SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

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APPELLANT BRENDAN DUNCKLEY'S REPLY BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
Second Judicial District

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I. ARGUMENT

A. The State Breached The Plea Bargain.

1. Standard of Review:

This court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.*

2. Argument:

The State knowingly and intentionally offered Mr. Dunckley an illusory Guilty Plea Memorandum which required Mr. Dunckley to spend months obtaining a psychosexual evaluation in accordance with NRS 176.139. Indeed, during the guilty plea hearing the State informed the District Court as follows:

> **Ms. Viloria**:Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-28; *underlining added*.)

Mr. Dunckley complied in all respects with the terms of the Guilty Plea Memorandum – Mr. Dunckley attended all required classes and appointments and obtained the appropriate psychosexual evaluation in accordance with NRS 176.139 that would have allowed him probation. (AA-75-89.) Moreover, Mr.

Dunckely complied in all respects with the conditions of his bail and complied with all laws. (AA 33-89.)

Yet the State deprived Mr. Dunckely of the benefit of his bargain. The State vigorously, inappropriately, and in violation of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. The State used charges it could not prove during a time of heightened anxiety because of the Brianna Dennison rape and murder investigation to con an inexperienced, ineffective, and inadequately paid attorney with a plea offer the State had no intention of fulfilling. The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation. However, the State deprived Mr. Dunckley of the benefit of probation by acting in bad faith thereby depriving Mr. Dunckley of the sole benefit to him of the Guilty Plea Memorandum. The State had no intention of allowing Mr. Dunckley probation and proved its intention to deprive Mr. Dunckley of the benefit of his bargain through its inappropriate sentencing arguments. Mr. Dunckely's conduct for the entire time he was on bail was exemplary – he complied in all respects with the guilty plea memorandum, the conditions of his bail and all laws. Despite her representations to the District Court that "I want to see what he does between now and then," Ms. Viloria vigorously argued, not only for no probation, but

argued for a sentence well in excess of that recommended by the Division of Parole and Probation in the Presentence Investigation Report. Her assertion that Mr. Dunckely constituted a risk to public safety is specious, if not frivolous. If Mr. Dunckely constituted a risk to public safety, the State would not have agreed to a many month extension of time for him to remain on bail while fulfilling his end of the plea agreement. Rather, it would have been against public policy for the State to agree to stipulate to leaving a risk to public safety on bail. *May v. Mulligan*, 36 F.Supp. 596 (W.D. Mich., 1939). Of course, Mr. Dunckely is and was no risk to public safety. A plea agreement includes an implied obligation of good faith and fair dealing. *U.S. v. Jones*, 58 F.3^{d} 688 (D.C. Cir. 1995); and the State breached the Guilty Plea Memorandum by acting in bad faith. Notwithstanding the State's bad faith, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. *Santobello v. New York*, 404 U.S. 257 (1971).

As this Court held in *Citti v. State*, 107 Nev. 89, 91, 807 P.2^{d} 724, 726 (1991) (*quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2^{d} 1215, 1216 (1986)):

> When the State enters a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' ... The violation of the terms or 'the spirit' of the plea bargain requires reversal."

The Due Process and Equal Protection Clauses of the Fourteenth

Amendment mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *accord*, *Bryant v. Smith*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State*, 110 Nev. 1009, 879 P.2d 60 (1994). Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation.

In its Answering Brief, the State argues first that Mr. Dunckley failed to raise this issue on direct appeal and second that the State was free to argue for "any particular sentence" and therefore did not breach the plea agreement. (Answering Brief, page 5.) The State is incorrect on both counts. As this court held in *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995), this court will consider in a habeas corpus matter issues not raised on appeal where "cause for doing so is related to his ineffective assistance of counsel allegations." This issue was not raised on appeal because of the ineffective assistance of his trial/appellate counsel. Mr. Dunckely specifically raised this very issue in his original Petition for Writ of Habeas Corpus: "Counsel failed to raise any issues on appeal that Petitioner had voiced a concern for in a letter to counsel dated February 5, 2008." (AA000115-116.) Since his trial/appellate attorney was ineffective for not raising this issue on appeal which is part of the

very habeas corpus matter before this court, Mr. Dunckely is entitled to litigate this issue through his Petition for Writ of Habeas Corpus. Second, the fact that the State used the term "free to argue" did not entitle the State to entice Mr. Dunckely into an illusory plea agreement.

This court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.* This court should allow Mr. Dunckely to withdraw his guilty plea.

B. Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

1. Standard of Review:

This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

2. Argument:

In its Answering Brief, the State argues that the district court was correct in believing Mr. Dunckely's attorney and rejecting "Dunckely's contrary testimony." (Answering Brief, page 4.) The State is again incorrect. To defend

himself against the charges, Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, divorce records, and IRS records, to corroborate his alibi that he was not in the State of Nevada at the time some of the crimes were alleged to have occurred and provided his attorney with alibi witnesses that could corroborate his whereabouts. Mr. Dunckley's attorney failed to seek funds to conduct an investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

In addition, there was no corroborating evidence in support of the alleged crimes of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. In fact, there was a stunning lack of evidence – there was no DNA; there were no bite marks, as the victim alleged; and there were no physical or psychological examinations conducted of any of the victims. Moreover, there was never any police report for the lewdness charges, and therefore, a meritorious statute of limitations argument because both women were over 21 years old. NRS 171.083 (Statute of limitations tolled where police report timely filed.) To make matters worse, one of the victims had a blood alcohol content of 0.226% at the time of one of the alleged crimes. Finally, some of the crimes were alleged to have occurred years prior to the State bringing charges against Mr. Dunckley. Accordingly,

the evidence in support of the alleged crimes consisted of the testimony of the alleged victims; and that testimony was highly suspect, but crucial for a conviction at trial. Mr. Dunckley's attorney failed to independently interview any of the victims.

Given the fact that Mr. Dunckely consistently insisted that he had not committed the alleged crimes and had provided his attorney with proof that he was not even in Nevada at the time most of the alleged crimes occurred, it is impossible to believe that he would now plead guilty after the lack of DNA evidence exonerated him. Mr. Dunckely was and is actually innocent of these alleged crimes; and no reasonable juror would have found him guilty. *Schlup v. Delo*, 513 U.S. 298 (1995).

There is no reasonable trial and/or sentencing strategy designed to effectuate Mr. Dunckley's best interest that would have justified his attorney's failures in this regard. Moreover, that the independent investigation would have shown Mr. Dunckley's alibi defense was true and that Mr. Dunckley was innocent. The independent investigation and interview of the victims would have also shown that the alleged victims lacked sufficient credibility because of alcohol impairment, age, and/or the length of time between the alleged crime and the trial to support a conviction. Any decision that Mr. Dunckley's attorney may have made not to conduct a pretrial investigation could not have been

informed and could not have constituted a reasonable professional judgment. Had Mr. Dunckley's attorney conducted a pretrial investigation and interview of the victims, Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault.

Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request for post-conviction habeas relief and remand with instruction to allow him to withdraw his guilty plea.

VIII. CERTIFICATE OF COMPLIANCE.

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

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

I hereby certify that pursuant to NRS 239B.030, no social security numbers are contained within this document.

DATED: October 24, 2012.

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By: /s/ Robert W. Story .

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IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 24, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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