONNIE STEINHEIMER

Official File Stamp:

12-30-2011:09:41:39

Clerk Accepted:

12-30-2011:10:33:02

Court:

Second Judicial District Court - State of Nevada

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Notice/Appeal Supreme Court

- **Continuation

- **Continuation

Filed By:

ROBERT STORY, ESQ.

You may review this filing by clicking on the following link to take you to your [cases](#).

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

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

The following people were served electronically:

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

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

STATE OF NEVADA

BRENDAN DUNCKLEY

1 Code: 2515
2 ROBERT W. STORY, ESQ., Bar No. 1268
3 STORY LAW GROUP
4 245 East Liberty Street, Suite 530
5 Reno, Nevada 89501
6 Telephone: (775) 284-5510
7 Facsimile: (775) 284-0800

8 Attorneys for Petitioner Plaintiff Brendan Dunckley

9
10
11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
12 IN AND FOR THE COUNTY OF WASHOE
13

14 BRENDAN DUNCKLEY

15 Petitioner,

16 vs.

17 STATE OF NEVADA, et al.,

18 Respondents.

Case No. CR07P1728

Dept. No. 4

19 **NOTICE OF APPEAL**

20 Petitioner Brendan Dunckley hereby appeals to the Nevada Supreme Court the Findings of
21 Fact, Conclusions of Law, and Judgment entered on December 29, 2011, and attached as Exhibit 1.

22 **AFFIRMATION**

23 **Pursuant to NRS 239B.030**

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

26 December 30, 2011.

27 STORY LAW GROUP

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

Attorneys for Petitioner Brendan Dunckley

EXHIBIT INDEX

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EXHIBIT 1

EXHIBIT 1

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PROOF OF SERVICE

I, Robert W. Story, declare as follows:

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

On December 30, 2011, I electronically filed the foregoing **Notice of Appeal** with the Clerk of the Second Judicial District Court via the Court's e-Flex system.

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

Gary Hatelstad
Chief Deputy District Attorney
Washoe County, Nevada

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on December 30, 2011.

STORY LAW GROUP

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

EXHIBIT 2

EXHIBIT 2

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

* * *

BRENDAN DUNCKLEY,

Petitioner,

v.

Case No. CR07P1728

JACK PALMER,

Dept. No. 4

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the Court on Dunckley's Petition for Writ of Habeas Corpus (Post-Conviction) and the Supplemental Petition filed by counsel. There has been an evidentiary hearing. The Court, being fully advised of the premises, hereby denies the relief requested.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dunckley argued that he did not receive effective assistance of counsel from his trial lawyer, David O'Mara, and that his pleas are invalid. The Court is not persuaded.

A. Ineffective Assistance of Counsel

Before considering the merits, the Court will start by setting forth the applicable standard of review.

1 1. The Applicable Standard of Review

2 To prove ineffective assistance of counsel sufficient to invalidate a judgment of
3 conviction based on a guilty plea, a petitioner must demonstrate (a) that his counsel's
4 performance was deficient in that it fell below an objective standard of reasonableness and (b)
5 resulting prejudice in that there is a reasonable probability that, but for counsel's errors,
6 petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v.*
7 *Lockhart*, 474 U.S. 52, 58–59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107
8 (1996). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S.
9 668, 697 (1984), and the petitioner must demonstrate the underlying facts by a preponderance
10 of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

11 2. Application of the Standard to the Alleged Instances of
12 Ineffective Assistance

13 In his original petition and in the Supplemental Petition filed by counsel, Dunckley sets
14 forth a large number of instances of ineffective assistance of counsel. As noted above, there
15 was an evidentiary hearing, but, despite having a full and fair opportunity to do so, Dunckley
16 did not present any evidence in support of the vast majority of the pleaded claims. Accordingly,
17 those claims were not proved, and the relief requested by them is denied. The Court will now
18 consider the claims for which Dunckley did present evidence.

19 a. Failure to Investigate and Present an Alibi Defense

20 At various places in his moving papers, Dunckley alleged that he did not commit the
21 crime charged in Count I because he was not in the State of Nevada or Washoe County at the
22 relevant time. Dunckley testified at the evidentiary hearing that, despite informing Mr. O'Mara
23 of his alibi and providing documentary evidence to substantiate it, O'Mara was ineffective
24 because he failed to take the defense seriously or otherwise investigate it. Dunckley went on to
25 allege that, had Mr. O'Mara investigated the alibi, he would not have pleaded guilty to the
26 charges.

1 From the standpoint of the performance prong of *Strickland* and *Hill*, the Court will
2 note that Mr. O'Mara confirmed that he and Dunckley discussed the alibi defense to Count I,
3 and that, prior to Dunckley accepting the State's plea offer, he had received the documents
4 Dunckley claimed substantiated the alibi. Furthermore, O'Mara testified credibly that, upon
5 investigating the case and reviewing discovery, he planned on taking the case to trial, asserting
6 the alibi defense to Count I, not negotiating it. Mr. O'Mara added that, as the trial date
7 approached, the State tendered a plea offer that put probation "on the table," an offer Mr.
8 O'Mara was duty bound to convey to his client. Mr. O'Mara went on to say that Dunckley
9 decided in favor of a change of plea to reduced charges because he was sure he would get
10 probation. Mr. O'Mara, however, warned Dunckley that he was not so sure about probation in
11 this case, believing prison a more likely outcome. Dunckley rejected Mr. O'Mara's assessment
12 and advice.

13 Given the testimony presented at the evidentiary hearing, the Court finds Mr. O'Mara's
14 testimony to be credible. In fact, contrary to Dunckley's testimony, Mr. O'Mara was well aware
15 of Dunckley's alibi defense, took it quite seriously, and believed it could be successful. Likewise,
16 Mr. O'Mara cautioned Dunckley about the potential consequences of taking the plea bargain: it
17 may have placed probation "on the table," but the parties remained "free to argue" and he
18 believed prison time to be a definite possibility. Dunckley rejected Mr. O'Mara's advice.

19 In short, Dunckley failed to establish, with credible evidence, that Mr. O'Mara's
20 performance in this case was objectively unreasonable. Quite the contrary, Mr. O'Mara
21 conducted a reasonably complete investigation, approached the case as if it were going to trial,
22 but upon conveying the State's plea offer, as he is required to do, Dunckley accepted it.
23 Thereafter, Mr. O'Mara counseled Dunckley on the possible ramification of his decision and
24 prepared for sentencing. In the end, it was Dunckley's decision to make after consulting with
25 counsel, and he made his decision.

26 ///

1 b. Failure to Investigate DNA Evidence

2 According to Jessica, one of the two victims in the case, she engaged in oral sex with
3 Dunckley in Washoe County. When the police investigated the accusation, they acquired a DNA
4 swab from Dunckley's penis. Subsequent forensic analysis revealed no DNA.

5 Dunckley alleged and then testified that he was unaware of the results of the forensic
6 examination before he entered his plea, and, had he known of it, he would have insisted on
7 going to trial. The Court is not persuaded.

8 First, it is undisputed Mr. O'Mara knew the results of the forensic examination prior to
9 the time Dunckley entered his plea. Moreover, while Mr. O'Mara said he never showed the
10 forensic report to Dunckley, he testified credibly that he and Dunckley went over its results.
11 Consequently, the Court finds that Dunckley was aware of the results of the forensic
12 examination before he accepted the plea bargain. Dunckley's testimony to the contrary is not
13 credible. The fact that Mr. O'Mara may not have shown Dunckley the actual written report
14 does not change the fact he was aware of its content. By the same token, Dunckley presented
15 no evidence proving or tending to prove that an objective standard of reasonableness required
16 Mr. O'Mara to present the forensic report to his client if, as was the case here, he explained its
17 content. As a result, Dunckley failed to establish the performance prong of *Strickland-Hill*.

18 Furthermore, Dunckley failed to establish prejudice. In *Hill v. Lockhart*, the Court said
19 the following on the subject of prejudice in a plea context: "where the alleged error of counsel is
20 a failure to investigate or discover potentially exculpatory evidence, the determination whether
21 the error 'prejudiced' the defendant will depend on . . . whether the evidence likely would have
22 changed the outcome of a trial." *Id.*, p. 59. If not, then the petitioner has failed to show a
23 reasonable probability that he would not have pleaded guilty and insisted on going to trial. *Id.*
24 Such is the case here.

25 For example, it is undisputed that Dunckley and Jessica were together at the time and
26 place Jessica claimed the crime was committed. It is also undisputed that, when Detective

1 Broome interviewed Dunckley, Dunckley admitted Jessica placed her mouth on his penis. He
2 repeated the same admissions to Steven Ing, the expert who prepared a psychosexual
3 evaluation. Thus, in light of Dunckley's admissions, the Court finds the fact that no DNA was
4 found on the penial swab is of no material consequence under *Hill's* prejudice prong. The
5 Court is, of course, aware that Dunckley testified that he lied to Detective Broome and Mr. Ing,
6 presumably in an effort to enhance the significance of the negative test results, but the Court
7 finds Dunckley's subsequent recantation to be unworthy of belief.

8 c. Motion to Suppress: *Miranda*

9 Dunckley also alleged and testified that Mr. O'Mara was ineffective because he failed to
10 file and litigate a motion to suppress statements he made to Detective Broome. As noted
11 above, Dunckley's statements to Detective Broome were important pieces of incriminating
12 evidence. Consequently, it would be objectively reasonable for Mr. O'Mara to at least consider
13 filing a motion to suppress the statements, and, if the motion enjoyed a reasonable probability
14 of being granted, then it would have been objectively unreasonable and prejudicial to omit it.

15 Here, Mr. O'Mara testified credibly that he was aware that his client had made
16 statements to Detective Broome, and he considered filing a motion to suppress them. Mr.
17 O'Mara went on to say, however, that, upon researching the motion, he concluded that the
18 motion would not be successful because they were voluntarily made and not the product of
19 custodial interrogation. Dunckley presented no credible evidence drawing Mr. O'Mara's
20 assessment into question.

