

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

Electronically Filed
Sep 22 2014 03:19 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CHARLES MAKI
Petitioner,
vs.

Sup. Ct. Case No. ~~66144~~
Case No. **CR94-0345**
Dept. 8

THE STATE OF NEVADA,
Respondent.

_____ /

RECORD ON APPEAL

VOLUME 6 OF 7

POST DOCUMENTS

APPELLANT

**Charles Maki #42820
Warm Springs Correctional Center
P.O. Box 7007
Carson City, Nevada 89702**

RESPONDENT

**Washoe County District Attorney's
Office
Terrance McCarthy, Esq.
P O Box 11130
Reno, Nevada 89502-3083**

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District Court 05/09/1996 07:53 AM
Washoe County 2385
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JUSTICE CLERK
BY [Signature]
DEPUTY

1 Case No. CR94-0345
2 Dept. No. VIII

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

9 CHALRES JOSEPH MAKI,
10 Petitioner,

11 -vs-

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

12 E.K. McDANIEL, WARDEN,
13 _____,
14 Respondent.

16 COMES NOW the Petitioner, in propria persona, pursuant
17 to N.R.S. §12.015, and respectfully moves this Honorable Court for
18 an Order granting Petitioner leave to proceed in the above-entitled
19 action in forma pauperis, without requiring Petitioner to pay or
20 provide security for the payment of costs of prosecuting this
21 action.

22 This motion is made and based upon the attached affidavit
23 and certificate.

24 DATED this 3rd day of MAY, 1996.

Respectfully submitted,
[Signature]
CHARLES J. MAKI

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Case No. CR94-0345

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Dept. No. VIII

JUDGE BAILLY CLERK

BY [Signature]
DEPUTY

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

CHARLES JOSSEPH MAKI,

Petitioner,

-vs-

E.K. McDANIEL, WARDEN,

Respondent.

AFFIDAVIT IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, CHARLES J. MAKI, hereby declare and state
that I am the Petitioner in the above entitled case; that in support
of my Motion to proceed without being required to prepay fees, costs
or give security therefor; I state that because of my poverty I am
unable to pay the costs of said proceeding or to give security
therefor; that I am entitled to relief.

I do xxx do not request an attorney be appointed to
represent me.

I further swear that the responses which I have made to
questions and instructions below are true.

1. Are you presently employed: Yes No xxx

a. If the answer is Yes, state the amount of your salary
or wages per month, and give the name and address of your employer:

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N/A

b. If the answer is No, state the date of last employment
and the amount of salary and wages per month which you received:

N/A

2. Have you received within the past twelve months any
money from any of the following sources?

a. Business, profession or form of self-employment?

Yes _____ No xxx

b. Rent payments, interest or dividends?

Yes _____ No xxx

c. Pensions, annuities or life insurance payments?

Yes _____ No xxx

d. Gifts or inheritances?

Yes _____ No xxx

e. Any other sources?

Yes xxx No _____

If the answer to any of the above is "Yes" describe each
source of money and state the amount received from each during the
past twelve months: SIIS payments of \$103.00 a month for disability

3. Do you own cash or equivalent prison currency, or do
you have money in a checking or savings account?

Yes _____ No xxx

If the answer is "Yes", state the total value of the
items owned: See attached certificate.

1 4. Do you own any real estate, stocks, bonds, notes,
2 automobiles, or other valuable property (excluding ordinary house-
3 hold furnishings and clothing)? Yes _____ No xxx

4 If your answer is "Yes", describe the property and state
5 its approximate value: N/A

6
7 5. List the persons who are dependent upon you for
8 support, state your relationship to those persons, and indicate
9 how much you contribute towards their support: _____

10 NONE.

11
12 UNDER THE PENALTY OF PERJURY, pursuant to N.R.S. §208.165,
13 the above affidavit is true and correct to the best of affiants
14 personal knowledge.

15 DATED this 3rd day of MAY, 1996.

16
17 Charles J. Maki
18 Sign your name
19 CHARLES J. MAKI

20 CHARLES J. MAKI 42820
21 Print your name DOP#

CR94P0345 DC-9900039454-002
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District Court 05/09/1996 07 54 AM
Washoe County 1368
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CASE NO: CR94-0345

DEPT NO: VIII

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JUDITH E. CLERK
BY [Signature]
DEPUTY

IN THE 2nd JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF

FINANCIAL
CERTIFICATE

CHARLES F. MAKI # 42820
NAME

ON MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

I hereby certify that the Petitioner herein has the sum
of \$ 0 - on account to his credit at the institution
where he is confined. I further certify that Petitioner likewise
has the following securities to his credit according to the records
of said institution: 0

DATED this 12th day of APRIL, 1996

BY: [Signature]
Nevada Department of Prisons
Inmate services Accountant
Authorized Officer of Institution

APR 09 1996

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Case No. CR94-0345

Dept. No. VIII

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JUSTICE CLERK
BY [Signature]
DEPUTY

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

CHARLES JOSEPH MAKI,

Petitioner,

v.

E.K. MCDANIEL, WARDEN,

Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or type-written, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence.

1 Failure to raise all grounds in this petition may preclude you
2 from filing future petitions challenging your conviction and
sentence.

3 (6) You must allege specific facts supporting the claims
4 in the petition you file seeking relief from any conviction or
5 sentence. Failure to allege specific facts rather than just
6 conclusions may cause your petition to be dismissed. If your
petition contains a claim of ineffective assistance of counsel,
that claim will operate to waive the attorney-client privilege
for the proceeding in which you claim your counsel was
ineffective.

7
8 (7) If your petition challenges the validity of your
conviction or sentence, the original and one copy must be filed
9 with the clerk of the district court for the county in which
the conviction occurred. Petitions raising any other claims
10 must be filed with the clerk of the district court for the
county in which you are incarcerated. One copy must be mailed
11 to the respondent, one copy to the attorney general's office,
and one copy to the district attorney of the county in which
12 you were convicted or to the original prosecutor if you are
challenging your original conviction or sentence. Copies must
13 conform in all particulars to the original submitted for
filing.

14 PETITION

15 1. Name of institution and county in which you are
16 presently imprisoned or where and how you are presently
17 restrained of your liberty:

18 ELY STATE PRISON, ELY, NEVADA, WHITE PINE COUNTY.

19 2. Name and location of court which entered the judgment
20 of conviction under attack: SECOND JUDICIAL DISTRICT COURT,
21 WASHOE COUNTY, RENO, NEVADA.

22 3. Date of judgment of conviction: May 17, 1994.

23 4. Case number: CR94-0345

24 5. (a) Length of sentence: Three life sentences with the
25 with the possibility of parole and five ten year ssentences.

26 (b) If sentence is death, state any date upon which
execution is scheduled: N/A

27 6. Are you presently serving a sentence for a conviction
28 other than the conviction under attack in this motion:

1 Yes _____ No xxx . If "yes," list crime, case number and
2 sentence being served at this time: _____
3 _____
4 _____

5 7. Nature of offense involved in conviction being
6 challenged: Three counts of sexual assault on a minor under the
7 age of fourteen and five counts of lewdness with a minor under
8 the age of fourteen.

8 8. What was your plea? (check one)

9 (a) Not guilty xxx

10 (b) Guilty _____

11 (c) Nolo contendere _____

12 9. If you entered a guilty plea to one count of an
13 indictment or information, and a not guilty plea to another
14 count of an indictment or information, or if a guilty plea was
15 negotiated, give details: N/A
16 _____
17 _____

18 10. If you were found guilty after a plea of not guilty,
19 was the finding made by: (check one)

20 (a) Jury xxx

21 (b) Judge without a jury: _____

22 11. Did you testify at the trial? Yes _____ No xxx

23 12. Did you appeal from the judgment of conviction?

24 Yes xxx No _____

25 13. If you did appeal, answer the following:

26 (a) Name of court: NEVADA SUPREME COURT, APPEAL

27 (b) Case number or citation: 26049
28 _____

1 (c) Result: DISMISSED

2 (d) Date of Result: OCTOBER 4, 1995.

3 (Attach copy of order or decision, if available).

4 14. If you did not appeal, explain briefly why you did
5 not: N/A

6

7 15. Other than a direct appeal from the judgment of
8 conviction and sentence, have you previously filed any
9 petitions, applications or motions with respect to this
10 judgment in any court, state or federal? Yes _____ No XXX.

11 16. If your answer to No. 15 was "yes," give the
12 following information: N/A

13 (a) (1) Name of Court: _____

14 (2) Nature of proceeding: _____

15

16

17 (3) Grounds raised: _____

18

19

20 (4) Did you receive an evidentiary hearing on
21 your petition, application or motion? Yes _____ No _____

22 (5) Result: _____

23 (6) Date of Result: _____

24 (7) If known, citations of any written opinion or
25 date of orders entered pursuant to each result: _____

26

27

28

1 (b) As to any second petition, application or motion,
2 give the same information: N/A

3 (1) Name of Court: _____

4 (2) Nature of proceeding: _____

5 (3) Grounds raised: _____

6 (4) Did you receive an evidentiary hearing on
7 your petition, application or motion? Yes _____ No _____

8 (5) Result: _____

9 (6) Date of Result: _____

10 (7) If known, citations or any written opinion or
11 date of orders entered pursuant to each result: _____
12 _____

13 (c) As to any third or subsequent additional
14 applications or motions, give the same information as above,
15 list them on a separate sheet and attach.

16 (d) Did you appeal to the highest state or federal
17 court having jurisdiction, the result or action taken on any
18 petition, application or motion?

19 (1) First petition, application or motion?

20 Yes _____ No _____

21 Citation or date of decision: _____

22 (2) Second petition, application or motion?

23 Yes _____ No _____

24 Citation or date of decision: _____

25 (3) Third or subsequent petitions, applications
26 or motions? Yes _____ No _____

27 Citation or date of decision: _____
28

1 e. If you did not appeal from the adverse action on
2 any petition, application or motion, explain briefly why you
3 did not. (You must relate specific facts in response to this
4 question. Your response may be included on paper which is
5 8 1/2 x 11 inches attached to the petition. Your response may
6 not exceed five handwritten or typewritten pages in length.)

7 N/A

8
9 17. Has any ground being raised in this petition been
10 previously presented to this or any other court by way of
11 petition for habeas corpus, motion or application or any other
12 post-conviction proceeding? If so, identify: identify:

13 a. Which of the grounds is the same: _____

14 N/A

15 b. The proceedings in which these grounds were raised:

16 N/A

17 c. Briefly explain why you are again raising these
18 grounds. (You must relate specific facts in response to this
19 question. Your response may be included on paper which is
20 8 1/2 x 11 inches attached to the petition. Your response may
21 not exceed five handwritten or typewritten pages in length.)

22 N/A

23 18. If any of the grounds listed in Nos. 23(a), (b), (c)
24 and (d), or listed on any additional pages you have attached,
25 were not previously presented in any other court, state or
26 federal, list briefly what grounds were not so presented, and
27 give your reasons for not presenting them. (You must relate

specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

This petition is being timely filed by petitioner.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No XXX.

If yes, state what court and the case number: _____

N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Janet C. Schmuck, DPD, 195 S. Sierra Str., Reno, NV Trial
Robin Wrigh, 226 Hill Str., Reno, NV Appeal counsel.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No XXX. If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL CRITICAL TRIAL STAGES, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

Supporting FACTS (Tell your story briefly without citing cases or law): SEE ATTACHED PAGE 8-A

(b) Ground two: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL APPEAL STAGES, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

Supporting FACTS (Tell your story briefly without citing cases or law): SEE ATTACHED PAGE 8-C

(c) Ground three: THERE WAS ACTUAL PROSECUTORIAL MISCONDUCT DURING ALL STAGES OF THE CRIMINAL PROCESS IN VIOLATION OF PETITIONER'S 5th, 6th and 14th AMENDMENT RIGHTS.

Supporting FACTS (Tell your story briefly without citing cases or law): SEE ATTACHED PAGE 8-D

(d) Ground four: THE TRIAL COURT COMMITTED CONSTITUTIONAL ERRORS THAT DEPRIVED PETITION OF HIS RIGHTS TO A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF HIS 5th, 6th and 14th AMENDMENT RIGHTS UNDER THE CONSTITUTION.

Supporting FACTS (Tell your story briefly without citing cases or law): SEE ATTACHED PAGE 8-D

WHEREFORE, Petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

1 EXECUTED at ELY, NEVADA on the 3rd day
2 of MAY, 1996.

3
4 Charles J. Maki
5 Signature of Petitioner
6 CHARLES JOSEPH MAKI
7 P.O. BOX 1989

8 Address
9 ELY, NEVADA 89301

10 PETITIONER DID NOT PREPARE THIS PETITION
11 IT WAS PREPARED BY AN INMATE LAY ASSISTANT.
12 Signature of Attorney (if any)

13
14 Attorney for Petitioner

15 Address

16 VERIFICATION

17 Under penalty of perjury, the undersigned declares that he
18 is the petitioner named in the foregoing petition and knows the
19 contents thereof; that the pleading is true of his own
20 knowledge, except as to those matters stated on information and
21 belief, and as to such matters he believes them to be true.

