

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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4 BRENDAN DUNCKLEY,

5 Appellant,

6 v.

7 THE STATE OF NEVADA,

8 Respondent.

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10 RESPONDENT'S ANSWERING BRIEF

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10 RESPONDENT'S ANSWERING BRIEF

11 I. Statement of the Issue

12 Did the district court err in denying Dunckley's post-conviction habeas  
13 claim that his counsel was ineffective for failing to develop certain defenses,  
14 which forced him to plead guilty, where Dunckley did not present evidence of  
15 his defenses at the habeas hearing, and where Dunckley's counsel testified he  
16 investigated all of Dunckley's defenses and counseled Dunckley to go to trial,  
17 but Dunckley rejected that advice and pleaded guilty?

18 Did the prosecutor breach the plea agreement by arguing for a prison  
19 sentence where the plea agreement provided that the State retained the right  
20 to argue for an appropriate sentence?

21 Does this Court's ruling on direct appeal that the district court used the  
22 correct sentencing statute bar Dunckley's argument that the district court  
23 sentenced him under the incorrect sentencing statute?

24 II. Summary of the Argument

25 This is an appeal from the district court's order denying Dunckley's post-  
26 conviction petition for a writ of habeas corpus. Dunckley alleges that because

1 his counsel failed to investigate certain defenses, he lost faith in his counsel  
2 and consequently pleaded guilty to lewdness with a child under the age of 14  
3 years and attempted sexual assault. Absent his counsel's deficient  
4 representation, Dunckley maintains he would have proceeded to trial.  
5 Dunckley also asserts the State breached the plea agreement because the State  
6 offered him the opportunity of probation through a plea agreement, but then  
7 argued against probation at the sentencing hearing. Dunckley finally argues  
8 the district court improperly applied the sentencing scheme that existed at the  
9 time of sentencing, which did not permit probation, as opposed to the  
10 sentencing statute that existed at the time Dunckley committed his crimes,  
11 which permitted probation.

12 At the habeas hearing, Dunckley's counsel testified he investigated all  
13 of Dunckley's defenses, and counseled Dunckley that he should go to trial.  
14 Dunckley rejected his counsel's advice, and pleaded guilty because he believed  
15 he would receive probation. The district court ruled that counsel was credible  
16 and Dunckley was not.

17 Dunckley failed to present the evidence at the habeas hearing he claims  
18 his counsel should have acquired and used at a trial. Thus, Dunckley failed to  
19 establish that his counsel was deficient or that Dunckley was prejudiced by the  
20 alleged deficiency. Accordingly, the district court correctly denied the  
21 petition.

22 Dunckley's claim that the prosecutor breached the plea agreement is  
23 barred because it could have been, but was not, raised on direct appeal, and  
24 because it is not based on an allegation that his plea was unknowing or  
25 involuntary or entered without the effective assistance of counsel. The district  
26 court also properly denied the claim because the State and Dunckley never

1 agreed that the State would recommend probation or not object to it.

2 Dunckley's argument that the district court erroneously used the  
3 sentencing statute that existed at the time of sentencing as opposed to the one  
4 that existed at the time of the offense is barred by the law of the case where  
5 this Court held on direct appeal that the district court applied the statute that  
6 existed at the time of the offense.

### 7 III. Argument

8 A. The District Court's Ruling That Dunckley Failed to Prove His  
9 Counsel Did Not Investigate Certain Defenses, Which Forced  
10 Dunckley to Plead Guilty, Is Supported by Substantial Evidence  
11 Where Counsel Testified He Investigated All of Dunckley's  
12 Defenses, Found Them to Be Meritorious, and Counseled  
13 Dunckley to Proceed to Trial, but Dunckley Rejected That Advice  
14 and Pleaded Guilty Because He Believed He Would Receive  
15 Probation.

#### 16 1. Standard of Review

17 When reviewing the district court's resolution of ineffective-assistance  
18 claims, the Court gives deference to the district court's factual findings if they  
19 are supported by substantial evidence and not clearly erroneous but reviews  
20 the district court's application of the law to those facts de novo. *Lader v.*  
21 *Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

#### 22 2. Discussion

23 To prove ineffective assistance of counsel sufficient to invalidate a  
24 judgment of conviction based on a guilty plea, a petitioner must demonstrate  
25 that his counsel's performance was deficient in that it fell below an objective  
26 standard of reasonableness, and resulting prejudice such that there is a  
reasonable probability that, but for counsel's errors, petitioner would not have  
pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474  
U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102,

1 1107 (1996). Both components of the inquiry must be shown. *Strickland v.*  
2 *Washington*, 466 U.S. 668, 697 (1984).

3 Here, Dunckley testified he provided his counsel with certain defenses,  
4 but that his counsel failed to investigate those defenses and told Dunckley he  
5 would be convicted if he went to trial (Appellant's Appendix, Volume 2, 252-  
6 54, 265). He also testified his counsel failed to give him a DNA report that  
7 exculpated him. *Id.* at 254-59. As a result, Dunckley lost faith in his counsel  
8 and simply pleaded guilty. *Id.* at 265.

9 Dunckley's counsel, on the other hand, testified he investigated all of  
10 Dunckley's defenses, believed that some of them had merit, and told Dunckley  
11 about the favorable DNA report. *Id.* at 296-98, 300-01, 306-16. Accordingly,  
12 counsel advised Dunckley that he should proceed to trial. *Id.* at 297-98.  
13 Dunckley, however, rejected counsel's advice, because he believed he would  
14 receive probation if he pleaded guilty. *Id.* at 297, 306. Counsel did not believe  
15 Dunckley would receive probation if he pleaded guilty; accordingly, he advised  
16 Dunckley not to accept the State's plea offer. *Id.* at 304.