21 Accordingly, the Court finds and concludes that, even though Mr. O'Mara did not make
22 a motion to suppress Dunckley's statements, Dunckley failed to prove that this omission was
23 objectively unreasonable or prejudicial.

24 d. Failure to Investigate or Interview the Victims

25 Dunckley also alleged and testified that Mr. O'Mara provided ineffective assistance
26 because he did not investigate and interview the two victims. While it might be the case that a

1 reasonably competent lawyer would try to interview the victims, Dunckley failed to establish
2 that victims were under an obligation to talk to his lawyer, outside the preliminary hearing, nor
3 did he establish what the victims would have said if they elected to talk. Consequently, even
4 assuming Mr. O'Mara should have put forth the effort and did not do so, Dunckley failed to
5 show prejudice.

6 e. Failure to Object to the Prosecutor's Breach of the
7 Plea Bargain

8 Finally, Dunckley alleged and then testified that he should be awarded a new sentencing
9 hearing because the prosecutor breached the plea bargain, and Mr. O'Mara was ineffective in
10 failing to object and demand specific performance. The Court has carefully reviewed the terms
11 and conditions of the plea bargain, and compared and contrasted those terms and conditions
12 with the comments made by the prosecutor during the sentencing hearing, and can find no
13 grounds upon which to maintain that the prosecutor breached the plea bargain. Accordingly,
14 the Court finds that, because there was no breach, Mr. O'Mara failure to object was neither
15 deficient nor prejudicial.

16 B. Validity of the Pleas

17 Under Ground Three, Dunckley alleged that his pleas were invalid because he was not
18 properly advised of the consequences of his pleas: namely, the unavailability of probation.
19 While it is true that a plea may be invalidated when a district judge fails to personally address a
20 defendant and inform him when probation is not available, probation was available as a
21 possible sentence for each of the two crimes at issue here at the time the crimes were
22 committed. As a result, the Court properly advised Dunckley that probation was available, and
23 his argument to the contrary is a nonstarter.¹

24 _____
25 ¹Insofar as Dunckley alleged that the Court applied the newly enacted version of NRS
26 176A.110, which disallows probation, and thus violated the Ex Post Facto Clause of the
Constitution, that claim lacks merit because the Court applied the law in effect at the time the

1 JUDGMENT

2 It is therefor the judgment and order of the Court that Dunkley's request for post-
3 conviction habeas relief is denied.

4 DATED this 23 day of December, 2011.

5
6 Connie S. Steinheimer
7 DISTRICT JUDGE
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25 crimes were committed and those provisions allowed for probation. The overarching problem
26 therefore was not the availability of probation, but whether probation was appropriate in this case.

BAHesson

From: eflex@washocourts.us
Sent: Friday, December 30, 2011 10:39 AM
To: bahesson@storylaw.net
Subject: NEF: POST: BRENDAN DUNCKLEY (D4): Notice/Appeal Supreme Court: CR07P1728
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Judge: CONNIE STEINHEIMER
Official File Stamp: 12-30-2011:09:49:07
Clerk Accepted: 12-30-2011:10:36:58
Court: Second Judicial District Court - State of Nevada
Case Title: POST: BRENDAN DUNCKLEY (D4)
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Filed By: ROBERT STORY, ESQ.

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ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

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SUPREME COURT OF THE STATE OF NEVADA

BRANDAN DUNCKLEY,
Appellant,

vs.

THE STATE OF NEVADA and JACK
PALMER, Warden,
Respondents.

Electronically Filed
Jun 25 2012 02:56 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
Case Nos. 59957 & 59958

APPELLANT'S APPENDIX

VOLUME II

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
2450 Vassar Street, Suite 3B
Reno, Nevada 89502
(775) 284-5510

Terrance P. McCarthy
Deputy District Attorney
Post Office Box 30083
Reno, Nevada 89520-3083
(775) 328-3294

Attorneys for Appellant Brendan
Dunckley

Attorneys for Respondents the State of
Nevada and Jack Palmer

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

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DATED: June 25, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story.
ROBERT W. STORY, ESQ.
Nevada Bar No. 1268
Story Law Group
245 E. Liberty Street, Suite 530
Reno, Nevada 89501
Telephone: (775) 284-5510
Facsimile: (775) 996-4103
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

COPY

- o O o -

APPEARANCES:

For the Plaintiff: GARY H. HATLESTAD
Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520

For the Defendant: ROBERT W. STORY
Story Law Group
245 East Liberty Street
Suite 530
Reno, Nevada 89501

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NO.

MARKED: ADMITTED:

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

2 -oOo-

3
4 THE COURT: Thank you. Please be seated.

5 Counsel, are you ready to proceed?

6 MR. STORY: Yes, Your Honor.

7 MR. HATLESTAD: Ready, Your Honor.

8 THE COURT: Go ahead, Mr. Story.

9 MR. STORY: This is set for a motion to withdraw.

10 Mr. Dunckley represents himself on that, so may he go
11 forward?

12 THE COURT: Certainly.

13 MR. STORY: May he be unchained?

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

16 THE DEFENDANT: Thank you, Your Honor.

17 Good morning, Your Honor.

18 THE COURT: Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 The statute that that wording gives the
13 precedence to is 201.230. And as we know, a conflict
14 between two statutes, between a general and specific, the
15 specific, which is the criminal statute, will take
16 precedence. Because of that, 176A does not hold any
17 bearing because it automatically shifts the authority to
18 201.230.

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

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

1 probation available.

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

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

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

20 The law previously read before October 1st of
21 1997 when it went into effect that it was a Category B
22 felony, not a Category A, and was punishable with a
23 sentence of two to ten years, not a ten to life. When AB
24 280 went into effect, it had the full support of the

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

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

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

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

1 minor with. It should have been a delinquency charge.
2 But Chief Shearing, in her concurring opinion, stated that
3 it's not difficult, in discussing the original charge,
4 it's not difficult to see the difference between a
5 non-probational felony with a life prison sentence and the
6 delinquency, an adjudicated delinquency with three years
7 probation.

8 The Supreme Court's already given an opinion as
9 to what the punishment was by saying it's
10 nonprobationable, but the key also was a life prison
11 sentence; ergo it was a Category A felony.

12 The State's only argument in the entire motion --
13 I've given 137 cases to support it, to support my argument
14 and my contention. I've supported it with the record. At
15 no point does my personal opinion have any bearing in this
16 matter except as to what I personally understood to be the
17 terms of the deal when I entered into the contract.

18 I believed that probation was available. That's
19 the only reason I agreed to enter this plea. At that
20 time, it was the advice of my counsel that probation would
21 be available.

22 You, yourself -- I know you're busy, Your Honor,
23 but if I could refresh your memory, when I came before you
24 to enter my plea, the district attorney and my attorney

1 made comments to the point of saying that at -- I
2 apologize, Your Honor. I'm just -- I'm trying to fight
3 for my freedom here, Your Honor.

4 THE COURT: That's okay.

5 THE DEFENDANT: Mr. O'Mara stated that the
6 agreement with -- the fact that the agreement was between
7 the district attorney and my attorney was to set out
8 sentencing for five to six months. I don't know if you
9 remember that or not. But -- I'm sorry, here it is.

10 And he said -- Mr. O'Mara said, and I quote,
11 "Your Honor, there's been negotiation with the district
12 attorney's office to set this out for five to six months
13 so that Mr. Dunckley can get the sexual offender therapy
14 during that period of time. And basically the DA is
15 giving him every opportunity to try to qualify for
16 probation and to do the things that will be beneficial for
17 him to present to you at sentencing. She's allowed for a
18 five- to six-month extension so that he can get those type
19 of therapy classes. And so we'd ask that type of time
20 before sentencing."

21 Ms. Vilorio, who is no longer with the district
22 attorney's office, stated at the time, "Your Honor, my
23 agreement is just to see if this defendant is worthy of
24 any type of grant of probation, whether he can earn it or

1 not. I want to see what he does between now and then, so
2 I do not object to any type of continuance that Mr. O'Mara
3 is seeking, is asking for to set out the sentencing date."

4 Even Mr. Hatlestad in his argument clearly showed
5 that if probation were not available, to quote him, he
6 said, "It necessarily follows that if probation were not
7 available, the motion should be granted. It's
8 interchange -- it's unacceptable."

9 The only case that Mr. Hatlestad used in rebuttal
10 and opposition was -- he cited *Skinner*, *Aswegan*, and
11 *Meyers*, which were ultimately overruled by *Little*. And
12 it's an interesting fact that I was celled up with
13 Mr. Little at the time when I got this opposition from
14 Mr. Hatlestad, and I read Mr. Little's case. And the fact
15 that he failed to realize the fact that in Mr. Little's
16 case, it was the fact that probation not available and he
17 knew probation was not available. So therefore it was not
18 necessary for the judge to convey that information.

19 That's the exact opposite of what's gone on here.
20 I was led to believe probation was available when the law
21 clearly states that it was not. It was an illusory deal
22 to start with for the fact that, yes, I benefitted
23 because, in exchange, the State lessened the charges and
24 lowered or changed the charges.

1 But also, by the record, I have never attacked
2 the charges specifically on what was amended. I have
3 always and fully attacked the charges on what the original
4 charges were.

5 For an actual innocence plea or a manifest
6 injustice, I've always attacked the charge that the State
7 has forgiven and gone to the lesser offense. I've shown
8 both areas. And the State's only contention is that 176A
9 allowed for probation; so, therefore, I am incorrect.

10 My opinion, like I said, has no bearing. What
11 does the law say? What does the history say? Is it
12 clear? Is it ambiguous? But it's not ambiguous. It's
13 unambiguous. The meaning is clear.

14 When they introduced the statute and the changed
15 law in 1997, see -- the assemblywoman that did it,
16 Ms. Berman, did it because she said that it was necessary
17 to increase the sentences to these people who are
18 committing crimes under the age of 14.