22 Charles J. Maki
23 Signature of Petitioner
24 CHARLES JOSEPH MAKI
25 Attorney for Petitioner

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MAKI v. McDANIEL, et al.,
CASE NO. CR94-0345
GROUND ONE SUPPORTING FACTS:
PAGE 8-A

1. Petitioner hereby incorporates all the supporting facts contained in Grounds Two, Three and Four to this Ground as if fully set forth herein by reference thereto. 2.) Petitioner's trial counsel failed to move the trial court for a psychiatric evaluation of both alleged victims after it was determined by her that Desiree Menees and Summer Menees were going to testify. 3.) Counsel failed to move the trial court for a psychiatric evaluation of Desiree Menees after reviewing the photographs that were taken of her during the physical examination conducted by C. Peele, as well as Ms. Peele's report that indicated that Desiree's examination showed a normal hymen. 4.) Counsel failed to move the trial court for a psychiatric evaluation after it was disclosed to her by the petitioner that the victim's father had sexually assaulted both victims before and had been investigated for this alleged acts of sexual assault. 5.) Counsel failed to move the trial court for a psychiatric evaluation of the two (2) alleged victims after it was determined that Summer Menees had extensive evidence of extensive sexual abuse, as was disclosed in C. Peele's reports, which demonstrated that Summer had been priorly sexually assaulted by unknown individuals. 6.) Counsel failed to move the trial court for an order allowing for the physical examination of both alleged victims, so that counsel would have expert evidence and testimony on the actual evidence of any sexual assaults, as well as counsel would have had testimony that would have contradicted C. Peele's testimony that a hymen will heal and grow back, this is entirely false, as a hymen will not grow back. 7.) Counsel failed to properly investigate any of the facts that petitioner gave to counsel prior to trial, such as that petitioner did not make any calls to Gary Menees, except for one call made some eight (8) days after petitioner's arrest, which could have been verified by phone bills; the fact that Gary Menees had sexually assaulted his two (2) girls prior to the alleged incidents involving the petitioner; other individuals that lived in the same apartment complex that knew that Gary Menees had sexual assaulted the two girls, and that John, a young boy who lived in the same apartment complex had sexual intercourse with both of the girls/victims prior to any allegations being brought against petitioner. 8.) Counsel failed to ask direct question about petitioner's tattoos and where they are located on petitioner's lower parts of his body, i.e., on his penis and genital area, which would have proved that the girls had never seen petitioner's privates. 9.) Counsel failed to move the court to stop officer Stegmaier from leaving the court room after the pictures of petitioner's genital area was admitted in open court, as Stegmaier went out and told the victims about the tattoos and told them that they would have to testify about these tattoos on rebuttal. 10.) Counsel failed to raise the issue of the timely appointment of counsel, in that petitioner should have been appointed counsel within 72 hours of his arrest, but was not appointed counsel until his arraignment hearing in justice court, which was some eight (8) days after petitioner's arrest. This was prejudicial to petitioner, in that he allegedly called individuals and he talked with officer Stegmaier while in the custody of the jail.

*** (CONTINUED ON ATTACHED PAGE 8-B) ***

MAKI v. McDANIEL, et al.,
CASE NO. CR94-0345
GROUND ONE SUPPORTING FACTS CONTINUED:
PAGE 8-B

11.) Counsel failed to move the court for a continuance to discuss with petitioner the guilty plea and plea bargain that counsel had obtained for petitioner, in that petitioner did wish to plea guilty to the charges of lewdness and was willing to plead to the charges that he had admitted committing but was not willing to plead to the charges that he did not commit but counsel would not fully and properly explain this to petitioner. 12.) Counsel failed to inform the court that she had a conflict of interest in the representation of petitioner after she reviewed the letter that was allegedly written by J. Coombs, in that counsel's representations of petitioner discontinued and she was only going through the motions, as this was what she told petitioner. 13.) Counsel failed to move the court for disclosure of any payments made to Ms. Coombs by the prosecution and/or secret witness programs, to demonstrate that she had a motive to lie, in that Ms. Coombs was paid \$5,000.00 for her testimony. 14.) Counsel failed to call rebuttal witnesses after Ms. Coombs was allowed to testify. See attached affidavits. 15.) Counsel failed to obtain an NCIC report of Ms. Coombs arrests, which would have proven that she had in fact been arrested and that the statements contained in the affidavits attached were true and that the statements given to counsel by petitioner were true. 16.) Counsel failed to move the trial court to dismiss Court II after it was determined that the jury could not reach a verdict on this Count. 17.) Counsel failed to properly object to the admission of the video taped interviews of the two (2) alleged victims, as this was overly prejudicial and only cumulative, as there had been three (3) individuals that had testified to the same alleged facts that were covered in the video taped interviews of the victims. 18.) Counsel failed to present any defense witnesses, such as those that were willing to testify. See attached affidavits.

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MAKI v. McDANIEL, et al.,
CASE NO. CR94-0345
GROUND TWO SUPPORTING FACTS:
PAGE 8-C

1.) Petitioner hereby incorporates all the supporting facts contained in Grounds One, Three and Four to this Ground, as if full set forth herein by reference thereto. 2.) Counsel failed to raise the issue that the trial court erred in not ordering a psychiatric evaluation of both the alleged victims prior to trial, to determine whether the victims had been priorly sexually assaulted by their father or other individuals. 3.) Counsel failed to raise the issue that the trial court erred in failing to order a physical examination of both alleged victims to determine what, if any injuries were caused by the petitioner's admissions. 4.) Counsel failed to raise the issue that the trial court erred in denying the petitioner's motion/request for appointment of new counsel on April 3, 1994. 5.) Counsel erred in not raising the issue that the trial court erred in admitting the videotaped interviews of the alleged victims, in that these interviews were cumulative in nature and had already been testified to by three (3) other witnesses. 6.) Counsel failed to raise the issue that Count II was never dismissed by the trial court nor did petitioner's trial counsel move to have this count dismissed after it was determined that the jury could not reach a verdict. 7.) Counsel failed to raise the issue that there was actual and prejudicial perjury offered by the prosecution witness C. Peele, in that a hymen will not heal by growing back. 8.) Counsel failed to raise the issue that the trial court erred in not excepting the petitioner's guilty pleas to the counts that he had admitted to committing. 9.) Counsel erred in not raising that the trial court clearly demonstrated bias and prejudice against the petitioner at the plea change hearing and during the trial stages and that the trial court clearly demonstrated that the court had determined that petitioner was guilty. 10.) Counsel failed to raise the issue that the prosecution failed to turn over evidence that was in its possession for over three (3) months, the picture of the victims vaginas. 11.) Counsel failed to raise the issues of prosecutorial misconduct, as more fully set forth in Ground Three of this petition. 12.) Counsel failed to raise the issue that petitioner was not appointed counsel in a timely fashion, in that petitioner was without counsel for over seven (7) days after he was arrested by police officers and formally charged. 13.) Counsel failed to raise the issue that the statement of petitioner's that was admitted into evidence was not properly edited before it was admitted for the juries review, in that there were portions of said interview that were admitted even though petitioner had invoked his rights to remain silent. 14.) Counsel erred in not raising the issue that after petitioner invoked his rights to remain silent that any and all statements made were inadmissible at trial, even though they were obtained through a video tape, this invaded the petitioner's rights without his knowledge or approval. 15.) Counsel failed to raise the issue that there was an actual and continuing conflict of interest between the petitioner and his trial counsel, in that she had been sexually assaulted before and she believed that petitioner was guilty and she would not present actual defenses that petitioner had available to him.

MAKI v. McDANIEL, et al.,
CASE NO. CR94-0345
GROUND THREE SUPPORTING FACTS:
PAGE 8-D

1.) There was actual prosecutorial misconduct that caused actual prejudice to the petitioner, that deprived petitioner of a fair and impartial trial. 2.) The prosecution withheld pictures of the victims vagina that were critical to the state's case and that would have proven that petitioner had not sexually assaulted Desiree, as that petitioner was unable to have an expert review these pictures prior to trial. 3.) The prosecutor allowed his witness to perjure herself, C. Peele, in that the prosecutor knew and/or should have known that the hymen does not heal and/or grow back, as the prosecutor had used Dr. Coulter, the director of SAINTS and has priorly testified that the hymen does not heal but scars and will not grow back. The prosecutor was aware of this and still condoned the perjury of C. Peele, thus this was suborn-perjury. 4.) The prosecutor acting in concert with Officer Stegmaier informed the two (2) alleged victims of the petitioner's defense that the victims had never seen petitioner without his clothes on and the petitioner's tattoos would verify this, the prosecutor told and/or instructed and/or allowed Stegmaier to tell and/or inform and/or show the two (2) victims the pictures that were going to be offered in the defenses case. Thus, this is why the victims were able to make the identification of the tattoos as they did in rebuttal.

GROUND FOUR SUPPORTING FACTS:

1.) The trial court erred in not removing himself from the petitioner's case because of bias and prejudice against the petitioner. 2.) The trial court erred in not making a factual determination as to the reasons that petitioner wanted to dismiss his counsel prior to trial. 3.) The trial court erred in admitting the videotaped interviews of the two (2) victims at the time of trial, as this was cumulative and only prejudicial to petitioner, as there had already been three (3) witnesses that had testified concerning this testimony and evidence. 4.) The trial court erred in denying petitioner's motion for a continuance to have an opportunity to review and examine the pictures that the state had withheld from the defense. 5.) The trial court erred in allowing C. Peele to perjure herself when she testified that the hymen grows back and heals, as the trial court is aware that this is not true at all. 6.) The trial court erred in not allowing the petitioner and his counsel time to discuss the guilty plea that was being entered by the petitioner. 7.) The trial court erred in not dismissing Count II after the jury could not reach a verdict. 8.) The trial court erred in allowing all of the taped interview of the petitioner even after petitioner had invoked his rights to remain silent. 9.) The trial court erred in not making a factual determination as to what the conflict of interest was between petitioner and his trial counsel. 10.) The trial court erred in not ruling that petitioner's rights to counsel at all critical stages of the criminal proceedings because petitioner was not appointed counsel until after 7 days.

CHARLES JOSEPH MAKI,

No. 26049

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

RECEIVED
FILED
OCT 04 1995
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of three counts of sexual assault on a child under the age of fourteen years and five counts of lewdness with a child under the age of fourteen years.

Charles Joseph Maki ("Maki") was charged with five counts of sexual assault on a child under the age of fourteen years and five counts of lewdness on a child under the age of fourteen years. Maki was found guilty of all but two counts of sexual assault. Maki appeals, arguing that (1) his confessions were obtained in violation of his constitutional rights; and (2) the district court erred by allowing evidence of uncharged prior bad acts to be admitted during the sentencing hearing.

We conclude that Maki's arguments are without merit. First, he was not "in custody" before he was read his Miranda warnings. See Oregon v. Mathiason, 429 U.S. 492 (1977). Accordingly, any incriminating statements he made during this time were admissible.

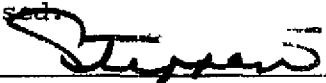
Second, after Maki was "in custody," read his Miranda warnings, and invoked his right to remain silent, the police did not "scrupulously honor" his right to remain silent. See Michigan v. Mosley, 423 U.S. 96, 104 (1975). However, because the parties stipulated to exclude portions of the police interview, there was only one incriminating statement admitted at trial that was obtained in violation of Maki's Fifth Amendment right. We conclude that the admission of this

statement resulted in harmless error. See *Weathers v. State*, 105 Nev. 199, 202, 772 P.2d 1294, 1297 (1989).

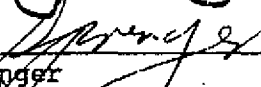
Finally, the district court did not err by allowing evidence of uncharged prior bad acts to be admitted during the sentencing hearing because the uncharged bad acts were supported by evidence, Maki's half-sister personally testified, and the district court did not necessarily have to rely upon these acts to sentence Maki as it did. Compare *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982).

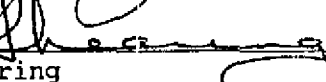
In view of the foregoing, we conclude that Maki's appeal lacks merit. Accordingly, we


ORDER this appeal dismissed.


_____, C.J.
Steffen


_____, J.
Young


_____, J.
Springer


_____, J.
Shearing


_____, J.
Rose

cc: Hon. Steven R. Kosach, Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Richard A. Gammick, District Attorney
Jack A. Alian Group,
Judi Bailey, Clerk

AFFIDAVIT OF CHARLES JOSEPH MAKI

THE STATE OF NEVADA)
)ss:
COUNTY OF WHITE PINE)

I, CHARLES JOSEPH MAKI, first being duly sworn and under my own oath, do hereby depose and state as follows:

1. That I am over the age of twenty-one (21) and full competent to testify to the matters set forth herein, and that the facts set forth herein are of my own personal knowledge, except for those made on belief and information supplied to me by others.

2. That I am the petitioner in Case No. CR94-0345, Maki v. McDaniel, and that I have read the petition and affidavits that have been submitted to the court for consideration and I believe same to be true and correct.

3. That I was represented by Janet Schmuck during the pre-trial and trial stages of the criminal proceedings in State v. Maki, Case No. CR94-0345, a court appointed Washoe County Public Defender.

4. That I was represented by Robin Wright, a court appointed private attorney to represent me on my direct appeal to the Nevada Supreme Court from the Judgment of conviction entered on May 17, 1994 in case number CR94-0345, appeal case number 26049, said appeal dismissed on October 4, 1995.

5. That I had advised Ms. Schmuck that Gary Menees had been investigated for the sexual assaulting of his two young girls, Desiree and Summer on several occasions prior to any allegations made by this two (2) individuals against myself.

6. That I had advised Ms. Schmuck that Desiree and Summer had had sexual intercourse with a young boy that lived in the same apartment complex, a John, but she would not investigate this fact.

7. That I had advised Ms. Schmuck that she needed to obtain the records from Social Services in Washoe County, Nevada to prove that the two (2) alleged victims had been sexually assaulted prior to any allegations being made against me, but she would not investigate these facts prior to trial.

8. That Ms. Schmuck told me and advised me that I was guilty and that I was stuck with her and that there wasn't anything that I could do about it and that she would go through the motions so that she would be doing her duty and obligations.

9. That I asked Ms. Schmuck to obtain psychiatric evaluations of both the alleged victims, as this would prove that they were lying about the allegations against me, Ms. Schmuck stated that she would not request or apply for such an order from the court.

10. That I requested of Ms. Schmuck to obtain a physical examination of both the alleged victims, as this would demonstrate that I had not had any sexual contact of any kind with the two (2) alleged victims, Ms. Schmuck refused to apply to the court for such an order allowing for this examination.

11. I requested of Ms. Schmuck to subpoena the following witnesses for their testimony at trial: Paul Grubbs, John (Mr. Grubbs step son), Curtis S. Woods, Esther Maki (Chong), Shirley J. Maki (mother), and other persons that lived in the same apartment complex during the time of the alleged sexual assaults, Ms. Schmuck refused to call and/or subpoena any of these witnesses, as she stated I was guilty and there was no reason to bring all these people in to testify on my behalf.

12. That I asked Ms. Schmuck to obtain my school records to prove that I was not even in the states that Ms. Coombes testified and stated I was in when she said I was, This was refused too.

13. That I requested Ms. Schmuck to advise the trial court that there was an actual conflict of interest between herself and me, because she had been sexually assaulted in the past and she believed that I was guilty and would not present a proper defense for me.

14. That I requested Ms. Schmuck to ask the two (2) alleged victims to describe the tattoos that are on my lower body, which would have proven that they had never seen my lower body, Ms. Schmuck said she would not ask such a personal question of the two (2) alleged victims, as I had put them through enough already.

15. That Ms. Schmuck failed to object to Officer Stegmaier taking a copy of the pictures of my tattoss out to the two (2) alleged victims to show them so that they would be able to testify about the tattoos on rebuttal.