17 The district court found Dunckley's counsel credible, and thus rejected  
18 Dunckley's contrary testimony. *Id.* at 363, 364. Since the district court's  
19 finding is based on substantial evidence and is not clearly wrong, this Court  
20 should affirm the district court's finding that Dunckley's counsel provided  
21 effective assistance of counsel.

22 Dunckley also failed to present the evidence he claims his counsel should  
23 have acquired and used at a trial. Thus, Dunckley failed to establish that his  
24 counsel was deficient or that Dunckley was prejudiced by the alleged  
25 deficiency. Accordingly, the district court correctly denied the petition for this  
26 additional reason as well.

1 B. The State Did Not Breach the Plea Agreement by Asking the  
2 District Court to Sentence Dunckley to Prison Where the Plea  
3 Agreement Permitted the State to Argue for an Appropriate  
4 Sentence.

5 1. Standard of Review

6 Courts generally review the failure to object to the breach of a plea  
7 bargain for plain error. *See In re Sealed Case*, 356 F.3d 313, 316-17 (C.A.D.C.  
8 2004) (“we join the substantial majority of circuits holding that when a  
9 defendant raises a claim of breached plea bargain for the first time on appeal,  
10 the reviewing court should apply a plain error standard of review consistent  
11 with Fed.R.Crim.P. 52(b).”).

12 2. Discussion

13 Dunckley argues the State breached the plea agreement by arguing for  
14 a prison sentence, because the State stated at the plea hearing it did not object  
15 to continuing the sentencing hearing to permit Dunckley to obtain favorable  
16 evidence in support of an argument for probation.

17 Dunckley waived this issue by pleading guilty and failing to raise it on  
18 direct appeal, and it falls outside the scope of claims permissible in a  
19 post-conviction petition for a writ of habeas corpus challenging a judgment of  
20 conviction based upon a guilty plea. *See* NRS 34.810(1)(a); *Franklin v. State*,  
21 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (“claims that are appropriate  
22 for a direct appeal must be pursued on direct appeal, or they will be  
23 considered waived in subsequent proceedings”), *overruled on other grounds*  
24 *by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999).

25 Furthermore, there was no breach of the plea agreement. In exchange  
26 for Dunckley’s guilty pleas, the State did not agree to any particular sentence.  
Dunckley and the State only agreed that the State would “be free to argue for



1 an appropriate sentence.” (Appellant’s Appendix, Volume 1, 12, 20).

2 Dunckley’s argument is premised on the idea that the prosecutor “held  
3 out the hope of probation” by her comments *after* Dunckley pleaded guilty,  
4 because she stated she did not object to a continued sentencing hearing to see  
5 if Dunckley might marshal some evidence in support of probation (Opening  
6 Brief, 12). Since the prosecutor made her comment after Dunckley pleaded  
7 guilty, it could not form the basis of an agreement to plead guilty between the  
8 parties. Further, the prosecutor’s comment was merely an explanation as to  
9 why she did not object to continuing the sentencing hearing out for a longer  
10 time than usual. The prosecutor never told Dunckley or the district court  
11 anything related to the entry of the guilty plea that would lead a reasonable  
12 person to believe the prosecutor would not object to probation. Dunckley fails  
13 to show clear error; thus, this Court should affirm the district court order  
14 denying the claim.

15 C. The District Court Did Not Mistakenly Believe Probation Was  
16 Not an Available Sentence.

17 Finally, Dunckley argues the district court erroneously believed  
18 probation was not an available sentencing option because the district court  
19 applied the version of NRS 176A.110 as it existed at the sentencing hearing,  
20 and the statute did not permit probation at that time. This Court addressed  
21 that issue on direct appeal, and held that “[t]he record is therefore clear that  
22 not only was the district court aware that probation was a sentencing option  
23 for Dunckley, but that it properly exercised its discretion by imposing prison  
24 terms for the offenses.” *Dunckley v. State*, No. 52383 (Order of Affirmance,  
25 May 8, 2009). The Court’s ruling is the law of the case and prevents further  
26 litigation of this issue. *See Hall v. State*, 91 Nev. 314, 315–16, 535 P.2d 797,

1 798-99 (1975).

2 IV. Conclusion

3 For the foregoing reasons, the State respectfully requests the Court to  
4 affirm the district court order denying the post-conviction petition for a writ  
5 of habeas.

6 DATED: August 24, 2012.

7 RICHARD A. GAMMICK  
8 DISTRICT ATTORNEY

9 By: JOSEPH R. PLATER  
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1 CERTIFICATE OF COMPLIANCE

2 1. I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)  
4 and the type style requirements of NRAP 32(a)(6) because this brief has been  
5 prepared in a proportionally spaced typeface using Corel WordPerfect X3 in  
6 14 Georgia font.

7 2. I further certify that this brief complies with the page- or type-volume  
8 limitations of NRAP 32(a)(7) because, excluding the parts of the brief  
9 exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

10 3. Finally, I hereby certify that I have read this appellate brief, and to  
11 the best of my knowledge, information, and belief, it is not frivolous or  
12 interposed for any improper purpose. I further certify that this brief complies  
13 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP  
14 28(e)(1), which requires every assertion in the brief regarding matters in the  
15 record to be supported by appropriate references to the page and volume  
16 number, if any, of the transcript or appendix where the matter relied on is to  
17 be found. I understand that I may be subject to sanctions in the event that the  
18 accompanying brief is not in conformity with the requirements of the Nevada  
19 Rules of Appellate Procedure.

20 DATED: August 24, 2012.

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