19 The district attorney's office agreed with this.
20 They said that it was necessary rather than allowing
21 people to skate by, so to speak, and hide from the
22 mandatory prison sentence that the sexual assault carried,
23 but instead they would go to the lesser offense of
24 lewdness. And they fought adamantly for it to be deleted,

1 and they won.

2 In 1997, the law changed, and it deleted
3 probation. And as the attorney general even stated that
4 year, that these punishments should be severely punished.
5 The law is clear. The statutes are clear. There's no
6 room for interchanging or trying to find our personal
7 interpretation.

8 So with that, I -- unfortunately, because of the
9 fact that 176A, which is the only contention and the only
10 counterargument that Mr. Hatlestad used, holds no merit
11 because of two grounds. One, it in itself gives the
12 authority to NRS 201.230 by the terminology "pursuant to";
13 and, two, it was never an attempt to commit the crime.

14 The law was clear. The State knew what it was
15 doing when it changed the law. Its intent was to make it
16 more severe by changing the statute and changing the
17 category in the felony in itself. It changed everything
18 about it.

19 No longer could we file a fast-track appeal, as
20 Mr. O'Mara found out. You could file a fast-track appeal
21 when a sentence carries a Category A felony. If life is
22 attached to a sentence, it must be a full appeal. Even
23 the way we attack it in the appellate area is changed when
24 they change that statute, Your Honor.

1 That's it for now.

2 THE COURT: Okay. Thank you.

3 Mr. Hatlestad?

4 MR. HATLESTAD: Thanks, Your Honor. Mr. Dunckley
5 was eligible for probation under the laws that existed at
6 the time the offense was committed. You said so. The
7 Supreme Court said so. And the statutes of Nevada say so.

8 I think where Mr. Dunckley is confused is he's
9 talking about the specific versus general. Not really
10 sure what that implies here. Usually, when you think
11 about that, it talks about definition of offenses.

12 So for example, if you had a case that said --
13 the prosecution has said unlawful possession of an eagle
14 feather, which obviously is a category X felony, but the
15 specific statute would say possession of a golden eagle
16 feather, and that would have its own definition. That
17 really doesn't apply to the sentencing range.

18 The Legislature has said that probation is
19 available under certain circumstances for lewdness. I
20 don't see -- I don't really see the confusion. I don't
21 see a conflict.

22 The notion of "pursuant" would be the definition
23 of the offense. I just don't see the confusion that
24 Mr. Dunckley is suggesting exists to the point of a

1 conflict or ambiguity where we have to appeal the
2 legislative history.

3 If Mr. Walker's position was that defendant could
4 be hammered in this case, and it's apparent that he was
5 unsuccessful in convincing them because now we have the
6 statute which is a replacement of the statute that existed
7 at the time, which is -- I can't remember exactly the
8 statute, the Nevada page. Looks like it would have been
9 2503. There's a paragraph in that section in the old
10 statute bracketed out. And then we have the italicized
11 portion which I have here if you want to see it, which is
12 the new statute, that is the statute that Mr. Dunckley
13 sentence is coming under.

14 THE COURT: Okay.

15 MR. HATLESTAD: So I think the argument is
16 somewhat interesting, but I think misdirected. I disagree
17 fundamentally with the major premise of the argument that
18 there's a specific general dichotomy here and that the law
19 is clear. I obviously agree with that in principle. But
20 what he thinks is clear is not what I think is clear.

21 I think it's obvious from reading the statute
22 that was enacted in 1997 that probation was available.
23 You said it and the Nevada Supreme Court said it in this
24 case. So I think the argument, albeit interesting, is

1 misguided.

2 THE COURT: Okay.

3 THE DEFENDANT: Your Honor, Mr. Hatlestad is a
4 busy man. So are you. You're a busy judge. And you both
5 have seen thousands of cases since I was last in your
6 courtroom.

7 I spent the last three years doing nothing but
8 researching this law, not from an angry defendant, but
9 from every other aspect but mine.

10 Mr. Hatlestad refers to the fact of the law on
11 page 20 -- 2053 -- 2503. I have that here. And in
12 actuality, what it says is, to be specific, it deleted the
13 paragraph -- the subsection heading of number one for the
14 designation, which means that there's nothing further
15 after that paragraph.

16 They -- what Mr. Hatlestad is referring to is
17 that the fact it's a bracket of two through six which,
18 yes, it previously did read:

19 "A person convicted of violating any of the
20 provisions in subsection (1) must not be
21 released on probation unless a psychological
22 list -- psychologist licensed to practice in
23 the state of Nevada or a psychiatrist
24 licensed to practice medicine in the state

1 of Nevada certifies that the person so
2 convicted is not a menace to health, safety,
3 or morals of others."

4 That was deleted, Your Honor. That was deleted.

5 And further, the law, how it finally read was
6 actually found for the 1999 laws. And I have --

7 MR. HATLESTAD: Wait a minute. Wait a minute.
8 Hang on.

9 THE COURT: Objection?

10 MR. HATLESTAD: Yes. Objection, Your Honor. I'm
11 going to object. He's not reading the next page. The
12 next page is subsection (7) which relocates the old
13 statute.

14 THE DEFENDANT: Your Honor, I have -- I have the
15 copy of the Legislature right here. I'm not
16 cherry-picking the law to fit mine. I never -- I -- if
17 you'd like to --

18 THE COURT: I'm sorry. What are you looking at?

19 THE DEFENDANT: I'm looking at the legislative
20 history from the 69th sessions, page 2503. Same thing
21 Mr. Hatlestad is referring to.

22 MR. HATLESTAD: Statutes of Nevada.

23 THE DEFENDANT: It's the Nevada statutes, Chapter
24 524, page 2503.

1 THE COURT: Okay.

2 THE DEFENDANT: And it's clearly here that the
3 final part of that, the next sentence that Mr. Hatlestad
4 is referring to is section (5) of NRS 201.450. There's
5 never been a section (7) in the entire history of this
6 law.

7 MR. HATLESTAD: It's on the next page. Object.

8 THE COURT: Do you have the next page?

9 THE DEFENDANT: Your Honor, I have -- the only
10 thing on here that says sections for the purpose --
11 section of breastfeeding a child by the mother of a child
12 is not --

13 THE COURT: We can't go by the --

14 THE DEFENDANT: No, I'm saying -- I'm saying for
15 the fact that, Your Honor, I have the page, and if you
16 would like --

17 THE COURT: You have the page you're reading.

18 THE DEFENDANT: I have the page I'm reading. And
19 the law --

20 THE COURT: And what page number is that?

21 THE DEFENDANT: 2503.

22 THE COURT: Do you have 2504?

23 THE DEFENDANT: I do not have 2504, because the
24 law stops at that point. That's why he goes to the next

1 law -- he goes to the next statute.

2 THE COURT: Just a minute.

3 Do you have 2504?

4 MR. HATLESTAD: I do.

5 THE COURT: Okay. Let's show Mr. Dunckley 2504.

6 THE DEFENDANT: Your Honor, what Mr. Hatlestad is
7 referring to, 2504, actually is dealing with NRS 176A.110.
8 It has nothing on the redistribution of the statute that I
9 was convicted of.

10 Again, he's misquoting -- he's directing
11 something differently. What he's referring to on section
12 (7) refers to the -- the not granted probation that's
13 basically the law of 176A. So --

14 THE COURT: What does it say?

15 THE DEFENDANT: 176A: The Court shall not grant
16 probation unless -- as it was set forth:

17 "The Court shall not grant probation or
18 suspend the sentence of a person convicted
19 of an offense listed in subsection (3)
20 unless a psychologist licensed to practice
21 in this state or a psychiatrist licensed to
22 practice in Nevada certifies that the person
23 is not a menace to the safety and health of
24 others."

1 And then it goes further, and he's highlighted
2 lewdness with a child pursuant to 201.230. But then
3 again, he again fails to bring this fact up, Your Honor.
4 Paragraph (m) says: "An attempt to commit an offense
5 listed in paragraphs (b) through (l) inclusive."

6 I was never charged with the attempt to commit
7 lewdness.

8 THE COURT: Okay. So your argument is that you
9 think it only applies -- that section only applies to an
10 attempt?

11 THE DEFENDANT: As being the fact that it
12 lists --

13 THE COURT: Don't tell me the law. Is that your
14 argument?

15 THE DEFENDANT: Yes, ma'am. On that area, yes.

16 THE COURT: All right. Anything else?

17 THE DEFENDANT: But the law that I was punished,
18 I was sentenced to, the law that I was charged with was
19 clear at the end of the statute. It didn't say subsection
20 (7), see this law. It never referred to 176A. It never
21 referred to probation. It never referred to anything but
22 a ten to life sentence with a Category A felony.

23 The law was clear. It's plain and simple. The
24 fact that the State's only contention -- we have to -- I

1 don't want the Court to forget the fact that the only
2 thing I'm bringing here is the fact that I waited for
3 Mr. Hatlestad to bring up the argument of all the other
4 areas that I brought up.

5 A manifest injustice is not just simply this one
6 area. The motions that I wrote were not based solely on
7 probation, were based on the fact of a contract analysis
8 on the fraud on the court, on the withholding of material
9 facts.

10 The motions that I brought forward were numerous
11 issues that Mr. Hatlestad just grazed over. And at no
12 point did he address those issues. He let them stand
13 unchallenged. 27 different areas of contract law and
14 fraud by the State and by former counsel withholding
15 material facts.

16 Mr. O'Mara, if we go further, will turn around
17 and will probably testify saying: I advised my client not
18 to take this deal. I told him it's not in his best
19 interest.

20 But what he failed to say is the fact that I
21 never even saw the material information. For example --

22 THE COURT: I think you are arguing your
23 post-conviction.

24 THE DEFENDANT: I actually, Your Honor --

1 THE COURT: You're arguing your ineffective
2 assistance of counsel claims, and as they relate to your
3 motion to withdraw, you have an attorney to argue that.
4 So I don't want to hear it twice.