16. That Ms. Schmuck entered into stipulations with the prosecution without my knowledge and/or consent, which were highly prejudicial to me.

17. That Ms. Schmuck would not inform the trial court that I was totally willing to plead guilty to the acts that I had committed, which only amounted to lewdness, as Ms. Schmuck stated that I had to plead guilty to sexual assaults because that was what the two (2) victims said I did.

18. Ms. Schmuck would not request of the trial court for a continuance so that she could and would fully explain to me what the plea negotiations were and what the penalties were for each count.

19. Ms. Schmuck would not move the trial court to dismiss Count II of the information, even after the jury could not reach a verdict.

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20. I requested in writing to Ms. Wright to raise specific issue on my direct appeal concerning Ms. Schmuck's actions, the prosecutions actions and the trial courts actions, but Ms. Wright would not raise these issues, as are set forth in Ground Two of the instant petition.

21. Ms. wright would not present and/or raise the issues that I have raised in the instant petition, even though these are clearly colorful issues and claims that are supported by evidence and affidavits, as well as the record.

22. That Ms. Schmuck did not discuss with me any defenses that could be raised or that would be raised by her during trial, as I was the one who advised her about the tattoos and that this would prove that I had not committed the alleged acts.

23. Ms. Wright would not discuss with me the issues that I requested her to raise on direct appeal, but would only say that I had to raise and present these claims in a post-conviction petition, as they could not be raised during the direct appeal proceedings.

24. Ms. Wright would not even present the claim that the trial court erred in not appointing me new counsel after I requested new counsel, and the court would not even conduct a hearing on this request.

25. That I attempted in every means I know to get my counsels of record to protect my constitutional rights through the proper means, the courts and on direct appeal, but neither counsel would represent any of the claims and/or defenses that I requested them to present to the courts.

26. That this petition was not prepared by myself but was prepared by an inmate lay assistant, MICHAEL R. EVANS (DULIN) NDOP #26022, and that he prepared this petition for no benefits to himself

but solely to assist me in obtaining justice and the relief that is requested in this action.

Further affiant sayeth not.

Dated this 30th day of ^{MAY}~~April~~, 1996.

Submitted by:

Charles J. Maki
CHARLES J. MAKI
PETITIONER IN PRO SE

VERIFICATION UNDER PENALTY OF PERJURY

I, CHARLES JOSEPH MAKI, do hereby verify that the above is true and correct and made under the penalties of perjury, as set forth under NRS 208.165, and that all the facts and statements made herein are of my own personal knowledge, except for those made under belief.

Dated this 30th day of ^{MAY}~~April~~, 1996.

SUBMITTED BY:

Charles J. Maki
CHARLES J. MAKI
P.O. BOX 1989-42820
ELY, NEVADA 89301

Petitioner In Pro Se

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PAUL GRUBBS
AFFIDAVIT

PAGE #1

First being duly sworn and under the penalty do hereby despose and state as follows:

1. That I am over the age of (21) twenty one years of age and am fully compentent to testify to the matters set forth herein, and that all statements are made of my own personal knowledge and belief.
2. That on January 19, 1994. and prior to that date I lived at 1015 Nevada street #5 Reno NV. 89504.
3. That I personally knew Charles Maki as he lived in the same appartment complex that I live in, and he lived in apartment Number 8.
4. That Mr. Maki and I worked on his truck on january 18 & 19 1994 that on January 19 1994 mr. Maki and I were drinking beer and two (2) plain clothes police men came up and arrested Mr. Maki, At least I believed that Mr. Maki was under arrest as the officers took him away Mr. Maki in my opinion was intoxicated as he and my self had been drinking beer all that day.
5. My step son John knows both of the girls that Mr. Maki is alleged to have sexually assaulted, as they were his playmates.
6. Mr. Maki contacted me after he had been arrested and asked me if I would be willing to come to court for him and testify in his behalf; I told Mr. Maki that I would be willing to testify in his behalf.
7. I could have offered testimony of Mr. Maki's caricture and how he acted around the alleged victims, as well as testamony concerning the girls, as well as there father and how he treated them.
8. I could of also offered testimony concerning the fact that the (2) two alleged victims were always left alone by there father.
9. That a Ms. Smuck left a card on my door and I attempted to contact her at the phonr number that she left but she never did return my calls, until right before Mr. Maki's trial.
10. I left messages for Ms. Smuck on several occasions that I was willing to testify for Mr. Maki and that I had vital information that would assist Mr. Maki and his defence.
11. I could of also testified that the alleged victims were baby sitted by a single male friend of there fathers and that it is my believe that he is the person that may have assulted the two victims the friend of the fathers was named francis, at least that is what I believe his name to be.
12. I finally contacted Ms. Smuck and she told me that Mr. Maki did not want nor need me to testify for him, as the state did

V6.27

not have a case and that Mr. Maki would be found innocent.

13. To my personal knowledge Mr. Meneese has been investigated by the child welfare dept. and the Reno police dept. in 1992 for allegations of child abuse, Lewdness with a minor and possible sexual assault of his own children; This was due to Mr. Meneeses habbit of getting drunk and telling others of his habbit of taking showers with the girls and running around the house nude in front of the children.

14. Mr. Maki did watch Mr. Meneeses girls on occasion, as Mr. Meneeses would leave his girls with anybody that would watch them for him when he wanted to go out drinking and gambling.

15. on many occassions when I would go up-stairs to Chucks (Mr. Maki's) Apartment and I would notice that Mr. Meneeses girls were at home alone and this would be until late at night.

16. It was not uncommon for Mr Meneese to leave his girls at home alone and the girls would have boys over while there father was gone, either at work or drinking and gambling at the Gold dust west casino in Reno.

17. Mr. Meneese told me he would get back at Mr. Maki Because Mr. Meneeses ex-girl friend left him and moved in with chuck (Mr. Maki) next door, she stayed there from Nov. 1993 to Dec. 1993 until Mr. Meneese made to much trouble for her.

18. Mr. Meneese bragged a few times when he was drinking how he had beat the system and would never have to go to jail for the acts he did with his girls; I understand there was testimony by the girls of lewd acts by the father during Chucks (Mr. Maki's) preliminary hearing.

19. In December of 1993 Chuch and the down stairs tenant that lived in theApts. caught the younger of the alleged victims with a boy in the girls bed room doing a sexual act.

20. Mr. Maki and the tenant both told Mr. Meneese about the above stated incident and Mr. Meneese stated that is was no big deal that it has happend in the past.

21. I told Ms. Smuck of this too, and she stated that this information was not needed. I also gave her the names of the people next door that had personal knowledge of the incident stated in paragraph #19.

22. Mr. Maki told me to go out and find the people that had lived in the apartment complex because Ms. Smuck had told him (Mr. Maki) that nobody wanted to come and testify for him; I told chuck that this was not true, as I had given Ms. Smuck the names as well as information but Ms. Smuck stated that this information was not needed because the state did not have a case.

23. I don't understand Ms. Smucks Judgment, when she could have called many witnesses that lived in the same apartment complex

and know the people and fact of this case.

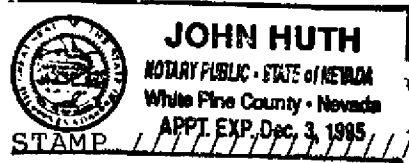
DATED THIS 29th DAY OF September, 1995

STATE OF NEVADA
County of White Pine

Paul Grubbs
Signature

SUBSCRIBED and SWORN to before me
this 29th day of September, 1995

John Huth
NOTARY PUBLIC



AFFIDAVIT OF CURTIS WOODS

STATE OF NEVADA

COUNTY OF WHITE PINE

} ss
}

I, CURTIS S. WOODS (AKA KEVIN C. ANDERSON) first being duly sworn and under the penalty of perjury, do hereby depose and state as follows:

1. That I am over the age of (21) twenty one and am fully competent to testify to the matters set forth herein, and that all of the statements contained herein are of my own personal knowledge and belief.

2. That I have known Charles Maki and his sister "Joslynn maki Combs" for (13) thirteen years.

3. I first met Joslynn Maki Combs through a few friends who rode and were members of a motorcycle club called the monguls in the Reno and Carson City area while partying up in lake tahoe in "1982" she was 17 or 18 years old and I was either 15 or 16.

4. I knew Joslynn Maki Combs about 3 years and partied with and dated her on and off during these years, she was a very wild young lady who enjoyed Sex and drugs and would trade Sexual favors allot of time to just about anyone for drugs she was known as a bag whore amongst the bikers and other people that we both hung around with.

5. Chicken Bob or C.B. as he was called and Mike Fried. AKA Colonel both of these men were her boyfriends at one time or another and both were members of the motorcycle club that I hung out with they introduced us, they as well as my self along with many others that I can think of in the Reno & Carson City area can testify in court, that Ms. Coombs was a known thief and drug whore for years and was known to lie about anything if it would get her drugs or money or just to be the center of attention.

6. During the time that I dated Joslynn Maki Combs she was I think a run away I lived at 1420 N. Edmonds St. Carson City NV. and on arizona street and on and off at a friends house at 200 E. 7TH ST. in Sun Vally NV. she was living in Lake Tahoe and in carson City NV, who ever would take her in mostly the bikers would just pass her around from one to another, and when she lived in Tahoe she was Prostitute her body and staying with another Prostitute.

7. From My understanding she didnt get along with her family very well I can remember time when she stole from them, she even once stole (I believe it was her Dads) car a toyota and was trying to sell it for parts to my friend at the junk yard "Little Johns auto parts" located in "mound house NV" where I sometimes worked as a parts puller, after that I believe that she left the state because I never seen her again.

Subscribed before me on
JUNE 28, 1995 by
KEVIN C. ANDERSON
Curtis S. Woods



JOHN HUTH
NOTARY PUBLIC - STATE OF NEVADA
White Pine County - Nevada
COM. EXPI. Dec. 3, 1995

CURTIS S. WOODS
(AKA) KEVIN C. ANDERSON
Curtis S. Woods
Kevin C. Anderson

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1 CASE NO. CR94^P0345

2 DEPT. NO. 8

JUDITH BAILEY, CLERK

BY: 
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 CHARLES MAKI,

10 Petitioner,

11 vs.

ORDER

12 THE STATE OF NEVADA,

13 Respondent.
14 _____/

15 This matter comes before the Court on a Petition for Writ of
16 Habeas Corpus which claims ineffective assistance of counsel in
17 a trial that was had in May of 1994.

18 IT IS ORDERED that Mr. David Hardy, Esq. be appointed to
19 represent Mr. Maki in his Petition for Writ of Habeas Corpus
20 regarding ineffective assistance of counsel.

21 DATED this 29 day of May, 1996.

22
23 
24 DISTRICT JUDGE
25
26

Certificate of Mailing

The undersigned hereby certifies that on the 29 day of
May, 1996, she mailed copies of the foregoing
ORDER in Case No. CR94-0345 to the following:

David Hardy, Esq.
458 Court Street
Reno, Nevada 89501

Charles Maki, Inmate #42820
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89701

Gary Hatlestad, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Kathryn Miller
ADMINISTRATIVE ASSISTANT

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FILED

CASE NO: CR940345

'96 AUG -5 P4:58

DEPT NO: 8

JUDICIAL CLERK
BY *[Signature]*
DEPUTY

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

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

STIPULATION AND ORDER

The undersigned attorneys hereby stipulate to extending the time at which Charles Maki must file his Supplemental Petition for Writ of Habeas Corpus. Maki will file said Supplement on or before August 16, 1996.

DATED this 31 day of July, 1996.

[Signature]
Gary H. Hatlestad
Deputy District Attorney

[Signature]
David A. Hardy
Attorney for Petitioner

It is so ordered.

[Signature]
District Judge

DAVID A. HARDY, ATTORNEY AT LAW
321 S. ARLINGTON AVE., RENO, NEVADA 89501 702/324-1113

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1 CASE NO: CR94P-0345

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JUDI BAILEY, CLERK

BY *[Signature]*
DEPUTY

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * * *

9
10 CHARLES MAKI,

11 Petitioner,

12 vs.

13 THE STATE OF NEVADA,

14 Respondent.
15

SUPPLEMENTAL POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF HABEAS
CORPUS

16
17 COMES NOW Petitioner, Charles Maki, by and through his attorney, David A.
18 Hardy, and supplements the Points and Authorities in Support of Petition for Writ of
19 Habeas Corpus filed on May 9, 1996. This Supplement is made and based upon the
20 attached Points and Authorities, the papers and pleadings on file herein, and any other
21 matter this Court may wish to consider.
22

23 DATED this 18th day of August, 1996.

24 *[Signature]*
25 David A. Hardy
26 321 S. Arlington Ave.
27 Reno, Nevada 89501
28 (702) 324-1113

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of facts and procedural history¹

On April 12, 1994, a jury convicted Maki of three counts of sexual assault on a child under the age of fourteen years and five counts of lewdness with a child under the age of fourteen years. Maki was subsequently sentenced to three consecutive life sentences with the possibility of parole and five consecutive ten-year sentences. Maki unsuccessfully appealed his conviction to the Nevada Supreme Court. See Order Dismissing Appeal, attached hereto as Exhibit A. Maki continues to insist he is innocent of the charges for which he was convicted, and but for the ineffective assistance rendered by his trial attorney, the jury's verdict would have been different. Make also insists his appellate attorney failed to raise substantial issues on direct appeal.

The alleged victims in this case are Desiree and Summer Menees. Desiree was nine years of age during the time in question; Summer was seven. Both girls testified regarding the sexual acts allegedly committed by Maki. The State also called Ms. Cathleen M. Peele and Detective James Stegmaier as witnesses. Peele testified that Summer's hymen demonstrated evidence of multiple sexual assaults. See Trial Transcript, page 141. However, Peele also testified that Desiree's hymen presented no physical signs of abuse. Stegmaier testified about his taped conversations with the girls and Maki. Maki did not testify. Instead, Maki's defense consisted of two witnesses: 1) an investigator who took photographs of the tattoos on Maki's body, and 2) a character witness who testified that Maki could not have committed the crimes. Both witnesses provided very brief testimony.

¹ This pleading supplements Petitioner's Petition for Writ of Habeas Corpus. It does not obviate any of the arguments presented in the underlying Petition, which Maki preserves the right to argue should this matter proceed to a hearing.