5 THE DEFENDANT: I understand, Your Honor. I
6 apologize. Thank you.

7 So basically what I'm saying is the fact, Your
8 Honor, is that the State only chose, out of the numerous
9 areas, to focus on the one thing of probation. We can't
10 overlook the fact that I've shown and proven numerous,
11 numerous other manifest injustices have occurred.

12 THE COURT: Okay. Thank you. I'm going to take
13 that under submission.

14 You may proceed.

15 MR. STORY: Thank you, Your Honor. May I call
16 Brendan Dunckley?

17 THE COURT: You may.

18
19 **BRENDAN DUNCKLEY,**

20 called as a witness by the defense,
21 having been first duly sworn, was examined
22 and testified as follows:
23

24 THE COURT: Mr. Story, before we begin, would you

1 make a record with regard to your client waiving any
2 issues.

3 MR. STORY: Yes, Your Honor.
4

5 DIRECT EXAMINATION

6 BY MR. STORY:

7 Q Mr. Dunckley, you understand that by testifying
8 today, you waive the attorney/client privilege; is that
9 correct?

10 A Yes.

11 Q Are you willing to waive the attorney
12 client/privilege in this case?

13 A Yes, I want to.

14 MR. STORY: Thank you, Your Honor.

15 THE COURT: Thank you.

16 BY MR. STORY:

17 Q Please state and spell your name for the record.

18 A Brendan Dunckley, D-U-N-C-K-L-E-Y.

19 Q And where are you presently housed?

20 A I'm currently incarcerated at Northern Nevada
21 Correctional Center.

22 Q Are you convicted of any crimes?

23 A Yes, I am.

24 Q What are those crimes?

1 A I am convicted of lewdness with a child under the
2 age of 14 and attempted sexual assault.

3 Q Were you charged with other crimes prior to being
4 convicted of these crimes?

5 A In lieu of the deal?

6 Q Yes, in this case.

7 A Yes, I was.

8 Q And what were those crimes?

9 A I believe it was sexual assault with a child and
10 sexual assault.

11 Q Did you know what the potential sentences for
12 those particular crimes was at the time?

13 A At the time?

14 Q At the time that you entered into your plea
15 ultimately.

16 A I don't recall.

17 Q Were you arrested on these charges?

18 A Yes, I was.

19 Q Were you assigned an attorney?

20 A Yes, I was.

21 Q Who was that attorney?

22 A David O'Mara.

23 Q Did you meet with your attorney?

24 A Prior to preliminary hearing, no.

1 Q When did you first meet with your attorney?

2 A The morning of the preliminary hearing, July 2nd.

3 Q How long did you meet with Mr. O'Mara?

4 A 15 minutes.

5 Q Did you discuss the case?

6 A He presented the NRSs to me and I gave him
7 documentation. That was the extent of it. I gave him
8 documentation of my location whereabouts.

9 Q Okay. Let me try to flesh that out a little bit.
10 What do you mean you gave him documentation?

11 A I gave him documentation for the allegations of
12 the sexual assault on a child and the -- with the Ashley
13 charge, and I gave him documentation of my location being
14 in New York State and college at the time in Hyde Park,
15 New York.

16 I gave him court paperwork proving that or
17 establishing the fact that I was in California up until
18 August 16th when I was served with divorce papers in
19 California. And I -- which is a summons of service I gave
20 him.

21 I gave him copies of the original registration
22 for the Ford Taurus that Ashley and I allegedly had sex in
23 that was purchased and registered on June 5th of 2000.

24 Q Why was that relevant?

1 A Well, the allegations from Ashley was that while
2 she was 12 years old, between August of 1998 and August of
3 1999, after spending the night at my house numerous,
4 numerous times, she and I drove -- I drove her home one
5 morning, and we stopped on the side of the road and had
6 consensual sex in the backseat of the Ford Taurus. She
7 contended at the preliminary that she was 12 years old.

8 And per Mr. Clifton, the window of offense was
9 close to October 14th of 1998 to October 13th of 1999.

10 Q So what you're saying is that registration would
11 show that you hadn't committed that crime.

12 A Well, not only the registration, but all the
13 other documentation as well, yes.

14 Q I may be under the mistaken impression -- I
15 thought you might have been in custody at the time you met
16 with Mr. O'Mara; is that correct?

17 A No. I was out on bail the whole time.

18 Q Okay. So you're out on bail, and you met with
19 Mr. O'Mara 15 minutes prior to preliminary hearing; is
20 that correct?

21 A Yes.

22 Q And you provided him documentation?

23 A Yes, I did.

24 Q And that documentation, from your perspective,

1 exonerated you from these crimes?

2 A For the allegations of Ashley, yes, it did.

3 Q All right. Did you discuss this with Mr. O'Mara?

4 A I did.

5 Q And what did you tell him?

6 A I told him that I had documentation to dispute
7 the allegations, and he informed me that this was not the
8 proper time and that if he saw a need, he would bring it
9 forward.

10 Q Did you ever ask Mr. O'Mara to conduct an
11 investigation?

12 A I did.

13 Q And what did you tell Mr. O'Mara?

14 A That I had -- that the allegation with Jessica
15 never occurred and that if he actually looked into the
16 paperwork that I provided, he could show that the
17 allegations -- the remaining allegations could not have
18 happened either.

19 Q Do you know whether or not Mr. O'Mara ever
20 conducted an investigation?

21 A Not to my knowledge, he did not.

22 Q Did you ever speak with an investigator who
23 represented Mr. O'Mara?

24 A Never.

1 Q Did you provide Mr. O'Mara with any other
2 documentation?

3 A I provided him with IRS paperwork going back to
4 1994 proving my location and my residency. I believe I
5 further provided him with -- later I provided him with
6 altered police reports from Detective Tom Broome that he
7 released to my ex-wife's attorney in California, and I
8 presented the stamped copies of the altered police
9 reports. And I was informed that that had no bearing and
10 it didn't matter.

11 Q What did the altered police reports prove or
12 disprove from your perspective?

13 A Well, it was -- if you look at the originals and
14 you look at the altered, it's cut and pasted to basically
15 fit a end result, basically, to prove that I was just -- I
16 was guilty, and the only --

17 MR. HATLESTAD: I'm going to object, Your Honor.
18 This is best evidence.

19 THE COURT: Sustained.

20 Do you have the documents?

21 MR. STORY: I do not, Your Honor.

22 THE DEFENDANT: Actually, Your Honor, it's in the
23 record. I have the documents in the writ of habeas
24 corpus.

1 MR. HATLESTAD: They haven't been offered. They
2 haven't been authenticated.

3 THE DEFENDANT: They have the detective's
4 signature and release --

5 THE COURT: You can't argue --

6 THE DEFENDANT: I'm sorry.

7 MR. STORY: I'll move on, Your Honor. Thank you.

8 THE COURT: Okay.

9 BY MR. STORY:

10 Q How many times do you believe you met with
11 Mr. O'Mara before you ultimately pleaded guilty?

12 A Maybe three or four times.

13 Q How much time did you spend with Mr. O'Mara?

14 A There was one time where I came just to pick up a
15 piece of -- the discovery, and the other times I think I
16 was there for maybe ten minutes.

17 Q And did you ever discover any other evidence that
18 you thought would disprove the fact that you committed
19 these crimes?

20 A I did after I had been convicted.

21 Q What evidence did you find?

22 A I found in the file that Mr. O'Mara forwarded to
23 me while I was incarcerated in Lovelock Correctional
24 Center, I found a -- the original offer from Ms. Viloria

1 to Mr. O'Mara. And then I found a fax that was dated
2 three days after the offer of the current deal I'm under,
3 which was a DNA test result from the Washoe County
4 Forensic Lab exonerated of the charge of sexual assault
5 against Jessica.

6 MR. HATLESTAD: Your Honor, I'm going to object
7 to that characterization.

8 THE COURT: Sustained.

9 BY MR. STORY:

10 Q Why do you believe that that DNA --

11 THE COURT: Do you have that?

12 MR. STORY: Do we have that document?

13 THE DEFENDANT: Yes, we do.

14 MR. STORY: Yes. May I -- he brought the entire
15 file. I did not, Your Honor. May I have Mr. Dunckley
16 come and pull that out?

17 THE COURT: Well, do pull it, but not this
18 second.

19 MR. HATLESTAD: I don't object to the report
20 coming in. I object to the characterization.

21 THE COURT: That's what I assume, but I'd like to
22 have the report come in. I don't want to lose track and
23 lose the report.

24 MR. STORY: I will bring in the report in, and I

1 will have Mr. Dunckley testify as to --

2 THE COURT: Okay.

3 MR. STORY: -- why he thinks it disproves or
4 proves some -- proves in this case --

5 THE COURT: He's not an expert.

6 MR. STORY: I understand that, Your Honor, but he
7 is in a position to testify. He was alleged to have
8 committed this crime.

9 THE COURT: You want him to comment on the
10 report?

11 MR. STORY: Yes. No, not on the report exactly.
12 The report speaks for itself.

13 THE COURT: Then that's what it does. That's the
14 point.

15 MR. STORY: My position, Your Honor, is that the
16 report suggests something to Mr. -- if Mr. Dunckley had
17 had this report prior to entering into the plea bargain,
18 he would not have entered into the plea bargain. That's
19 the point of the question.

20 THE COURT: Well, you can ask him that.

21 MR. STORY: Thank you.

22 BY MR. STORY:

23 Q Had you seen this DNA report prior to entering
24 into the plea bargain, would it have changed your mind in

1 any way?

2 A Absolutely.

3 Q And why is that?

4 A Because by the allegation that was made -- it was
5 a specific allegation that Jessica made -- the DNA test
6 result showed absolutely no foreign DNA except for my own.
7 No foreign DNA was obtained from the general swabs. It
8 would have completely exonerated me. The specific
9 allegation --

10 MR. HATLESTAD: I'll object to that.

11 THE COURT: Sustained.

12 THE DEFENDANT: I apologize.

13 BY MR. STORY:

14 Q And had you had this DNA report prior to pleading
15 guilty, you would not have pleaded guilty; is that what
16 you're saying?

17 A No.

18 Q Did Mr. O'Mara have this report before he advised
19 you to plead guilty or talked to you about pleading
20 guilty?

21 A Yes, he did.

22 Q How do you know that?

23 A Because the fax indicated February 7th, 2008, and
24 it was a direct fax from Ms. Viloria's office to

1 Mr. O'Mara.

2 Q And when did you plead guilty?

3 A March 6th, 2008.

4 Q Was there any other evidence that you discovered
5 in the file that Mr. O'Mara provided you that would have
6 altered your opinion about pleading guilty?

7 A Besides the fact that I saw no investigation or
8 interview of any sort.

9 MR. HATLESTAD: That's not responsive, Your
10 Honor. I object.

11 THE COURT: Sustained. Asking for that testimony
12 to be stricken?

13 MR. HATLESTAD: Yeah, that's fine.

14 THE COURT: It is stricken.

15 MR. STORY: Let me reask the question. Maybe you
16 misunderstood it.

17 BY MR. STORY:

18 Q Was there any other evidence that you found in
19 the file that would have altered your opinion about
20 pleading guilty?

21 A The -- I can't say off the top of my head. I'm
22 not a lawyer. I know the case. I just -- I don't want to
23 speak out of turn.

24 But, I mean, to me, the withholding of that

1 evidence or that documentation without my knowledge was --
2 I can't -- to me -- I apologize to the Court. I can't get
3 past, to me, that issue.

4 Q Once you reviewed the file that Mr. O'Mara
5 provided you when you were in prison, did it alter your
6 view of what you should have done in this case?

7 A Yes.

8 Q And how was that?

9 A Well, after looking at the file and looking at
10 the record and looking at the law, in my opinion, no way I
11 would have ever taken this deal or entered in this
12 contract. I would have wanted to go to trial.

13 Q And you found no evidence of an investigation
14 having been conducted; is that correct?

15 A None at all.

16 Q Did you ask Mr. O'Mara to conduct an
17 investigation?

18 A Yes, I did.

19 Q You at some point pleaded guilty; is that
20 correct?

21 A Yes, I did.

22 Q Did you discuss the guilty plea with your
23 attorney?

24 A I discussed it literally moments before court at

1 his office when he gave me the deal that morning. And he
2 said that it didn't matter what evidence he presented or
3 what documents were presented. I'd be found guilty, and
4 my best option and my best availability and my best tactic
5 would be to take the deal and fight for probation.

6 Q Did you have an understanding as to what it took
7 on your part to be eligible for probation?

8 A From what I understood, if I certified as a low
9 risk to reoffend after a psychosexual evaluation.

10 Q And what did you have to be certified as a low
11 risk?

12 A Well, along with meeting with therapists to be
13 evaluated, I also participated in I believe almost 17
14 sessions with Dr. Ing in both group sessions and
15 individual counseling.

16 Q Did this cost you money?

17 A It did.

18 Q Did it take time away from you?

19 A Yes, it did.

20 Q And did you do what you were required to prove
21 yourself to be a low-risk offender?

22 A I kept up my side of the complete contract, yes.

23 Q So you did everything you were required to do?

24 A Yes, I did.

1 Q And your reason for entering into the plea
2 bargain was what?

3 A At the time, the community environment was going
4 on, it was days before they had just found Brianna
5 Denison's body at the time. And it was my counsel's
6 advice that because of the environment with the community,
7 that I would be -- it was my best interest to take this
8 deal as opposed to going to trial.

9 Q And your counsel at the time was Mr. O'Mara; is
10 that correct?

11 A Yes, it was.

12 Q Was there any other reason that Mr. O'Mara
13 provided you for taking this deal?

14 A None.

15 Q Did he advise you on what you needed to do to
16 obtain probation?

17 A I was to attend my classes, my therapy groups,
18 and to keep my side of the agreement, refrain from
19 alcohol, drugs, meet with Court Services, meet with P&P,
20 become evaluated, and be honest with the evaluation.

21 Q And did you do you all of those things?

22 A I did.

23 Q And you ultimately pleaded guilty; is that
24 correct?

1 A Yes, I did.

2 Q And what did you plead guilty to?

3 A I pled guilty to lewdness with minor under the
4 age of 14 and attempted sexual assault.

5 Q Did you appear at sentencing?

6 A I did.

7 Q And did your attorney argue for probation?

8 A He did.

9 Q And did you get probation?

10 A No, I did not.

11 Q Do you know why you didn't get probation?

12 THE COURT: Because I didn't give it to him.

13 THE DEFENDANT: Per -- to be specific, per the
14 decision of the Supreme Court, the Honorable Connie
15 Steinheimer used her discretion, judicial discretion, to
16 impose the sentence of imprisonment.

17 BY MR. STORY:

18 Q What was the time frame in the charge, do you
19 recall, of the lewdness with a minor?

20 A The time that the offense occurred as opposed to
21 when they originally charged me?

22 Q The time that the offense occurred. There was a
23 time frame.

24 A The time frame, original time frame was August of

1 1998 to August of 2000, and that was changed by way of
2 Mr. Clifton at the preliminary hearing to August 13th --
3 August 14th, excuse me, August 14th of 1998 to August 13th
4 of 1999.

5 Q Did you have any other belief from any other
6 party, any other person, that probation was available for
7 this particular charge?

8 A I just took the word of my attorney at the time.

9 Q Did you happen to be in court when the district
10 attorney's office took the position?

11 A I'm sorry, I didn't hear you.

12 Q Were you in court at the time that the deputy DA
13 took the position that probation might be available?

14 A Yes, I was.

15 Q And what did you learn from that?

16 A Well, I left the courtroom under the belief that
17 if I kept to my side of the contract, that probation would
18 be available.

19 Q Did you discuss the elements of the crimes with
20 Mr. O'Mara?

21 A I discussed the allegations with him briefly,
22 yes.

23 Q And were you convinced that you would be found
24 guilty of this crime?

1 A I personally wasn't, no, but Mr. O'Mara said I
2 would be.

3 Q Why did you take the deal?

4 A When my own counsel tells me I'd be found guilty,
5 my faith kind of wanes.

6 MR. STORY: No further questions, Your Honor.

7 THE COURT: Cross?

8 MR. HATLESTAD: Thanks, Your Honor.

9
10 **CROSS-EXAMINATION**

11 BY MR. HATLESTAD:

12 Q Well, let me start at the end. I've got a number
13 of questions.

14 You have essentially told your lawyer you had an
15 alibi for Count I, right?

16 A Yes.

17 Q And so when he says he thinks you'll be convicted
18 of that, you guys have a discussion, right?

19 A The morning of the deal, yes.

20 Q And you discuss or did you argue with him about
21 it, saying, you know, David, I got an alibi for this. Why
22 should I plead to it?

23 A Yes, and he said it didn't matter what evidence I
24 presented. I'd be convicted.

1 Q Okay. Do you deny that you had sexual contact
2 with Ashley?

3 A I do.

4 Q And you deny you had sexual contact with Jessica,
5 too, correct?

6 A I do.

7 Q In that case, can you reconcile that position
8 with statements you made to the police and Mr. Ing and in
9 preparing for the sentencing and police investigation?

10 A It was just that, preparing for sentencing. I
11 was --

12 Q Again --

13 A I'm answering, Mr. Hatlestad.

14 Q How do you reconcile that?

15 A I'm answering your question, sir.

16 Q Go ahead.

17 A First of all, with Mr. Ing and with the
18 investigation for sentencing, as you say, it was the
19 requirement that I admit the guilt.

20 Q So you lied.

21 A I had already -- I had already admitted guilt,
22 Mr. Hatlestad.

23 Q Well, let me just ask it, then. You lied to
24 Mr. Ing?

1 A I did -- I presented what I was supposed to
2 present to present as a viable candidate for probation. I
3 had already entered a plea of guilty, sir.

4 Q My question is very simple. Did you lie to
5 Mr. Ing about having sexual contact with Ashley? Did you
6 lie to him about that?

7 A I approached with my counselor what was needed
8 by -- what was required, what my attorney required me to
9 do.

10 MR. HATLESTAD: Your Honor, would you please
11 direct the witness to answer the question.

12 THE COURT: You have to answer the question.
13 Whether you want to call it a lie or you didn't tell the
14 truth, the words are not important, but you are not
15 answering the question.

16 THE DEFENDANT: Okay. My discussions with
17 Mr. Ing were made in conforming with my plea.

18 MR. HATLESTAD: Your Honor, I would again ask --

19 THE COURT: You're not answering the question.
20 He's not asking you whether you were in conformity with
21 the plea.

22 THE DEFENDANT: Okay.

23 THE COURT: He's saying: Did you lie to him --

24 THE DEFENDANT: Yes. I did.

1 BY MR. HATLESTAD:

2 Q Okay. Did you lie to Detective Broome when it
3 came to your discussions and description of what happened
4 with Jessica?

5 A Yes.

6 Q What part?

7 A Any sexual contact whatsoever.

8 Q So as I recall your statement to Detective
9 Broome, she came on to you, she unzipped your pants, she
10 pulled your penis out, and she gave or tried or started to
11 give you oral sex. Is that true? Is that what happened
12 with Jessica?

13 A No.

14 Q So you lied to Detective Broome, too?

15 A Yes.

16 Q Why did you lie to him?

17 A Detective Broome entered the room with the
18 booking he had already filled out. Detective Broome
19 entered the room with the booking sheet filled out, all
20 ready, with the intent to take me into custody.