1 An evidentiary hearing was conducted on March 11, 1994, wherein Maki's
2 attorney made an oral motion for the discovery of all evidence relating to the physical
3 examinations of the girls. Trial began on Monday, April 11, 1994. On Friday, April 8,
4 1996, the State informed Maki's attorney that it possessed pictures that were taken during
5 the girls' physical examinations a few months earlier. On the first morning of the trial
6 Maki's attorney requested a continuance so she could have an expert review the
7 photographs and present a defense opinion. In the alternative, Maki's attorney asked the
8 Court to prohibit the State from introducing the photographs. See Trial Transcript, pages
9 5-7. In so arguing, Maki's attorney conceded she had access to an expert who could
10 provide testimony in this case. This Court denied Maki's request.

12 Maki was sentenced on May 17, 1994. The State informed Maki's attorney of its
13 intention to call Ms. Joslyn Coombs as a witness. Ms. Coombs, who is Maki's step-
14 sister, testified that Maki sexually molested her numerous times when she was a young
15 girl. Although Maki's attorney knew Ms. Coombs was going to testify, and she knew the
16 substance of Ms. Coombs' testimony, she did not produce any rebuttal witnesses or
17 adequately prepare for cross-examining Ms. Coombs. Indeed, Maki's attorney failed to
18 present any witnesses at the sentencing hearing.

20 II. Argument

21 The Sixth Amendment to the U.S. Constitution provides that Maki with the right of
22 effective counsel. See e.g. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 122
23 L.Ed.2d 180 (1993). The right to effective assistance of counsel extends to sentencing
24 and appellate proceedings. See Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994)
25 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)); Weaver v. Warden, 107
26

1 Nev. 856, 822 P.2d 112 (1991). The benchmark for measuring an ineffective assistance
2 claim is whether counsel's conduct prevented a just result. The standard for reviewing
3 claims of ineffective assistance of counsel is as follows:

4 First, appellant must demonstrate that his trial counsel's
5 representation fell below an objective standard of
6 reasonableness. Second, appellant must show that counsel's
7 deficient performance prejudiced the defense to such a degree
that, but for counsel's ineffectiveness, the results of the trial
would probably have been different.

8 Jones v. State 110 Nev. 730, 738, 877 P.2d 1052 (1994) (citing Davis v. State, 107 Nev.
9 600, 601-02, 817 P.2d 1169, 1170 (1991)).

10 The guarantee of "effective assistance" must have some meaning; otherwise, it is
11 superfluous. An effective attorney adequately investigates the facts, considers all viable
12 theories, develops evidence to support such theories, and makes reasonable investigations
13 in preparing the case or makes a reasonable decision not to conduct a particular
14 investigation. Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993). See also State v. Love,
15 109 Nev. 1136, 865 P.2d 322 (1993) (stating that counsel's failure to contact and
16 interview known potential witnesses, and the subsequent failure to call such witnesses at
17 trial, may constitute ineffective assistance of counsel). Maki submits the representation he
18 received from his trial and appellate attorneys fell below the objective standard expected
19 of criminal attorneys and prejudiced his defense. Maki supports his position as follows.

- 20
21 1. Maki's trial attorney failed to obtain psychological and physical examinations of
22 the victims.

23 Maki provided evidence to his trial attorney indicating that Desiree and Summer
24 might have been sexually assaulted on previous occasions. The girls' own father may
25 have acted in a sexually inappropriate manner toward the girls. Maki also informed his
26 trial attorney that Desiree had been sexually active with a young neighbor boy by the
27

1 name of "John." Maki's attorney failed to investigate these issues or hire a psychologist
2 to independently interview the girls. The Nevada Supreme Court's decision in Felix v.
3 State, 109 Nev. 151, 849 P.2d 220 (1993), illustrates the importance of a defendant's
4 psychological examination of a child sexual assault victim. Unfortunately, a child's
5 testimony is malleable and susceptible to different influences. Maki should have been
6 given a chance to have his own psychologist examine the girls and determine the factual
7 bases for their testimony. This is particularly true in light of Ms. Peele's own testimony
8 that Summer demonstrated abnormal behavior. See Trial Transcript, page 136.
9

10 In Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995), defense counsel failed to
11 obtain psychological evidence of the defendant. The Supreme Court reversed the
12 conviction because failure to present psychological or other evidence pertaining to mental
13 status renders the representation ineffective. The Court also noted that counsel has a duty
14 to make reasonable investigations and not just rely upon the State's expert. Dumas
15 applies to this case by analogy. Maki's counsel had evidence that the girls may have been
16 sexually assaulted in the past. If true, the assaults may have affected the trustworthiness
17 of the girls' trial testimony. Maki's attorney should have sought a psychological
18 examination of the girls.
19

20 Similarly, Maki's attorney should have sought an independent physical examination
21 of the girls. As noted, Ms. Peele testified that Summer's hymen showed evidence of
22 multiple abuse. However, Summer testified that Maki penetrated her vagina with his
23 penis on one occasion. Although Desiree's hymen did not show any evidence of abuse,
24 Ms. Peele testified her examination did not preclude the possibility that such abuse had
25 occurred. This is an important point that Maki's attorney failed to challenge. As noted in
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1 Medical Examination for Sexual Abuse: Have We Been Misled?, attached hereto as
2 Exhibit B, there are serious difficulties with diagnosing sexual abuse on the basis of
3 ano/genital examinations. Indeed, the attached article states in relevant part:

4 Likewise, it might seem obvious that a normal ano/genital
5 examination is no help in establishing molest. Such normal examinations
6 are, nonetheless, frequently termed "consistent with" sexual abuse. Rarely
7 is this followed by a statement indicating that a normal examination is
8 equally consistent with no abuse. Take, for example, the case in which the
9 doctor wrote, "The normal size of her vagina is not an uncommon finding
10 in girls who have been fondled although not deeply penetrated into the
11 vagina. This finding is still consistent with someone attempting to stick
12 their finger into the vagina."

13 Given that with many victims of molestation the medical examination
14 will be normal, it follows that every child's anatomy is "consistent with"
15 molest because normal anatomy is also consistent with nontraumatic molest.

16 See Id. at 1-2.

17 Maki has been convicted of sexually assaulting a girl whose physical examination
18 was inconsistent with her trial testimony. Maki's attorney should have retained an expert
19 to analyze and possibly challenge Ms. Peele's opinion.

20 2. Trial counsel failed to allow Maki to testify.

21 Criminal defendants have the right to testify on their own behalf. See Rock v.
22 Arkansas, 483 U.S. 44, 49 (1987). Counsel must advise a defendant of his right to
23 testify. U.S. v. Teague, 953 F.2d 1525 (11th Cir. 1992). In this case, Maki's trial
24 counsel erred when she refused to call Maki to the witness stand. Maki submits that he
25 told his attorney on numerous occasions he wished to testify. Maki further submits that
26 when his attorney finally told him he could not testify he became disruptive, turning a
27 table to the ground and asking a sheriff's deputy to remove his attorney from the room.
28 Maki was not allowed to testify because the Deputy District Attorney would "eat him
alive." If this is true, Maki's attorney deprived Maki of his fundamental and

1 constitutional right to testify on his own behalf.

2 3. Maki's trial attorney had a conflict of interest that prevented full and fair
3 representation.

4 An attorney owes a duty of loyalty to her client. This includes the responsibility
5 of providing meaningful assistance. See Frazer v. U.S., 18 F.3d 778 (9th Cir. 1994).
6 See also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992). In Frazer, the court held
7 that the attorney's verbal assault and threat to compromise the defendant's case was
8 inconsistent with the duty of loyalty. In this case, Maki and his trial attorney had a
9 conflict of interest that infected the fairness of these proceedings. Maki was informed by
10 his attorney that she had an experience with sexual assault which prevented her from fully
11 representing his interests. Maki submits his attorney told him she did not want to
12 represent him, but she would go through the necessary motions. More importantly,
13 Maki's relationship with his attorney deteriorated to the point that they could not have
14 meaningful discussions about the case. Maki even filed a request to have his attorney
15 removed from his case, which was denied by this Court.

17 In limited circumstances, a defendant is relieved of responsibility of establishing
18 the prejudicial effect of his attorney's ineffective assistance. An actual conflict of interest
19 which adversely affects a lawyer's performance will result in a presumption of prejudice
20 to the defendant. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Mannon v. State, 98
21 Nev. 224, 645 P.2d 433 (1982). Every defendant has a constitutional right to the
22 assistance of counsel unhindered by conflicting interests. Maki and his attorney were in
23 conflict on a number of issues, which cumulatively resulted in unfair representation.
24 Maki and his attorney disagreed about the development and presentation of evidence,
25 whether Maki was guilty, and whether Maki's attorney could disregard her personal
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1 experiences and zealously represent Maki. More importantly, Maki had a personality
2 conflict with his attorney that prevented almost all communications between attorney and
3 client. At one point Maki's attorney informed Maki she had visited with the girls and
4 their father and concluded they were telling the truth. She specifically told Maki, "I think
5 you're guilty." Maki's attorney also told Maki she did not want to represent him at trial.
6 Maki was concerned about his attorney's commitment to his defense and before the trial
7 ever began he complained to this Court, the state bar, and Washoe Legal Services. In
8 short, Maki's attorney felt no loyalty to Maki, and therefore, rendered ineffective
9 assistance of counsel.
10

11 4. Maki's trial attorney failed to adequately examine the girls about Maki's
12 tattoo.

13 Maki has a large multi-colored tattoo in his pubic area. This tattoo is
14 unmistakable. Maki had photographs taken of this tattoo immediately after his arrest
15 because he knew the girls would be unable to identify it. When Maki's attorney cross-
16 examined the girls she failed to elicit any testimony about this tattoo; indeed, she failed to
17 even ask about Maki's tatoos. See trial transcript, pages 55-68; 87-93. This is important
18 because the girls failed to specifically mention the tattoo at the preliminary hearing. After
19 Maki's attorney called the investigator to testify about photographing the tatoo, the State
20 called the girls as rebuttal witnesses. This time, however, Summer was able to describe
21 the tattoo in question. Desiree still did not fully describe the tattoo, but she provided
22 general testimony about a tattoo on Maki's stomach. There is some confusion regarding
23 the location of the tattoo Summer described. Maki submits the tattoo Summer described
24 is on his back near the right shoulderblade. In both cases, Maki's attorney failed to cross-
25 examine the girls after their rebuttal testimony. Maki submits the girls were able to
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1 testify about the tatoo because they were coached in the hallway prior to taking the
2 witness stand. Maki's attorney failed to exploit the girls' ignorance of the tattoo during
3 their direct testimony. Accordingly, Maki lost his one good opportunity to show the girls
4 were fabricating their stories.

5 5. Maki's trial attorney rendered ineffective assistance at the sentencing
6 hearing.

7 Approximately two weeks before the sentencing hearing the State advised Maki it
8 would be calling Ms. Coombs as a witness. The State also informed Maki that Coombs
9 was going to testify he had sexually assaulted her on numerous occasions when she was a
10 young girl. Despite this damning testimony, Maki's counsel did not present any rebuttal
11 witnesses or otherwise attempt to discredit Ms. Coombs' testimony. For example, Maki's
12 attorney failed to investigate and expose the remuneration allegedly paid by the State for
13 her testimony. Maki's attorney did nothing more than correct certain elements of the pre-
14 sentence report. Indeed, there was no mitigating evidence presented at all. In Brown v.
15 State, 110 Nev. 846, 877 P.2d 1071 (1994), the Court held that counsel's failure to
16 present a complete picture of the mitigating facts constitutes ineffective assistance. The
17 Court noted that "when a judge has sentencing discretion, as in the instant case,
18 possession of the fullest information possible regarding the defendant's life and character
19 is essential to the selection of the proper sentence." The Court further noted in Wilson v.
20 State, 105 Nev. 110, 771 P.2d 583 (1989), that counsel's decision to only call family
21 members, whose testimony appeared biased, was ineffective.

22 In this case, Maki informed his attorney that Mike Fried, Bob Loyal, Kevin
23 Anderson, and Mike Vendramin could be called to discredit Ms. Coombs' testimony.
24 Maki's attorney apparently failed to investigate these men as possible witnesses. Maki's
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1 attorney could also have called a number of character witnesses. In particular, Maki
2 submits that Ken Daniels, Linda Stalings, Paul Grubbs, Gale Thomas, and Carla Scarpa
3 would have testified in his behalf. Unfortunately, Maki's attorney failed to investigate
4 these people as possible witnesses. Representative affidavits are attached hereto as Exhibit
5 C. Maki submits that had his attorney done a better job at the sentencing hearing he
6 would have received a lesser sentence.

7 6. Maki was not arraigned within 72 hours of being arrested.

8 Maki was arrested on January 19, 1994. However, he was not arraigned until
9 January 25, 1994. He did not receive counsel until some time after that. Maki submits
10 that the delay between his arrest and arraignment violates NRS 171.178 and is grounds for
11 vacating his judgment of conviction. See Powell v. State, 108 Nev. 700, 838 P.2d 921
12 (1992), vacated, ___ U.S. ___, 114 S.Ct. 1280 (1994).
13

14 7. Maki's appellate attorney failed to raise critical issues on direct appeal.

15 A criminal defendant is entitled to effective assistance of counsel during the
16 appeals stage of a proceeding. Again, the relevant standard is whether the attorney's
17 conduct fell below the reasonable standard expected of similar attorneys, and whether the
18 ineffective assistance prejudiced the defendant's defense. In this case Maki's appellate
19 attorney raised three issues on appeal: 1) whether the court erred when it admitted Maki's
20 statements to the police, 2) whether the court erred when it admitted Maki's confession,
21 and 3) whether the court erred by allowing Ms. Coombs to testify at the sentencing
22 hearing. As depicted in Exhibit A, the Supreme Court dismissed Maki's appeal.
23


24 Maki's appellate counsel failed to challenge this Court's decision denying his
25 request for a new attorney. Based upon the apparent conflict between Maki and his
26
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1 attorney, which destroyed even their ability to communicate, this decision was erroneous.
2 Maki's appellate attorney also failed to challenge this Court's decision denying Maki's
3 request for a continuance so Maki could retain a defense expert. As noted, the State
4 withheld critical evidence until three days before trial. This severely prejudiced Maki's
5 defense because the girls' testimony was inconsistent with Ms. Peele's explanation of the
6 photographs. WCD CR 13 provides that continuances may be granted for "good cause."
7 Maki submits he had good cause for a continuance, and this Court's decision was an abuse
8 of its discretion. Maki also alleges his appellate attorney should have raised the violation
9 of NRS 171.178. Maki submits the Supreme Court would have ruled in his favor had
10 these issues been presented on direct appeal.
11

12 8. Maki is entitled to a hearing to discuss the matters raised in his petition and
13 this supplemental petition.