21 Q He didn't take you into custody.

22 A Yes, he did. Yes, he did.

23 Q Okay. So you lied to him because he was going to
24 arrest you anyway?

1 Just trying to get to the bottom of it.

2 Wasn't the idea here that you wanted to make it
3 sound consensual so there wouldn't be an arrest for a
4 crime --

5 A No, I knew there was nothing there.

6 Q Well, you basically said there was no crime here
7 because you did not commit an act, right? She's the
8 actor, not you.

9 A I didn't say that.

10 Q Well, I know you didn't say it because I've got
11 it right here in front of me.

12 A I don't recall the conversation without looking
13 at it.

14 Q Okay. Well, you said she came on to you and
15 unzipped your pants, took out your penis, and began to
16 perform oral sex. You're telling us today that that is a
17 lie.

18 A Yes.

19 Q So the fact that there's no foreign DNA on your
20 penis pursuant to this DNA test would be consistent with
21 your lie.

22 A Yes.

23 Q Or inconsistent with your lie.

24 A It would be consistent with the truth.

1 Q Okay. Well, that's --

2 A Which was not what --

3 Q That's kind of what we're up to.

4 So you have got lies to Mr. Ing. You got lies to
5 Detective Broome. And I suspect that you probably lied to
6 Judge Steinheimer during your guilty plea, too, right?

7 A I was advised by my client (sic) to say yes to
8 what was asked.

9 Q Well, that's not exactly what happened, is it?

10 A Is that a question?

11 Q Yes, it is. You didn't say yes to every question
12 that was asked you, did you?

13 A I don't -- it's 36 pages long. Which part are
14 you talking about?

15 Q I'm talking about several parts. We'll go
16 through it.

17 A Let's go.

18 Q Just to be clear, Mr. O'Mara did not say to you:
19 Brendan, when the judge asks you a question, you say yes.
20 He did not do that in this case, did he?

21 A When Mr. O'Mara gave me --

22 MR. HATLESTAD: Your Honor, that's a simple yes
23 or no question.

24 THE COURT: I think it is, Mr. Dunckley.

1 Mr. Dunckley, you are very, very bright, and you
2 have spent a lot of time on your case. But isn't doing
3 you any good to not cooperate and answer the questions
4 directly.

5 THE DEFENDANT: Okay.

6 THE COURT: It's making you seem evasive.

7 THE DEFENDANT: I understand. I apologize, Your
8 Honor.

9 THE COURT: Well, it's not really an apology.
10 I'm just telling you, number one, I'm going to make you
11 answer the questions.

12 THE DEFENDANT: Okay.

13 THE COURT: And, number two, I'm advising you
14 it's not doing your cause any good.

15 THE DEFENDANT: Thank you, Your Honor.

16 THE COURT: Would you repeat the question,
17 please, Mr. Hatlestad.

18 MR. HATLESTAD: I will, Your Honor.

19 BY MR. HATLESTAD:

20 Q Mr. O'Mara did not say to you: Brendan, answer
21 yes to every question Judge Steinheimer asks you. Did he?

22 A Not every question, no.

23 Q Did he tell you to answer -- did he tell you to
24 tell the truth? Did he tell you not to tell the truth?

1 A Neither. He just told me that to admit -- to
2 take the deal and do what's asked.

3 Q Okay. So my question to you is --

4 A I am answering.

5 Q We're building up to it. When Judge Steinheimer
6 asked the questions during the guilty plea, you told the
7 truth, or did you not tell the truth, when you answered
8 those questions?

9 A With the questions of the allegations, I told
10 what I was -- I agreed to what the charge was, yes.

11 Q Okay. Was that true?

12 A What the allegations were, and that I did -- that
13 I was a principal in the issues?

14 Q Yes.

15 A No, that was not true.

16 Q So you told the truth some of the time to get the
17 deal, and then you lied other times because it didn't
18 matter.

19 A Honestly, I don't know how to answer that
20 question, sir.

21 Q We're trying to figure out whether we should
22 believe you or not. You have already admitted you lied to
23 Mr. Ing. You admitted you lied to the detective.

24 Now, the next question is did you lie to Judge

1 Steinheimer at your plea, and ultimately you're lying now.
2

3 So let's go through your guilty plea. If you
4 need a copy to follow, I've got one.

5 THE COURT: Do you want to follow the written
6 transcript?

7 THE DEFENDANT: Please.

8 MR. HATLESTAD: I was going to use this one, Your
9 Honor, but I have another, so we can mark this one.

10 THE COURT: Okay.

11 MR. HATLESTAD: Can we use this one for
12 Mr. Dunckley?

13 THE COURT: Yes, I have it.

14 THE CLERK: Exhibit A marked.

15 (Exhibit No. A marked.)

16 THE COURT: And would you read the title,
17 Ms. Clerk.

18 THE CLERK: This is the transcript of the plea,
19 Motion to Confirm Trial, Thursday, March 6th, 2008.

20 THE COURT: I have that on my computer now.
21 BY MR. HATLESTAD:

22 Q I'll cite the pages and the lines, if that will
23 help.

24 A Thank you, sir.

Q Okay. On that transcript, flip over to page

1 five. Go down to line ten. Actually line seven.
2 Mr. O'Mara is reciting the plea bargain there, and it
3 says:

4 "In exchange for his plea of guilty, Your
5 Honor, the State and counsel and
6 Mr. Dunckley have agreed to recommend the
7 following: The State will be free to argue
8 for the appropriate sentence."

9 Do you remember that?

10 A I do.

11 Q And then on the next page, the Court asks you, on
12 line two: "Mr. Dunckley, do you understand these
13 negotiations?"

14 And you said, "Yes."

15 Correct?

16 A Yes.

17 Q Okay. So the State is free to argue, and yet
18 your contention here is they breached the plea agreement,
19 right?

20 A (No audible response.)

21 Q Please explain that.

22 A Well, my contention is, Mr. Hatlestad, that just
23 because the State reserved the right to argue did not
24 allow Ms. Vilorio the right to disavow and circumvent the

1 deal.

2 Q Well, she's free to argue, right?

3 A She is free to argue for sentence, absolutely,
4 but she's not allowed to argue adamantly for the one
5 consideration that I viewed as an important factor.

6 Q Please cite in the record where it says that.

7 A Where it cites in the record that she's not
8 allowed to disavow the deal?

9 Q Well, she didn't disavow the deal because the
10 deal was free to argue. If there's another term or
11 condition, please cite it from the record, sir.

12 A By her comments on -- at the change of plea
13 hearing, at the close of hearing, where she allowed for
14 the probation and led me to believe the availability of
15 the probation, but then by her arguing -- then her arguing
16 adamantly for no form of probation, and not only that, her
17 arguing for the maximum sentence, which she was allowed to
18 do, but at that point, it became an illusory deal.

19 Q Your belief is her comment at the end changed the
20 negotiation?

21 A I believe that her comments and actions were
22 equally as -- could be construed equally as fraud by her
23 actions and comments as much the written word, yes.

24 Q Even though she's free to argue?

1 A Even though she's free to argue, she's not
2 legally allowed to disavow and circumvent the contract.
3 And what we --

4 Q The contract is free to argue, sir. That's where
5 we're having the problem here. It's free to argue. If
6 her position at the end of the plea hearing is that you're
7 worthy of probation and then later argues that you're not,
8 then her position is you're not worthy of probation and
9 she's free to argue, correct?

10 A Well, I agree, but my question is --

11 Q Thank you. Next question: "Sir, did you read
12 the guilty plea memorandum?" And you said, "Yes."

13 Is that true?

14 A What page are you on, sir?

15 Q I'm on page six, line ten. Is that a true
16 statement?

17 A Yes.

18 Q "Do you have any questions about the document?

19 "Answer: No."

20 Is that correct?

21 A Yes.

22 Q And just for completeness: "Do you have any
23 questions about the modification on the typed document?"

24 And you said, "No."

1 Is that correct?

2 A Yes, I said that.

3 Q On page eight, the judge is asking you about

4 Count I and Count II. Line 15. This is in reference to

5 Count I: "Did you do what it says you did in that

6 charge?"

7 And your answer is, "Yes."

8 That I assume is false.

9 A Yes, it was.

10 Q So that's one lie, correct? Can we agree with

11 that?

12 A Yes, that's agreed.

13 Q "And what about Count II?

14 "Yes, ma'am.

15 "Do you understand that charge?

16 "Yes, ma'am, I do.

17 "Did you do what it says you did in that charge?"

18 And you answered, "Yes."

19 And that is a false statement, correct?

20 A Yes.

21 Q On page 11, line four, the Court asks: "Has

22 anyone made threats to get you to enter these pleas?"

23 And you said, "No."

24 Is that true?

1 A Yes.

2 Q "Has anyone told you that you would be guaranteed
3 probation or any particular result?"

4 And you said, "No."

5 A That's correct.

6 Q "Has anyone made any promises or representations
7 to you to get you to enter these pleas that you haven't
8 told me about?"

9 And you said, "No."

10 A Correct.

11 Q "Do you have any doubt about what you're doing
12 here today?"

13 And you said, "No."

14 Is that true?

15 A Yes.

16 Q That's true?

17 A That I had no doubt what I was doing there that
18 day, that's true.

19 Q That's true?

20 A Yeah.

21 Q Okay. All right. Okay. Good.

22 Now, did you ever live in Washoe County at or
23 about the time these offenses were alleged?

24 A Which offense, sir?

1 Q Well, the two we're here on. The offense --
2 A Over a ten-year period of time.
3 Q Okay.
4 A Each count.
5 Q When did you move to the county, sir?
6 A I didn't move to Washoe until 2000.
7 Q So prior to 2000, you had never been in Washoe
8 County; is that correct?
9 A That is correct.
10 Q Never set foot here?
11 A I have driven past, through on the way to
12 California on 80, but never stopped or set foot in Washoe
13 County, no.
14 Q So when Ashley says you lived here, had a house
15 or a residence here, that's false?
16 A That is correct.
17 Q You discussed this with your lawyer?
18 A I did.
19 Q What did he say?
20 A It didn't matter.
21 Q Is that a quote? I'm going to ask him.
22 A I don't remember the exact conversation, but I
23 remember he said it didn't matter.
24 Q Well, certainly, if you're saying to him, look, I

1 didn't -- I didn't live here when these offenses happened,
2 he says it didn't matter, I'm having a hard time believing
3 you didn't argue with him on that.

4 So tell me you argued with him and tell me what
5 you said to him.

6 A I told him that I had proof and documentation
7 that I did not even reside in the state.

8 Q And he accepted all of that?

9 A He accepted all the documents, yes.

10 Q And what did he say about it?

11 A Nothing further after that.

12 Q Just accepted them?

13 A Just took the documents and never brought it up
14 again.

15 Q Okay. But you were living in Washoe County at
16 the time of the offense with Jessica, correct?

17 A Yes, I was.

18 Q Where were you living?

19 A I was living on Highplains Drive.

20 Q Highplains?

21 A Yes, sir, one word.

22 Q Highplains. What part of town is that in?

23 A I believe it's northwest.

24 Q Okay. Now, you don't deny being with Jessica

1 that night, correct?

2 A Having contact with Jessica, no, I do not.

3 Q There were plenty of witnesses around.

4 A Yes, there were.

5 Q So there's no point in denying that. And there's
6 no witnesses to events that happened inside the building,
7 right, except you and her?

8 A Correct.

9 Q And your big thing about the offense with Jessica
10 is there were no evidence of bite marks, right?

11 A And no DNA.

12 Q Well, the DNA we have a statement from you that
13 says she put her mouth on your penis. We have that,
14 right? So the fact --

15 A Well, that was --

16 Q Well, we have it, right? It's right here.

17 A We've already established that was a lie.

18 Q Well, I know. That's what you have established.
19 That's what you've said.

20 A I believe you established that also as a lie.

21 Q What we have here is you have been making a
22 statement to a police officer saying: I had oral sex with
23 Jessica.

24 A I understand. We've already established ten

1 minutes ago that was a lie. And you established my
2 credibility on that was a lie.

3 Q Right. So how did you expect to get before the
4 jury the notion that you were not guilty of this offense
5 with this statement?

6 A Well, I brought that to my attorney with the
7 discussion -- I discussed that briefly with my attorney on
8 the fact that morning of the preliminary hearing is the
9 fact that when -- excuse me, when I was interviewed or
10 interrogated by Detective Broome, at no time was I
11 Mirandized.

12 Q Where did the interview happen?

13 A At the police department interrogation of a sex
14 offender unit.

15 Q How did you get there?

16 A I drove there.

17 Q Okay. Did that on your own, did you?

18 A I did.

19 Q Okay.

20 A It didn't negate the fact that I felt I was in
21 custody.

22 Q Well, we all understand that, but the fact of the
23 matter is you came down on your own. You were told you
24 were free to leave and not under arrest --

1 A It didn't negate his responsibility to Mirandize
2 me, which is on the top of their letterhead, on the top of
3 the Miranda papers.

4 Q That's only if you're in custody.

5 A I was in custody and I asked him on the record.
6 I asked him on the record if Ms. -- if Detective Broome
7 had any intention of letting me walk out the door, and he
8 said no.

9 Q Okay. Now, you discussed this motion to suppress
10 with counsel, right?

11 A No. I didn't know that it was a motion to
12 suppress. I just simply asked if the fact that I was not
13 Mirandized was relevant, and he said it didn't matter if I
14 was Mirandized or not.

15 Q Either Mr. O'Mara loves the statement "it didn't
16 matter," or you're just paraphrasing. So which is it?

17 A Well, that phrase and also the fact that his only
18 strategy was: I can buy you enough time to get your
19 family ready for prison.

20 Q I like how you're adding to the story. When did
21 that happen?

22 A I'm simply answering the questions, sir.

23 It happened every time I spoke to him on the
24 phone. And every time we left the court -- every time we

1 left the court appearances on the preliminary hearing on
2 July 2nd, and then further on -- when I met with him one
3 other time. He said that he can try and go for a deal and
4 get us a deal and push off the State long enough to get my
5 family ready for prison financially -- excuse me,
6 financially stable for prison.

7 Q Okay. All right. So the way you see the defense
8 of your case going if it had gone to trial is you would
9 try and make a motion to suppress this statement to
10 Broome.

11 A I can't -- I can't count of what a strategy, a
12 legal strategy was, 'cuz no one would discuss with me --

13 MR. HATLESTAD: Your Honor --

14 THE DEFENDANT: Mr. Hatlestad, the difference
15 between me now and me three years ago in my legal
16 knowledge is substantial. Three years ago I had no idea
17 of any of the protocol or establishments of a courtroom.

18 BY MR. HATLESTAD:

19 Q Well, your view when you wrote this petition you
20 were corroborating, which is you would not have pleaded
21 guilty, your lawyer would have done a better
22 investigation, you would have gone to trial and been
23 acquitted, right?

24 A For clarification, had my attorney done any

1 investigation, it would have made a difference. Had I
2 known the evidence I know now and had I known the
3 information I know now, yes, I would have been more than
4 confident to go to trial. But at the time I was --

5 Q To put a fine point on it, you would have pleaded
6 not guilty to the major offenses.

7 A Yes.

8 Q You would have tried to get this statement to
9 Broome suppressed or excluded, right?

10 A If that's what it's called, yes.

11 Q It's called excluded, suppressed.

12 A Okay.

13 Q You would have brought this DNA report before the
14 jury and said: Hey, no foreign DNA. It's just me.
15 There's no bite marks.

16 A I would think that's relevant, yes.

17 Q So the offense with Jessica never happened
18 despite what I said with Mr. Broome.

19 A I would think that that would be relevant, yes.
20 That would be important.

21 Q How exactly did you expect to get on the record
22 evidence contradicting Jessica's statement that she --
23 that you had her perform oral sex on you outside the bite
24 mark?

1 A Can you rephrase the question?

2 Q Yeah, let me rephrase that.

3 Jessica would testify against you that there was
4 oral sex performed on you.

5 A Mm-hmm.

6 Q Despite what this DNA test shows.

7 A Well, I was under the impression -- I'm under the
8 impression now, that I didn't know then, that it was the
9 State's duty to present that exculpatory evidence forward
10 pursuant to statute.

11 Q No. Our duty to is present it to your lawyer,
12 and we did that. He had it in the file.

13 A If I --

14 THE COURT: Let's not -- no. I'm not going to
15 listen to a debate.

16 THE DEFENDANT: That's why -- I'm stopping now,
17 Your Honor. Thank you.

18 THE COURT: Okay.

19 THE DEFENDANT: No problem.

20 MR. HATLESTAD: I'll move on, Your Honor.

21 BY MR. HATLESTAD:

22 Q Just to complete the circle, you have three
23 meetings with Mr. O'Mara. The first is the prelim.

24 A Yes.

1 Q And then you're on bail.

2 A Yes.

3 Q Does he call you on the phone or are you calling
4 him?

5 A I believe we touched base on the phone, yes.

6 Q Did you tell him what your defense was to these
7 offenses?

8 A At the preliminary hearing, yes, I did.

9 Q At the preliminary hearing.

10 A Yes.

11 Q Did you tell him in complete or is was it a
12 shorthand version?

13 A At the time I didn't know about the DNA. I told
14 him about the information and the documentation I had for
15 Ashley's charge.

16 Q Okay. And you brought all that documentation you
17 rattled off at the prelim, right?

18 A Yes, I did.

19 Q You told him your defense to Count No. II, or the
20 other charge, right, with Jessica?

21 A I didn't tell him anything on that one. I had no
22 argument. Just simply stated my side.

23 Q Just so we're clear, what more did you want
24 Mr. O'Mara to investigate on the Ashley charge beside

1 those documents?

2 A It would have been helpful if he had spoken to
3 her and/or verified and confirmed -- and confirmed the
4 doc -- and verified and confirmed the documentation's
5 authenticity.

6 Q Anything else?

7 A That's all I could think of at this time.

8 Q Okay. And what did you want Mr. O'Mara to
9 investigate on the Jessica charge?

10 A The consistency of the statements.

11 Q I'm sorry?

12 A The consistencies of her statements.

13 Q Okay.

14 A The fact, after the preliminary hearing, how the
15 apartment -- the condition of the apartment and the doors.
16 At no time, to my knowledge, did he ever visit the
17 apartment or speak to Jessica at all. And I would like
18 for him to have interviewed Jessica.

19 Q And we had no idea if she would talk to him,
20 right?

21 A I don't know, sir.

22 Q Is she going to testify here or is Ashley going
23 to testify?

24 A I couldn't speak on that.

1 Q So we're going to have no idea what these people
2 would have said to your lawyer, right?

3 A (No audible response.)

4 MR. HATLESTAD: Okay. Okay. Thank you, sir.

5 THE COURT: Mr. Story?

6 MR. STORY: Thank you, Your Honor.
7

8 **REDIRECT EXAMINATION**

9 BY MR. STORY:

10 Q Once you received the file from Mr. O'Mara, you
11 reviewed it; is that correct?

12 A Yes, I did.

13 Q And you found things in that file that you didn't
14 know about prior to entering your plea; is that correct?

15 A That's correct.

16 Q And what are those things?

17 A The -- specifically the DNA and the lack of any
18 investigation and/or strategy, for that matter.

19 Q Had you known that prior to entering your plea,
20 would you have entered your plea?

21 A No.

22 Q Now, you said that you lied to the Court and
23 admitted guilt in this case; is that correct?

24 A Yes, I did.

1 Q Was that at the advice of your counsel?

2 A It was.

3 Q Was that true at the time?

4 A No.

5 Q So you just followed your attorney's advice; is
6 that correct?

7 A He told me to answer in the affirmative to all
8 questions pertaining to the charges.

9 Q And you requested that your attorney investigate
10 this case; is that correct?

11 A Yes, I did.

12 Q To the best of your knowledge, he did not; is
13 that also correct?

14 A Not to my knowledge.

15 MR. STORY: I have no further questions, Your
16 Honor. Thank you.

17
18 **RECROSS-EXAMINATION**

19 BY MR. HATLESTAD:

20 Q Well, take a look at page 12 of that transcript,
21 sir.

22 A (Witness complies.)

23 Q Line No. 10. Judge is asking you about pleading.
24 "Are you doing so of your own free will?"

1 And your answer is, "Yes."

2 Is that true or not?

3 A It was under the advice of counsel that I
4 answered yes. So at the time, it was in my best interest
5 to do so. So yes.