14 The Nevada Supreme Court has held that when a Petition for Writ of Habeas
15 Corpus raises claims that are supported by specific evidence, which if true would entitle
16 petitioner to relief, the district court should conduct a hearing on the Petition.
17 Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). Maki has raised certain claims
18 that, if true, would entitle him to relief. Maki respectfully asks this Court to conduct a
19 hearing on these and other matters.
20

21 DATED this 14th day of August, 1996.

22 
23 David A. Hardy
24 321 S. Arlington Ave.
25 Reno, Nevada 89501
26 (702) 324-1113

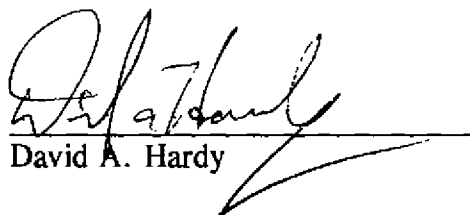
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this date I delivered a copy of Petitioner's Supplemental Points and Authorities to Reno-Carson Messenger Service for delivery to the following:

Frankie Sue Del Papa, Esq.
Nevada Attorney General
198 South Carson Street
Carson City, Nevada 89710

Gary Hatlestad, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

DATED this 20th day of August, 1996.


David A. Hardy



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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,

No. 26049

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Morgan **FILED**

OCT 04 1995

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of three counts of sexual assault on a child under the age of fourteen years and five counts of lewdness with a child under the age of fourteen years.

Charles Joseph Maki ("Maki") was charged with five counts of sexual assault on a child under the age of fourteen years and five counts of lewdness on a child under the age of fourteen years. Maki was found guilty of all but two counts of sexual assault. Maki appeals, arguing that (1) his confessions were obtained in violation of his constitutional rights; and (2) the district court erred by allowing evidence of uncharged prior bad acts to be admitted during the sentencing hearing.

We conclude that Maki's arguments are without merit. First, he was not "in custody" before he was read his Miranda warnings. See Oregon v. Mathiason, 429 U.S. 492 (1977). Accordingly, any incriminating statements he made during this time were admissible.


Second, after Maki was "in custody," read his Miranda warnings, and invoked his right to remain silent, the police did not "scrupulously honor" his right to remain silent. See Michigan v. Mosley, 423 U.S. 96, 104 (1975). However, because the parties stipulated to exclude portions of the police interview, there was only one incriminating statement admitted at trial that was obtained in violation of Maki's Fifth Amendment right. We conclude that the admission of this

statement resulted in harmless error. See Weathers v. State, 105 Nev. 199, 202, 772 P.2d 1294, 1297 (1989).

Finally, the district court did not err by allowing evidence of uncharged prior bad acts to be admitted during the sentencing hearing because the uncharged bad acts were supported by evidence, Maki's half-sister personally testified, and the district court did not necessarily have to rely upon these acts to sentence Maki as it did. Compare Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982).

In view of the foregoing, we conclude that Maki's appeal lacks merit. Accordingly, we

ORDER this appeal dismissed.


_____, C.J.
Steffen


_____, J.
Young


_____, J.
Springer


_____, J.
Shearing


_____, J.
Rose

cc: Hon. Steven R. Kosach, Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Richard A. Gammick, District Attorney
Jack A. Alian Group
Judi Bailey, Clerk



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EXHIBIT B

For post conviction
TO DAVID HARDY - ATTORNEY
321 S. ARLINGTON AVE.
RENO, NV. 89501

Medical Examination for Sexual Abuse: Have We Been Misled?

Lee Coleman

ABSTRACT: *There are serious difficulties in diagnosing sexual abuse on the basis of an ano/genital examination. Nevertheless, medical conclusions are often used in court to provide evidence for abuse. The support for the alleged physical indicators of abuse has been based on opinions and claims unsupported by research data. Recent research by John McCann on the ano/genital anatomy in nonabused children has established that findings often attributed to sexual abuse are found in many normal children. McCann's findings were applied to 158 children who had been medically examined in cases of alleged sexual abuse. Nearly all the findings attributed to sexual abuse were present in McCann's sample of nonabused children. More baseline studies are needed, including those comparing nonabused children to children where there is convincing evidence of abuse. In the meantime, the courts need to modify their current practices concerning evidence from ano/genital examinations.*

The growing recognition of sexual exploitation of children has brought special problems in determining whether an alleged abuse has in fact taken place. Unlike other crimes, the victim may not complain immediately. The victim may be inarticulate, or feel intimidated by the perpetrator. There may be no obvious physical evidence of abuse.

Equally difficult, the "victim" may in truth have been led to believe he or she was abused, through the use of leading and suggestive questioning. In such cases, false accusations are not necessarily lies because improper questioning may lead a child to sincere but incorrect beliefs (Coleman, 1986).

Faced with such problems, police and child protection workers naturally hope for a way to resolve these special difficulties which may protect the child molester in one case and falsely accuse an innocent person in another.

Not for the first time and undoubtedly for the last, we

have turned to doctors to relieve us of the uncertainty. And so great has been our desire for resolution, for "science" to come to the rescue, that we have been only too happy to accept whatever the doctors have offered. With few exceptions (Nathan, 1989; Paul, 1977; Paul, 1986; Woodling & Heger, 1986; Zeitlin, 1987) little thought has been given to whether the doctors' offerings are legitimate medical evidence, or mere speculation.

Some Clarifications

A good beginning is a recognition that sexual abuse is not a "diagnosis" but an event. Even highly suspicious findings, such as the presence of a disease normally transmitted through sexual contact, do not automatically mean sexual abuse. While medical findings may be important in supporting or negating alleged events, a finding of sexual molest is a legal and not a medical conclusion.

The confusion becomes acute when the methods normally used to reach a diagnosis in a nonadversarial, clinical situation are carelessly adopted in a legal investigation. Take, for example, the "history." In medicine, statements made by patients and/or family are generally taken at face value. Allegations of criminal conduct, on the other hand, should be *investigated* rather than assumed correct.

If a doctor hears an allegation and writes it down as "history," he or she is recording a "finding" but merely repeated the allegation. This might seem obvious, yet it is common for doctors to make a "diagnosis" of sexual abuse, relying heavily on what they call the "history," as given by an accusing adult or by an investigator.

Likewise, it might seem obvious that a normal ano/genital examination is no help in establishing molest. Such normal examinations are, nonetheless, frequently termed "consistent with" sexual abuse. Rarely is this followed by a statement indicating that a normal examination is equally consistent with no abuse. Take, for example, the case in which the

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doctor wrote, "The normal size of her vagina is not an uncommon finding in girls who have been fondled although not deeply penetrated into the vagina. This finding is still consistent with someone attempting to stick their finger into the vagina."

Given that with many victims of molestation the medical examination will be normal, it follows that *every child's anatomy* is "consistent with" molest because normal anatomy is also consistent with nontraumatic molest.

The confusion deepens when these two non-findings—"history of molest" and "physical examination consistent with molest"—are combined. Investigators learn that medical examiners have made a "diagnosis" of sexual abuse, based on the "history" and on a medical examination said to be "consistent with the history." With their suspicions confirmed, these investigators are hardly likely to continue with a vigorous and unbiased investigation.

Next, it should be remembered that "normal" always means a *range*. Parts of the body vary in detail from person to person. Whether examiners may safely equate physical findings with prior trauma will depend on whether controlled studies have documented the range of normal anatomy.

Finally, a note on "experience." Experience, like consensus, is not enough to move from conjecture to science. Feedback, i.e. controlled testing of ideas through research, is necessary to be sure that one's experience is not filled with incorrect notions that go unrecognized. Thousands of women, for example, underwent radical mastectomy because highly experienced surgeons, and doctors in general, believed it was the best way to save lives. Only subsequent research demonstrated that simple mastectomy saved as many lives.

The situation is even worse when the doctor's opinion will itself influence the ultimate findings of the justice system. If Doctor X opines that a child has been molested, based on findings which in truth do not prove molest, a court will frequently rubber-stamp such an opinion. This judicial finding then becomes the confirmation which makes the doctor feel he can rely on his "experience." Such "confirmation" is, of course, scientifically meaningless.

History of Sexual Abuse Examinations

Medical examinations for sexual abuse of children, done long after the alleged fact, are a new phenomenon. All but a handful of the articles on this subject are from the 1980s.

An early but influential article was that of Woodling and Kossoris (1981). A collaboration of a

family practitioner and a district attorney, this article listed findings which the authors claimed were indicative of abuse. These included a number of findings which are either extremely nonspecific or open to subjective interpretation by the examining physician, such as perihymenal erythema (redness), tightness (too much or too little) of pubic or anal muscles, anal fissures, and hymenal irregularities interpreted as either "transections" or evidence of scarring.

In support of these alleged indicators of prior sexual contact, Woodling offered only his "experience," which he wrote "suggests that only forced penile penetration causes actual transection of the hymen or perihymenal injuries. Chronic molestation or repeated coitus will result in multiple hymenal transections which eventually heal and leave multiple rounded remnants present between 3 and 9 o'clock . . ."

When a growing number of physicians and nurses began to take a special interest in forensic ano/genital examinations of suspected child sexual abuse victims, these new specialists eagerly absorbed such ideas, despite the lack of any research corroboration. Take, for example, Woodling's *Training Syllabus: Medical Examination of the Sexually Abused Child* (1985). To the above list of supposed indicators of molest he added "rounded scars called synechiae," which "when magnified may show neovascularization." Another unsupported claim: "the rectal sphincter may manifest laxity or may reflexively relax when stimulated by direct contact with an examining finger, perianal stroking with a cotton bud (perianal wink reflex) or by lateral traction of the buttocks."

As trainees went back to their communities, and in turn became the trainers, these uncorroborated claims became the conventional wisdom of the "experts." This second generation wrote more articles which passed along the same alleged "indicators" of molest, articles which were conspicuous in their absence of any controlled data (Berkowitz, Elvik, & Logan, 1986; Cantwell, 1983; Cantwell, 1987; Chadwick, undated; DeJong, 1985; Elvik, Berkowitz & Smith-Greenberg, 1986; Enos, Conrath, & Byer, 1986; Grant, 1984; Hammerschlag, Cummings, Doraiswamy, Cox, & McCormack, 1985; Heger, 1985; Herbert, 1987; Herman-Giddens & Frothingham, 1987; Hobbs & Wynne, 1986; Hobbs & Wynne, 1987; Jones, 1982; Kerns, 1981; Khan & Sexton, 1983; Levitt, 1986; Levitt, undated; McCann, Voris, & Simon, 1988; McCauley, Gorman, & Guzinski, 1986; Muram, 1988; Pascoe & Duterte, 1981; Ricci, 1966; Seidel, Zonana, & Totten, 1979; Seidel, Elvik, Berkowitz, & Day, 1986; Spencer & Dunklee, 1986; Tilelli, Turek, & Jaffe, 1980).

Pediatricians and other qualified physicians refused to do such examinations, deferring to those few who claimed to be "specialists." Law enforcement and child

protection workers quickly learned which examiners were likely to make findings supportive of an allegation of molest. Most often these examiners were attached to a "sex abuse team."

I have had the opportunity to read the reports and testimony of these examiners in cases involving 158 children suspected to have been molested. The confidence expressed, to the effect that findings like those mentioned above are reliable indicators of molest, is usually very high. Rounded hymenal edges and anal relaxation, to mention just two examples, are seen as signs of molest, and only molest.

Behind the scenes, however, doubts were being expressed. Perhaps far fewer doubts than scientific caution dictated, but nonetheless more doubts than law enforcement officials, judges, or juries were hearing. Take, for example, a meeting in April, 1985, during which physicians and nurses came to learn how to examine children who might have been molested.

Dr. Woodling acknowledged that "there is a significant variation in hymenal types . . . we need to realize that hymens are like people's faces, there are lots of variations . . . there are often times cuts or transections but they're not traumatic, they're just clefts that the child was born with . . . and can in fact appear to the untrained eye as an old transection . . ." (Woodling & Heger, 1985).

I have seen countless cases in which exactly these findings were said to be unequivocal evidence of molest. Likewise, to take another example, vaginal size may be cited as evidence of molest. A paper by Cantwell (1983) is still cited as support for the proposition that a vaginal opening size above four millimeters is supportive of molest. Woodling nonetheless acknowledged that this had "not held true in our experience" (Woodling & Heger, 1985).

Countless trials have had expert testimony that anal sphincter relaxation was a definite sign of sodomy, but Woodling admitted, "This is not a hard test, that means in fact that you have sexual abuse . . ." (Woodling & Heger, 1985).

At the same meeting, the remarks of another specialist, Dr. Astrid Heger, also showed greater willingness to acknowledge uncertainty than I have seen in court trials. "... I think diagnosing sexual abuse on the hymenal diameter alone is a very dangerous thing to do . . . the same kid (may have) two different diameters, depending on how you were looking at her" (Woodling & Heger, 1985).

What emerges from these meetings is the fact that these "specialists" have seen a lot of children, and opined on which ones were molest victims, but *they have no way of checking the accuracy of their conclusions*. Even if they agree on how to interpret a particular

finding, this doesn't mean they are correct. Only controlled research will allow them to decide whether a particular finding is indicative of molest.

Dr. Robert ten Bensel, a physician long involved in the effort to increase awareness of child abuse, has commented on the difference between consensus and true scientific evidence. In response to a 1985 Los Angeles conference at which there was an attempt to reach consensus of positive findings among doctors doing these examinations, ten Bensel wrote, "I am not comfortable with the reported 'consensus of positive findings.' This is not the procedure of science; rather, it is simply an agreement among a select group of physicians invited . . ." (1985).

Consensus, in other words, is no substitute for research.

In Search of Research

The heightened interest in medical detection of sexual abuse of children has produced lots of articles, but little research. Before discussing what little research exists, let me illustrate how today's "experts" seem to ignore the difference between naked claims and true evidence.

A nurse examiner routinely consulted by law enforcement officials in Northern California county described "a healed V-shaped laceration at the 12 o'clock position in the rectum . . . the tip of the V is pointed toward the inside, this indicates penetration from the outside." This nurse was faithfully passing on what she had learned in workshops like those mentioned above. No supportive evidence was cited.

Asked to evaluate these claims, I commented on the lack of data to support such an allegation. In response, lawyers supporting the allegation called on a pediatrician specializing in such examinations. She backed the nurse's findings by citing several articles which made the same claims. *None of the articles, however, contained reference to any research*. Once again, unsupported claims were being passed as medical evidence.