6 Q Well, I know, but it says: "Are you doing so of
7 your own free will?"

8 A It was my choice to enter the plea upon
9 counsel -- I took the advice of counsel and made the final
10 decision to enter the plea. So, yes, it was free will.

11 MR. HATLESTAD: All right. Nothing else.

12 THE COURT: You may step down, sir. Thank you.

13 THE DEFENDANT: Thank you, Your Honor.

14 MR. STORY: Your Honor, we have no further
15 witnesses.

16 And if it's entirely possible, may I take a quick
17 break? I've been taking some medication and I need --

18 THE COURT: Sure.

19 MR. STORY: -- to use the restroom. I apologize.

20 THE COURT: We'll take a short recess. Court's
21 in recess.

22 (Recess taken.)

23 THE COURT: Thank you. Please be seated.

24 Okay. Mr. Story, you have no witness?

1 MR. STORY: That's correct, Your Honor.
2 THE COURT: Mr. Hatlestad?
3 MR. HATLESTAD: I'd like to call Mr. O'Mara.
4 THE COURT: Okay. Mr. O'Mara, please come
5 forward and be sworn.
6

7 DAVID O'MARA,
8 called as a witness by the State,
9 having been first duly sworn, was examined
10 and testified as follows:
11

12 DIRECT EXAMINATION

13 BY MR. HATLESTAD:

14 Q State your name and spell your last name.

15 A My name is David O'Mara, O apostrophe, capital
16 M-A-R-A.

17 Q And what is your occupation and profession?

18 A I'm an attorney here in Reno.

19 Q Are you licensed to practice law here in Nevada?

20 A I'm licensed to practice in all courts in the
21 state of Nevada.

22 Q Did you have occasion to represent Mr. Dunckley
23 here?

24 A Yes. I did represent Mr. Dunckley on various

1 charges in both the Justice Court here in Washoe County
2 and District Court.

3 Q Okay. First of all, why don't you tell us how
4 that came about, how you were appointed or received --

5 A I was part of the Jack Alian group, and I took
6 various cases per -- and I was paid \$3,000 for six cases,
7 I think, a month, and Mr. Dunckley was one of my cases.

8 Q Now, prior to taking Mr. Dunckley's case, had you
9 ever had any other sex cases?

10 A Yes. I probably had handled three or four sex
11 cases at that time or was in the process of handling a few
12 of those cases. And most of those were with the ADA
13 Ms. Vilorio.

14 Q Now, Mr. Dunckley has said very clearly the first
15 time the two of you talked was at his preliminary hearing;
16 is that correct?

17 A I don't recall if that's really true, but that's
18 probably likely that the first time that we had
19 discussions was probably that afternoon.

20 I don't remember if there was a continuance.
21 Normally there is a continuance in regards to some cases,
22 and then set it out for another date, but I cannot recall
23 that happening in this case. I just don't know.

24 Q Do you remember, was it at the preliminary

1 hearing or the day of that preliminary hearing that
2 Mr. Dunckley laid out his defenses or his version of these
3 offenses to you?

4 A He did say that they did not occur. And so I
5 don't really think that that would be an accurate
6 portrayal of what actually occurred at the preliminary
7 hearing in regards to what are his defenses.

8 We did discuss the fact that he was not there in
9 Nevada for the other one.

10 There were also some discussions because there
11 was another girl. I don't remember her name off the top
12 of my head. There were numerous charges. I believe there
13 was 17 charges or some odd in the Justice Court. And I'd
14 have to look at the filing document to find out how many
15 charges were set.

16 And so we talked about that very -- you know.
17 And we went in, and many of the charges were dismissed,
18 one because one of them didn't show up. But there were
19 also sexual coercion charges as well that were also
20 dismissed in the lower court, Justice Court.

21 I don't believe at that time that he gave me any
22 documentation at all that day. He did make that
23 mention -- there was no question in my mind that he said
24 that he was not in this area.

1 But one of the documents he provided was a
2 transcript of his culinary union, and he had to obtain
3 that document, so I'm fairly confident that that did not
4 happen that day.

5 And some in some of my notes, I did ask for
6 additional documents. I have letters that I had provided
7 him asking for additional notes throughout the period of
8 time of my representation. And so I believe that he
9 provided me some of those things throughout the entire
10 period of my representation of him.

11 Q Now, Mr. Dunckley was on bail during the periods
12 of time, correct?

13 A That's correct.

14 Q Was he having any trouble getting ahold of you?
15 Are you noticing it or is he complaining about lack of
16 contact?

17 A Mr. Dunckley would not have any contact with me
18 basically. I on numerous occasions had to send him
19 letters, call him, and try to get him in. He was very
20 unavailable at most times, even up until the last day of
21 his sentencing.

22 When I asked him for various information and to
23 meet with me, he still found a way to not meet with me
24 until very shortly before any hearing.

1 Q Are you questioning him about this, like: We
2 need to get together?

3 A Oh, absolutely. We met on numerous occasions.
4 And one specific time we met, we went over all of the
5 taped interviews in regards to him. And we also went
6 over -- I'm not sure if there was a video as well, but I
7 think there was a video deposition that we also went over.

8 So we met on numerous occasions. We went over
9 various things. And I could give you -- I'll let you ask
10 the question, then I'll give you more specifics as we go.

11 Q All right. Let's put it this way: In addition
12 to talking to Mr. Dunckley about the various facts and
13 circumstances of the offense and getting his account,
14 you're pursuing discovery from the State, right?

15 A That's correct. In fact, I sent numerous letters
16 to Ms. Vilorio because I believed that I was not getting
17 all of the information. And specific, I do believe -- and
18 I don't -- I really have not reviewed anything
19 Mr. Dunckley has filed in the writ, what information he
20 has done, but this morning I did go through my file and
21 did find I think two letters to Ms. Vilorio saying that I
22 needed certain information from her that I had not gotten.
23 Some were the audiotapes and some of it was the
24 documentary evidence as well because Mr. Dunckley was

1 telling me that the -- the DNA was a big issue. Not
2 having that document was a big issue.

3 And he knew and we had talked about the fact
4 that -- whether or not if that document came back with DNA
5 on his private parts, that would obviously be very
6 difficult to overcome. But also, if that document came
7 back and there was nothing on there as he was going to
8 claim there was, we still had some problems and there were
9 still some serious risks for him going to trial on the
10 sexual assault charge of Ms. Jessica.

11 Q Okay. As far as that DNA report is concerned,
12 did you show that to Mr. Dunckley before his plea?

13 A I don't know if I showed that to him, but we did
14 discuss the fact that there was nothing on that DNA test.
15 And that went into the equation of whether or not he was
16 going to plead guilty.

17 Q And what was the ultimate conclusion of that?

18 A Mr. Dunckley decided to not take my advice and go
19 to trial, and he accepted a plea deal that was offered by
20 the State because he believed that there was no chance
21 that Judge Steinheimer would not give him probation and
22 that Judge Adams would specifically write him a letter of
23 recommendation and many hundreds of letters would be
24 coming in as to his credibility in this community.

1 Q Okay. So rewind just a little bit. You
2 conducted -- or correct me if I'm wrong. You tell me.

3 You conducted a pretty thorough and complete
4 investigation of the case, including discovery and
5 conversations with your client, and you have concluded
6 this case should go to trial, correct?

7 A That's correct.

8 Q And you discussed that with Mr. Dunckley. And
9 your view is -- or you're telling us today that upon
10 telling Mr. Dunckley that, he is not inclined to take the
11 case to trial but take a plea bargain which apparently you
12 negotiated in the meantime; is that correct?

13 A The method and what happened was that we were
14 preparing for trial. There was no question in my mind we
15 were going to trial. I believed in our defenses in
16 regards to Count I. I was not as confident in Count II
17 which was the sexual assault charge, but Mr. Dunckley was
18 moving me towards that position of trial.

19 It was almost immediately when I gave him the
20 offer that there was probation on the table that he was
21 going to accept it, and I had to explain to him that that
22 was probably not going to happen in this case, that he was
23 going to have to spend some significant time in prison.

24 And I reiterated that throughout the entire

1 process of him -- in regards to before he entered his
2 guilty plea, and also after he entered guilty plea and
3 before sentencing, that there was a likelihood that he was
4 going to prison.

5 Q Well, if his attitude is, as you indicate that it
6 is, he thinks for sure he's going to get probation in this
7 case, for whatever reason, and you're telling him
8 something that's 180 degrees opposite of that, can you
9 identify any sort of tie-breaking issue, fact,
10 circumstance that made him insist on taking the plea?

11 If he's over in one direction and you guys are
12 completely separate and apart here and the twain does not
13 meet, can you identify anything, any fact, circumstance,
14 conversation that will convince a guy like Mr. Dunckley
15 that says "I'm getting probation," and you're saying "No,
16 you're not"?

17 A I have no idea why he would think he was going to
18 get probation. I firmly believed he was not going to get
19 probation, and I acknowledged that. I specifically told
20 him that many times before the entry of guilt was entered
21 on March 6th.

22 I mean, there's a lot of things that go into this
23 case. I mean, he wouldn't have been probationable if he
24 had gone to trial and been convicted. That was something