Dr. David Paul, one of the most experienced examiners for sexual abuse, has written "... even the most careful examination of a fissure—healed or fresh—by magnifying glass or colposcope, cannot differentiate between a "natural" fissure caused by constipation and one that was caused by anal penetration" (1986).

Clearly, there is a need to get beyond these differences of opinion, into the world of *research findings*. It is remarkable, considering the attention paid to sexual abuse of children in recent years, how little the doctors examining the children and giving opinions

which may send a person to prison for life, have done to validate the claims they so readily make in our courts.

We are not totally without research findings, however. What we do have directly contradicts the claims made in recent years by the small number of examiners so regularly consulted by law enforcement and child protection investigators.

Emans, Woods, Flagg, and Freeman (1987) attempted to compare three groups of girls; abused (group 1), normal girls with no genital complaints (group 2), and girls with other genital complaints (group 3). The study has serious flaws. The examiners were not blind to which category each girl belonged; no information is given on how certain it was that alleged molest victims were true victims; and examiners were not randomly assigned. Instead the lead author was the exclusive examiner of girls assumed to be molested.

Nonetheless, the authors deserve credit for addressing what has been ignored by so many others. They concluded from their literature search, just as I have from my own, that "no previous study has reported the incidence of various genital findings in girls. . . ."

Presence or absence of twenty genital findings were recorded on each child. These included hymenal clefts, hymenal bumps, synechiae (tissue bands), labial adhesions, increased vascularity and erythema (redness), scarring, friability (easy bleeding), rounding of hymenal border, abrasions, anal tags, anal fissures, and condyloma accuminata (venereal warts). These are the kinds of findings which are being attributed to sexual abuse in courts across the land, despite there having been "no previous study. . . ."

Their findings: "The genital findings in groups 1 and 3 were remarkably similar. . . . There was no difference between groups 1 and 3 in the occurrence of friability, scars, attenuation of the hymen, rounding of the hymen, bumps, clefts, or synechiae to the vagina." These findings, in other words, are not specific to molest.

Emans et al. do claim that only the sexually abused group showed hymenal tears and synechiae (tissue bands) inside the vagina. Doubts about this, however, are raised by the results of the only other research effort done so far. It is not yet in print, but lead investigator, Dr. John McCann, has recently been presenting his team's data before professional audiences.

McCann and his colleagues are the only ones so far to take on the very necessary task of trying to establish the range of ano/genital anatomy in normal children. Without such data, the "findings" so regularly attributed to molest are essentially meaningless.

That there are as yet no published data on this is itself highly significant.

At a meeting in San Diego in January, 1988, sponsored by the Center for Child Protection of the San Diego Children's Hospital, McCann reported on this research. Three hundred prepubertal children, carefully screened to rule out prior molest, were examined, and it was found that many of the things currently being attributed to molest are present in normal children. Here are some conclusions:

- Vaginal opening size varies widely in the same child, depending on how much traction is applied and the position of the child while being examined. Knee-chest position (Emans, 1980) leads to different results from frog position.

- Fifty percent of the girls had what McCann calls bands around the urethra. He has heard these described as scars indicative of molest.

- Fifty percent of the girls had small (less than 2 mm) labial adhesions when examined with magnification (colposcope). Twenty-five percent had larger adhesions visible with the naked eye.

- Only 25 percent of hymens are smooth in contour. Half are redundant, and a high percentage are irregular.

- What are often called clefts in the hymen, and attributed to molest, were present in 50 percent of the girls. Commenting on his team's mistaken assumptions at the outset of their study, McCann said, "*We were struck with the fact that we couldn't find a normal (hymen). It took us three years before we found a normal of what we had in our minds as a preconceived normal . . . you see a lot of variation in this area just like any other part of the body . . . We need a lot more information about kids . . . we found a wide variety . . .*" (my emphasis).

- "... in the literature, they talk about . . . intravaginal synechiae and it turns out that . . . we saw them everywhere . . . We couldn't find one that we couldn't find those ridges."

- "When does normal (hymenal) asymmetry become a cleft? I don't know."

McCann's anal examination were equally revealing of a good deal more variation among normal children than the "experts" have so far been recognizing:

- Thirty-five percent of children had perianal pigmentation.

- Forty percent had perianal redness. The younger the age group, the more likely this finding.

- One third of the children showed anal dilation less than 30 seconds after being positioned for the examination.

- Intermittent dilation, said by Hobbs and Wynne (1986) to be clear evidence of molest, was found in two-thirds of the children.

Recall that Emans found that while abused (by "history" at least) girls were remarkably similar to nonabused but symptomatic girls (infections, rashes, etc.), hymenal tears and intravaginal synechiae were said to be found *only* in the abused group. We now see that McCann's findings contradict both these alleged differences between molested and nonmolested children. McCann saw no way to distinguish between a healed hymenal tear and "normal asymmetry." He also routinely saw "intravaginal synechiae" in his population of normal girls.

What little research exists, then, shows that a small group of self-appointed "experts" has been given undeserved credibility by an all-too-eager law enforcement and child protection bureaucracy. This has misled the courts, falsely diagnosed sexual abuse, and damaged the lives of countless nonabused children and falsely accused adults.

The Debacle in England

To illustrate that such an assessment is not an overstatement, let us briefly review what happened in the English town of Cleveland, where two pediatricians relied on their certainty that anal relaxation meant "buggery" (sodomy).

Hobbs and Wynne (1986) had reported in the British medical journal *Lancet* that "Dilation and/or reflex dilatation of the anal canal" were not seen in normal children, and indicated sodomy. They added that, "In addition to reflex dilatation, we have also seen alternate contraction and relaxation of the anal sphincter or 'twitchiness' without dilatation. In our experience this also indicates abuse."

Despite the fact that Hobbs and Wynne (like Woodling) presented no controlled data, relying instead on their "experience," their claims were accepted as uncritically in Britain as similar ones are here. This is how Her Majesty's *Report of the Inquiry into Child Abuse in Cleveland 1987* (Buden-Gloss, 1988) described what then started to unfold:

"Dr. Higgs had, in the summer of 1986... suspected sexual abuse and on examination saw for the first time the phenomenon of what has been termed 'reflex relaxation and anal dilatation.' She had recently learned from Dr. Wynne... that this sign is found in children subject to anal abuse...."

Higgs and a colleague (Wyatt) soon were diagnosing children right and left as victims of sodomy. So sure were they of their conclusions that when the finding

disappeared and then returned, and the alleged perpetrator had no contact prior to the reappearance, they presumed a *second* sodomy by a different person! In one case, by the time of the fourth reappearance of the anal relaxation, the grandfather, father and finally the foster parents had all been accused of sodomizing the child.

Before this farce played itself out, Higgs and Wyatt had "diagnosed" sexual abuse in 121 children from 57 families, over a period of 5 months. In the typical case, the child would be removed from the parents and then subjected to regular "disclosure work" interviews.

Eventually, outraged parents were able to arrange second examinations and British courts gradually came to their senses and returned most of the children. Interestingly, these second examinations by highly experienced doctors often differed from the initial examinations. As Her Majesty's investigators wrote, "The signs recorded by Dr. Higgs and Dr. Wyatt were in the main confirmed by Dr. Wynne in those children she examined, but not by Dr. Irvine, Dr. Paul, Dr. Roberts and others in the children they saw."

This should be enough to give readers a sense of the pseudoscience which is presently passing as medical evidence in these cases.

A Review of 158 Examinations

I have as of this writing reviewed 221 cases of alleged child sexual abuse. Some cases have included dozens of children, so the total number of children is much higher. In these cases, 158 children have been examined medically. In all but a handful, only one examiner was permitted to examine the child, a practice which surely needs revising in light of the current state of the art.

Of the 158 children examined, 49 were boys and 109 girls. They ranged in age from one year, 10 months to 13 years old. The age distribution is shown in Tables 1 and 2.

Table 1
Age Distribution of Boys

Number of Children	Age			
	0-2	3-4	5-8	9-12
	2	5	31	11

Table 2
Age Distribution of Girls

Number of Children	Age				
	0-2	3-4	5-8	9-12	13
	8	27	57	14	3

With no scientific way to know which children were in fact abused, we cannot keep score on the percentage of false positive and false negative examinations. We can, however, look to see whether findings described in the single study of normal children (McCann) are being attributed to prior sexual abuse.

Table 3 tabulates those findings said to indicate genital abuse of girls. (As it turned out, all "positive" findings in boys were confined to anal examinations). Because of inconsistent terminology used by different examiners, I have included alternate terms in parenthesis.

Table 3
Frequency of Alleged Indicators of Molest in 109 Girls

Hymenal "scar" (bands, synechia)	45
Rounded hymenal edge	35
"Neovascularization"	27
Dilated vaginal opening	19
Vaginal Erythema	18
Vaginal scar	16
Hymen thickened	10
Healed hymen tear (transection)	9
Hymen redundant	5
Vaginal or labial adhesions	5
Hymen thinned	4
Hymenal tags	3
Labial abrasion	3
Vaginal erosions	2
Hymen absent	1
Labial thickening	1
Condyloma	1
Herpes	1

We see that nearly all the findings attributed to molest were in fact found by McCann in substantial portions of the normal children he examined. They are also the findings which Emans, et al. (1987) found in children allegedly molested but also found in girls with no evidence of molest but suffering other types of medical problems.

Even the few findings Emans claims distinguish molested from nonmolested but otherwise symptomatic girls, such as hymenal tears and intravaginal

synechiae, have been found to be unreliable. McCann et al. found, as already mentioned, that it was impossible to tell the difference between "normal asymmetry" of the hymen and hymenal "tear," and that he saw intravaginal synechiae "everywhere" when the normal children were examined.

Turning to the anal findings in the cases I have reviewed, Table 4 tabulates those findings said to indicate anal abuse. Here, both boys and girls were included.

Table 4
Anal Findings in 158 Boys and Girls

Scars	35
Anal relaxation	23
Fissures	12
Hyperpigmentation	8
Tags	6
Funneling	6
Prominent veins	3
Failure to contract on stroking	2
Loss of rugae	2
Perianal bruising	1

Once again, we should first make use of the only study of normal children available, McCann's, to evaluate these findings. Both hyperpigmentation and anal relaxation were found in many unmolested children. Venous congestion was very common, as was thickening of anal folds. This leaves "scars" and "fissures" as the major finding said to indicate anal abuse in the cases I have studied.

Several factors raise serious questions about whether these findings are reliable. First, it is not uncommon for the scars described to be so small (one or two millimeters) as to be visible only with the use of the colposcope. (I am unable to present here a tabulation of the sizes of the scars in the cases reviewed, for most often no pictures are taken and no measurement is taken.)

Also, we have no data on how frequently these findings will be found if normal children are examined in this way, particularly if the examiner is not told ahead of time that the child is to be examined is brought in for a sexual abuse examination. Specks of one or two millimeters (about one-sixteenth of an inch) may be easily called "scars" but are hardly reliable indicators of prior trauma.

Paul (1986) has commented forcefully on overinterpretation of such "scars." He writes, "... there is no evidential value in the finding of these tiny areas of scar tissue, for they are certainly not indicative of any form of sexual abuse. To honour them as being indicative of

sexual abuse is to dishonour the administration of justice." Clayden (1987), Hey, Buchan, Littlewood and Hall (1987) and Roberts (1986) comment in a similar vein.

Are "fissures" any more reliable as an indicator of molest? Just as in other parts of the body, (take chapped lips, for example) fissures may occur from many causes (Mazier, DeMoraes & Dignan, 1978). Infection and secondary scratching are certainly a prime example. Thus, fissures are too nonspecific to reliably indicate anal abuse.

In those cases I have reviewed where a second examination took place, it was common for the one examiner to describe fissures and/or scars while the next examiner saw none. This was particularly true if the second examiner had not had a chance to see the first examiner's findings.

Confusion in the Laboratory

Overinterpretation of data is not, unfortunately, confined to the physical examination of the child. Laboratory data are frequently being interpreted in ways which are not medically justified.

Gonorrhea of the throat, for example, is easily confused with other organisms which occur normally (Mazier et al., 1978; Whittington, Rice, Biddle, & Knapp, 1988). Even genital gonorrhea, which obviously should lead to the most searching investigation of possible sexual contact, is not inevitably caused by adult sexual contact (Folland, Burke, Hinman, & Schaffner, 1977; Frau & Alexander, 1985; Frewen & Bannatyne, 1979; Gilbaugh & Fuchs, 1979; Gunby, 1980; Lipsitt & Parmet, 1984; Low, Cho, & Dudding, 1977; Neinstein, Goldenring & Carpenter, 1984; Poterat, Markewich, King, & Mercicky, 1986; Shore & Winkelstein, 1971).

Condyloma acuminata (so-called venereal warts) in children do not necessarily prove molest, despite frequent court testimony to the contrary (Bender, 1986; DeJong, 1982; Rock, Naghashfar, Barnett, Buscema, Woodcock, & Shah, 1986; Seidel et al., 1979; Shelton, Jerkins, & Noe, 1986; Stringel, 1985). Chlamydia false-positives are a risk with antigen screening tests, yet many persons have been accused on this basis (Fuster & Neinstein, 1987; Hammerschlag, Rettig, & Shields, 1988). Other organisms, such as *Gardenella* may infect the genitals of children, but insufficient data exist to automatically assume molest (Bargman, 1986; Barley, Morgan, & Rimsza, 1987; Kaplan, Fleisher, Paradise, & Friedman, 1984).

Suggested Reforms

The medical community should first speak out forcefully, alerting the community to the fact that unwarranted conclusions are being drawn by a small group of practitioners.

Research which generates controlled data is long overdue. Studies like that of McCann et al. must be replicated for all age groups, so that standards of normal ano/genital anatomy are established. Examiners should not be limited to those with a "special interest" in sexual abuse, for they have already demonstrated a profound bias.

Beyond such studies to establish the range of normal anatomy, we need studies which compare molested with nonmolested children. Those studies which have claimed to do this have in fact simply relied on the judgment of the referring agency as to which children were molested victims (Cantwell, 1983; Cantwell, 1987; Emans et al., 1987; Enos et al., 1986; Grant, 1984; Hammerschlag et al., 1985; Herbert, 1987; Hobbs & Wynne, 1986; Khan & Sexton, 1983; McCann et al., 1988; McCauley et al., 1986; Muram, 1988; Seidel et al., 1986; Spencer & Dunklee, 1986; Tilelli et al., 1980). This ignores, of course, the well established fact that false accusations of molest are a major problem.

Studies which compare molested children with normals must limit themselves to children demonstrated convincingly to have been molested. This will be difficult, for court findings are not necessarily accurate. If, however, this difficulty is ignored, and an unknown number of children examined and assumed to be molested have in fact not been molested, the data will continue to be as meaningless as they are now.

Meanwhile, the courts need to modify their current practice. The current assumption that a second examination is unnecessary must be reevaluated. Opinions not accompanied by photographs should be viewed with suspicion. Serious consideration should be given to the claim that interpretations being currently offered are not yet recognized by the general medical community. Finally, our Appeals Courts should recognize that convictions which relied on these premature medical claims are now suspect.

Physical examiners should not interview the child to get a "history" of possible abuse. This may influence the child and bias the examiner's subsequent findings and interpretations. Examiners should be told only that a careful ano/genital examination is required. When findings are conveyed to family

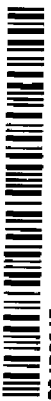
members and/or law enforcement, overinterpretations must be avoided. All parties should be careful to remember that sexual abuse is rarely determined by physical examination alone. Thorough investigation is required.

Only when the medical community recognizes, and speaks out against, the current perversion of medical science, will the Courts and law enforcement respond. No sign of such an outcry from the doctors is on the horizon. Their deep sleep will only end, it seems, when concerned citizens take up the trumpet to awaken them.

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EXHIBIT C

PAUL GRUBBS
AFFIDAVIT

PAGE #1

First being duly sworn and under the penalty do hereby despose and state as follows:

1. That I am over the age of (21) twenty one years of age and am fully compentent to testify to the matters set forth herein, and that all statements are made of my own personal knowledge and belief.

2. That on January 19, 1994. and prior to that date I lived at 1015 Nevada street #5 Reno NV. 89504.

3. That I personally knew Charles Maki as he lived in the same appartment complex that I live in, and he lived in apartment Number 8.

4. That Mr. Maki and I worked on his truck on january 18 & 19 1994 that on January 19 1994 mr. Maki and I were drinking beer and two (2) plain clothes police men came up and arrested Mr. Maki, At least I believed that Mr. Maki was under arrest as the officers took him away Mr. Maki in my opinion was intoxicated as he and my self had been drinking beer all that day.

5. My step son John knows both of the girls that Mr. Maki is alleged to have sexually assaulted, as they were his playmates.

6. Mr. Maki contacted me after he had been arrested and asked me if I would be willing to come to court for him and testify in his behalf; I told Mr. Maki that I would be willing to testify in his behalf.

7. I could have offered testimony of Mr. Maki's caricture and how he acted around the alleged victims, as well as testamony concerning the girls, as well as there father and how he treated them.

8. I could of also offered testimony concerning the fact that the (2) two alleged victims were always left alone by there father.

9. That a Ms. Smuck left a card on my door and I attempted to contact her at the phonz number that she left but she never did return my calls, until right before Mr. Maki's trial.

10. I left messages for Ms. Smuck on several occasions that I was willing to testify for Mr. Maki and that I had vital information that would assist Mr. Maki and his defence.

11. I could of also testified that the alleged victims were baby sitted by a single male friend of there fathers and that it is my believe that he is the person that may have assulted the two victims the friend of the fathers was named francis, at least that is what I believe his name to be.

12. I finally contacted Ms. Smuck and she told me that Mr. Maki did not want nor need me to testify for him, as the state did

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not have a case and that Mr. Maki would be found innocent.

13. To my personal knowledge Mr. Meneese has been investigated by the child welfare dept. and the Reno police dept. in 1992 for allegations of child abuse, Lewdness with a minor and possible sexual assault of his own children; This was due to Mr. Meneeses habit of getting drunk and telling others of his habit of taking showers with the girls and running around the house nude in front of the children.

14. Mr. Maki did watch Mr. Meneeses girls on occasion, as Mr. Meneeses would leave his girls with anybody that would watch them for him when he wanted to go out drinking and gambling.

15. on many occasions when I would go up-stairs to Chucks (Mr. Maki's) Apartment and I would notice that Mr. Meneeses girls were at home alone and this would be until late at night.

16. It was not uncommon for Mr Meneese to leave his girls at home alone and the girls would have boys over while there father was gone, either at work or drinking and gambling at the Gold dust west casino in Reno.

17. Mr. Meneese told me he would get back at Mr. Maki Because Mr. Meneeses ex-girl friend left him and moved in with chuck (Mr. Maki) next door, she stayed there from Nov. 1993 to Dec. 1993 until Mr. Meneese made to much trouble for her.

18. Mr. Meneese bragged a few times when he was drinking how he had beat the system and would never have to go to jail for the acts he did with his girls; I understand there was testimony by the girls of lewd acts by the father during Chucks (Mr. Maki's) preliminary hearing.

19. In December of 1993 Chuch and the down stairs tenant that lived in theApts. caught the younger of the alleged victims with a boy in the girls bed room doing a sexual act.

20. Mr. Maki and the tenant both told Mr. Meneese about the above stated incident and Mr. Meneese stated that is was no big deal that it has happend in the past.

21. I told Ms. Smuck of this too, and she stated that this information was not needed. I also gave her the names of the people next door that had personal knowledge of the incident stated in paragraph #19.

22. Mr. Maki told me to go out and find the people that had lived in the apartment complex because Ms. Smuck had told him (Mr. Maki) that nobody wanted to come and testify for him; I told chuck that this was not true, as I had given Ms. Smuck the names as well as information but Ms. Smuck stated that this information was not needed because the state did not have a case.

23. I don't understand Ms. Smucks Judgment, when she could have called many witnesses that lived in the same apartment complex

and know the people and fact of this case.

DATED THIS 29th DAY OF September, 1995

State of Nevada
County of White Pine

Paul Grubb
Signature

SUBSCRIBED and SWORN to before me
this 29th day of September, 1995

John Huth

NOTARY PUBLIC



JOHN HUTH
NOTARY PUBLIC - STATE of NEVADA
White Pine County - Nevada
APPL EXP. Dec. 3, 1995

STAMP

AFFIDAVIT OF CURTIS WOODS

STATE OF NEVADA

COUNTY OF WHITE PINE

}
} ss
}

I, CURTIS S. WOODS (AKA KEVIN C. ANDERSON) first being duly sworn and under the penalty of perjury, do hereby depose and state as follows:

1. That I am over the age of (21) twenty one and am fully competent to testify to the matters set forth herein, and that all of the statements contained herein are of my own personal knowledge and belief.

2. That I have known Charles Maki and his sister "Joslynn Maki Combs" for (13) thirteen years.

3. I first met Joslynn Maki Combs through a few friends who rode and were members of a motorcycle club called the monguls in the Reno and Carson City area while partying up in lake tahoe in "1982" she was 17 or 18 years old and I was either 15 or 16.

4. I knew Joslynn Maki Combs about 3 years and partied with and dated her on and off during these years, she was a very wild young lady who enjoyed Sex and drugs and would trade Sexual favors alot of time to just about anyone for drugs she was known as a bag whore amongst the bikers and other people that we both hung around with.

5. Chicken Bob or C.B. as he was called and Mike Fried. AKA Colonel both of these men were her boyfriends at one time or another and both were members of the motorcycle club that I hung out with they introduced us, they as well as my self along with many others that I can think of in the Reno & Carson City area can testify in court, that Ms. Combs was a known thief and drug whore for years and was known to lie about anything if it would get her drugs or money or just to be the center of attention.

6. During the time that I dated Joslynn Maki Combs she was I think a run away I lived at 1420 N. Edmonds St. Carson City NV. and on arizona street and on and off at a friends house at 200 E. 7TH ST. in Sun Vally NV. she was living in Lake Tahoe and in carson City NV. who ever would take her in mostly the bikers would just pass her around from one to another, and when she lived in Tahoe she was Prostitute her body and staying with another Prostitute.

7. From My understanding she didnt get along with her family very well I can remember time when she stole from them, she even once stole (I believe it was her Dads) car a toyota and was trying to sell it for parts to my friend at the junk yard "Little Johns auto parts" located in "mound house nv" where I sometimes worked as a parts puller, after that I believe that she left the state because I never seen her again.

SUBSCRIBED BEFORE ME ON
JUNE 28, 1995 BY
KEVIN C. ANDERSON
CURTIS S. WOODS



JOHN HUTH

COUNTY PUBLIC - WHITE PINE
White Pine County - Nevada
COM. EXPI. DEC. 3, 1995

CURTIS S. WOODS

(AKA) KEVIN C. ANDERSON
V6.63
CURTIS S. WOODS
KEVIN C. ANDERSON

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No. CR94P0345

Dept. No. 8

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

* * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

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

COMES NOW, the State of Nevada, by and through counsel,
to answer the petition as follows:

1. That the State admits all allegations in paragraphs
1 through 22 of the Petition.

2. That the State denies each and every material
allegation in paragraph 23 of the Petition and the accompanying
supporting allegations.

As to the "Supplemental Points and Authorities in
Support of Petition for Writ of Habeas Corpus" filed by Attorney
Hardy:

3. Respondent State of Nevada denies each and every
material allegation of fact contained in the Supplemental Points

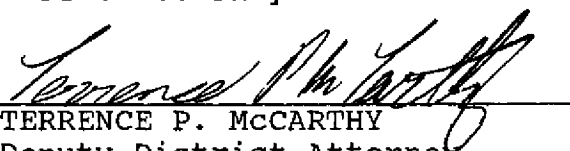
1 and Authorities. Specifically, the State denies that Petitioner
2 Maki was deprived of the effective assistance of counsel or that
3 Maki was prejudiced in any way by the alleged failings of his
4 attorneys.

5 4. That your affiant is informed and does believe that
6 all relevant pleadings and transcripts necessary to resolve the
7 Petition are currently available.

8 5. That the State is informed and does believe that
9 aside from an unsuccessful appeal from his jury verdict,
10 Petitioner has not applied for any other relief from this
11 conviction.

12 DATED: August 22, 1996.

13 RICHARD A. GAMMICK
14 District Attorney

15 By 
16 TERRENCE P. MCCARTHY
17 Deputy District Attorney
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David A. Hardy, Esq.
Attorney at Law
321 South Arlington Avenue
Reno, Nevada 89501

DATED: August 23, 1996.

Linda Jackling

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CASE NO: CR94P-0345

DEPT. NO: 8

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JUDICIAL CLERK
81 *[Signature]*

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

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

INTERIM CLAIM FOR
COMPENSATION AND REQUEST
FOR ORDER GRANTING
ATTORNEY'S FEES AND COSTS

COMES NOW Petitioner, David A. Hardy, Esq., and respectfully asks this Court for its Order granting interim attorney's fees and costs in the above-entitled matter. This request is based upon NRS Chapter 7, the affidavit of counsel, the pleadings on file herein, and any other matter this Court may wish to consider.

DATED this 27th day of September, 1996.

[Signature]

David A. Hardy, Esq.
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 324-1113

1 CASE NO: CR94P-0345

2 DEPT NO: 8

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5 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
6 **IN AND FOR THE COUNTY OF WASHOE**
7

8 * * * *

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12 CHARLES MAKI,

13 Petitioner,

14 vs.

AFFIDAVIT OF DAVID A. HARDY

15 THE STATE OF NEVADA,

16 Respondent.
17
18

19 STATE OF NEVADA)
20) ss.
21 COUNTY OF WASHOE)
22

23 I, David A. Hardy, being first duly sworn do hereby state under penalty of perjury
24 as follows:

- 25 1. That I am licensed to practice law in the State of Nevada;
26 2. That on May 29, 1996, I was appointed to represent Petitioner Charles
27

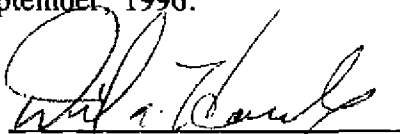
1 Maki with respect to his Petition for Writ of Habeas Corpus.

2 3. That in representing Petitioner Maki I incurred the time and costs depicted
3 in the attached Memorandum of Fees and Costs. That the Memorandum of Fees and
4 Costs is reasonable and correct. That NRS 7.125 should be waived in this case because
5 of the reasonable amounts of time necessary to interview Petitioner, fully review the file
6 herein, review the voluminous file materials presented by Petitioner, and examine the
7 relevant law within the State of Nevada. Affiant has diligently recorded his time, and in
8 numerous instances, reduced the amount of time actually expended on Petitioner Maki's
9 behalf.
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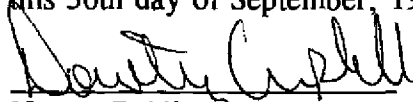
11 4. That I am entitled to \$1,470 as and for interim attorney's fees and \$208.40
12 as and for interim costs.

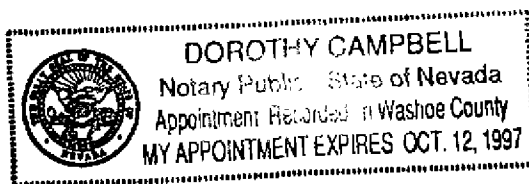
13 5. That I have not received money for this matter from any other source.

14 DATED this 27th day of September, 1996.

15
16 
17 David A. Hardy, Esq.
18
19
20

21 Subscribed and sworn to before me
22 this 30th day of September, 1996.

23 
24 Notary Public
25
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28



1 **MEMORANDUM OF FEES AND COSTS**

2 The undersigned was appointed by this Court on May 29, 1996, to represent
3 Charles Maki with respect to his Petition for Writ of Habeas Corpus. The following is a
4 summary of time and costs incurred in this case from May 29, 1996, through the present
5 date.

6 **FEES**

7	8	9	10	11	12	13	14	15	16	17	18
	Date	Time	Task								
	6-01	0.5	Review court file.								
	6-13	0.2	Three telephone calls with Nevada State Prison.								
	6-18	8.0	Meet with client Ely State Prison and discuss case.								
	7-05	0.2	Receive and review correspondence from client.								
	7-12	0.1	Review letter from client.								
	7-15	2.5	Review file materials sent by client. Legal research, re: issues raised in underlying Petition.								
	7-17	2.5	Continued research of legal issues raised in underlying Petition.								
	7-26	0.2	Prepare letter to client.								
	7-27	0.2	Review two letters from client.								
	8-13	2.7	Work on Supplemental Petition. Continued analysis of voluminous file materials provided by client.								
	8-14	2.0	Continued work on Supplemental Petition.								
	8-30	0.3	Telephone call with client.								
	9-27	0.2	Prepare letter to client.								

19
20 **Total hours: 19.6**

21
22 **COSTS**

23	4-15	670 miles at .31 per mile:	\$201
24		37 copies at .20 per copy:	\$7.40

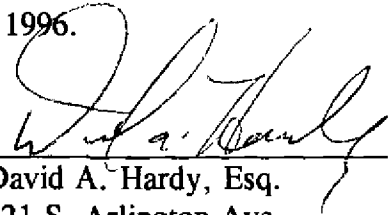
25 **Total costs: \$208.40**

26 **Total fees and costs: \$1,678.40**

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DATED this 27th day of September, 1996.


David A. Hardy, Esq.
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 322-1077

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CASE NO: CR94P-0345

DEPT. NO: 8

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BY *[Signature]*
DEPUTY

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

CHARLES MAKI,

Petitioner,

ORDER

vs.

THE STATE OF NEVADA,

Respondent.

This matter having been presented by David A. Hardy's Interim Claim for Compensation and Request for Order Granting Attorney's Fees and Costs, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that David A. Hardy shall be awarded \$1,470 in attorney's fees and \$208.40 in reimbursable costs pursuant to NRS 7.125.

DATED, this 4 day of October, 1996.

[Signature]
District Judge

CASE NO: CR94P-0345

DEPT. NO: 8

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JUDITH BAILEY, CLERK

BY *[Signature]*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

**MOTION TO WITHDRAW AS
COUNSEL**

THE STATE OF NEVADA,

Respondent.

COMES NOW, David A. Hardy, counsel of record for Petitioner Charles Maki, and moves this Court for its Order allowing him to withdraw as counsel and that Defendant be substituted in pro per until substitute counsel can be appointed. This motion is based upon SCR 46 and supported by the following affidavit of David A. Hardy.

DATED this 19th day of November, 1996.

[Signature]
David A. Hardy
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 324-1113

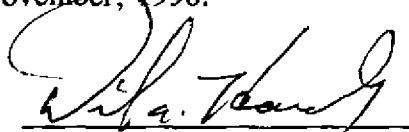
AFFIDAVIT OF DAVID A. HARDY

STATE OF NEVADA)
) .ss
COUNTY OF WASHOE)

I, David A. Hardy, do hereby swear under penalty of perjury that the assertions contained herein are true:

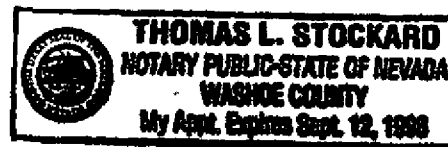
1. Affiant is an attorney in good standing licensed to practice in the State of Nevada.
2. Affiant is counsel of record for Petitioner in the above-captioned action.
3. That Affiant has accepted a position at the Nevada Supreme Court and will be leaving the private practice of law.
4. That Defendant's address is P.O. Box 1989, Ely, Nevada, 89501.

DATED this 19th day of November, 1996.


David A. Hardy
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 324-1113

Subscribed and sworn to
before me, this 19th day of
November, 1996.


Notary Public




CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that on this date I mailed a copy of Counsel's
Motion to Withdraw for delivery to the following:

Gary Hatlestad, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Charles Maki
P.O. Box 1989
Ely, Nevada 89501

DATED this 23rd day of November, 1996.



David A. Hardy

Case No. CR94P-0345

Dept. No. VIII

FILED

'96 DEC -4 AM 1:35

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
JUDI BAILEY, CLERK

IN AND FOR THE COUNTY OF WASHOE

BY Ed Duncan
DEPUTY

* * * * *

CHARLES J. MAKI,

Petitioner,

vs.

MOTION FOR THE
APPOINTMENT OF COUNSEL

THE STATE OF NEVADA,

Respondent. /

COMES NOW, petitioner, CHARLES J. MAKI, appearing in pro se, to respectfully move this Honorable Court for an order granting this petitioner's motion for the appointment of counsel. This motion is made and based upon the fact that David A. Hardy, court appointed counsel's motion to withdraw as counsel, which was filed on or about November 19, 1996. This motion is further based upon the fact that this Court priorly appointed counsel because of the allegations that are contained in petitioner's petition, and the fact that a hearing will be required to resolve the issues and allegations that are contained in petitioner's filed habeas corpus petition.

The Court should take into consideration that petitioner has raised the issue of ineffective assistance of counsel at the trial stages and during the direct appeal stages of petitioner's criminal proceedings. Said counsels were appointed through the Washoe County Public Defenders office, and therefor, there would be an actual conflict of interest if, the Washoe County Public Defenders office were

appointed to represent petitioner in this now pending action. Therefore, petitioner would respectfully request this Honorable Court to appoint an attorney outside of the Washoe county Public Defenders office to represent petitioner through the conclusion of these proceedings.

Dated this 30 day of November, 1996.

Respectfully submitted by:

Charles J. Maki
CHARLES J. MAKI
P.O. BOX 1989-42820
Ely, Nevada 89301-1989

Petitioner In Pro Se

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 30 day of November, 1996, that I placed a true and correct copy of the foregoing in the United States mail, postage prepaid, addressed as follows:

GARY HATLESTAD, Esq.
Deputy District Attorney
P.O. BOX 11130
Reno, Nevada 89520

Attorney for Respondent

DAVID A. HARDY, esq.
Attorney at Law
321 South Arlington Ave.
Reno, Nevada 89501-2001

Attorney for Petitioner

Charles J. Maki
CHARLES J. MAKI
P.O. BOX 1989-42820
ELY, NEVADA 89301-1989

Petitioner In Pro Se

CR94P0345 DC-9500039496-039
POST CHARLES JOSEPH MAKI (DB 1 Page
District Court 12/05/1996 09:39 AM
Washoe County 3860
JY05-
DOC

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 DEC -5 A9:39

JUDITH BAILEY, CLERK
BY *Barthelm*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES MAKI,

Petitioner,

vs.

REQUEST FOR SUBMISSION

THE STATE OF NEVADA,

Respondent.

COMES NOW, David A. Hardy, counsel of record for Petitioner Charles Maki,
and asks that his Motion to Withdraw be submitted to the Court for its consideration.

DATED this 5th day of December, 1996.

David A. Hardy
David A. Hardy
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 324-1113

0-8

DC-9900039496-039
CR94P0345
POST CHARLES JOSEPH MAKI (DB 1 Page
District Court 12/11/1996 08:24 AM 3860
Washoe County NV05

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 DEC 11 A8:24

JUDICIAL CLERK
BY *W. Stewart*
DEPUTY

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

* * * *

CHARLES MAKI,

Petitioner,

vs.

REQUEST FOR SUBMISSION

THE STATE OF NEVADA,

Respondent.

COMES NOW, David A. Hardy, counsel of record for Petitioner Charles Maki,
and asks that his Motion to Withdraw be submitted to the Court for its consideration.

DATED this 5th day of December, 1996.

David A. Hardy
David A. Hardy
321 S. Arlington Ave.
Reno, Nevada 89501
(702) 324-1113

CR94P0345 DC-9900039496-037
POST CHARLES JOSEPH MAKI (D 3 Pages)
District Court 01/16/1997 09:55 AM
Washoe County 3370
DOC

FILED

'97 JAN 16 A9:55

JUDITH RANNEY, CLERK

BY _____

1 Case No. CR94P0345

2 Dept. No. 8

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6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE
9

10 CHARLES MAKI,

11
12 Petitioner,

13 vs.

ORDER

14 THE STATE OF NEVADA,

15 Respondent.
16 _____

17 Petitioner Charles Maki was appointed counsel, David A. Hardy, to supplement his
18 petition for writ of habeas corpus. Mr. Hardy supplemented the petition and now moves for
19 leave to withdraw as Petitioner's counsel because he has accepted a position with the Nevada
20 Supreme Court and will be leaving the private practice of law. Mr. Hardy refined the issues
21 raised in the petition and is familiar with the case. In the interest of economy, Mr. Hardy's
22 motion is DENIED.
23

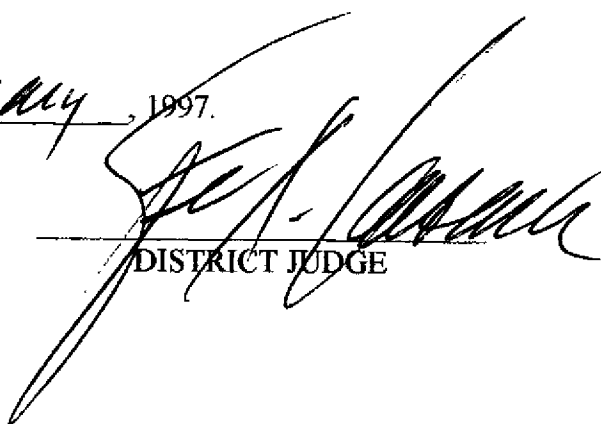
24 Accordingly, Petitioner's motion for new counsel is also DENIED. Mr. Hardy will
25 represent Petitioner at the hearing because Petitioner has alleged issues which, if true, would
26 entitle him to relief. See Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). The State is

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ordered to set the hearing.

IT IS SO ORDERED.

DATED this 15 day of January, 1997.



DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 16 day of January, 1997, she
mailed copies of the foregoing ORDER in Case No. CR 94P 0345 to the following:

David A. Hardy, Esq.
321 S. Arlington Avenue
Reno, Nevada 89501

Gary Hatlestad, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Charles Maki
P.O. Box 1989
Ely, Nevada 89501

Kathryn Miller
Administrative Assistant

CR94P0345
DC-9900039496-036
POST CHARLES JOSEPH MAKI (D 3 Pages
District Court 01/29/1997 04:10 PM
Washoe County 3370
Doc.

FILED

'97 JAN 29 P4:10

Case No. CR94P0345

Dept. No. 8

JUDI BAILEY, CLERK
BY *[Signature]*
DEPUTY

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

CHARLES MAKI,

Petitioner,

vs.

ORDER

THE STATE OF NEVADA,

Respondent.

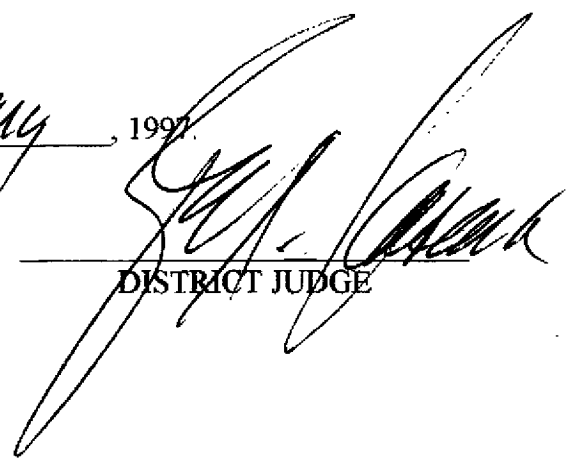
In the interest of economy the Court denied Mr. David A. Hardy's motion to withdraw as counsel for Petitioner Charles Maki in its January 15, 1997, Order. Thus, the Court also denied Petitioner's motion for new counsel. The State recently advised the Court that Mr. Hardy's position with the Supreme Court precludes him from representing Petitioner; upon reconsideration, the Court's January 15, 1997, Order is vacated. Mr. Hardy's Motion to Withdraw is GRANTED.

Petitioner's Motion for New Counsel is also GRANTED. Mr. Joseph Plater, Esq. is appointed to represent Petitioner.

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IT IS SO ORDERED.

DATED this 29 day of January, 1997.



A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is slanted and appears to be 'J. P. ...'.

DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 29 day of January, 1997, she mailed copies of the foregoing ORDER in Case No. CR 94PO345 to the following:

David A. Hardy, Esq.
321 S. Arlington Avenue
Reno, Nevada 89501

Terrence P. McCarthy, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Charles Maki
P.O. Box 1989
Ely, Nevada 89501

Joseph P. Plater, Esq.
313 Flint Street
Reno, Nevada 89501


Administrative Assistant

No. CR94P0345

Dept. No. 8

FILED

'97 MAY 20 AIO:14

JUDICIAL CLERK
BY [Signature]
DEPUTY

Second Judicial District Court

State of Nevada, Washoe County

CHARLES MAKI,

~~Plaintiff~~
Petitioner,

vs.

STATE OF NEVADA,

Respondent.
~~Defendant~~

APPLICATION FOR SETTING

TYPE OF ACTION: Post Conviction

MATTER TO BE HEARD: Evidentiary Hearing

Date of Application: _____ Made by: Petitioner
Plaintiff or Defendant

COUNSEL FOR ~~PLAINTIFF~~ PETITIONER: Joseph R. Plater, Esq.

COUNSEL FOR ~~DEFENDANT~~ RESPONDENT: Washoe County D.A.'s Office

Instructions: Check the appropriate box. Indicate clearly who is requesting the jury.

☐ Jury Demanded By (Name): _____

Estimated No. of Jurors: _____

☐ No Jury Demanded By (Name): _____

Estimated Duration of Trial: 1 day

[Signature]
Attorney(s) for Plaintiff

[Signature]
Attorney(s) for Defendant

Motion - No. 1 Setting at 10:00 a m. on the 11 day of July, 19 97.

Trial - No. _____ Firm Setting at _____ m. on the _____ day of _____, 19 _____.

CR94P0345
DC-9900039496-035
POST: CHARLES JOSEPH MAKI (DB 1 Page
District Court 05/20/1997 10:14 AM
Washoe County
JYC

FILED

'97 JUN -3 P2:52

No. CR94P0345

Dept. No. 8

JUDICIAL CLERK
By *W. Stewart*
DEPUTY

CR94P0345 DC-9900039496-033
POST: CHARLES JOSEPH MAKI (D 3 Pages
District Court 06/03/1997 02:52 PM
Washoe County 1260
mc

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

8 * * *

9 CHARLES MAKI,

10 Petitioner,

11 v.

APPLICATION FOR ORDER
TO PRODUCE PRISONER

12 THE STATE OF NEVADA,

13 Respondent.
14 _____/

15 COMES NOW, the State of Nevada, Respondent herein, by
16 and through RICHARD A. GAMMICK, District Attorney of Washoe
17 County, by TERRENCE P. MCCARTHY, Deputy District Attorney, and
18 alleges as follows:

19 1. That the above Petitioner, CHARLES MAKI, is
20 presently incarcerated at the Nevada State Prison, Carson City,
21 Nevada.

22 2. That the above CHARLES MAKI is scheduled for a
23 post-conviction hearing before the Second Judicial District Court
24 on Friday, July 11, 1997, at 10:00 a.m.

25 WHEREFORE, Applicant prays that an Order be made
26 ordering the appearance of the said CHARLES MAKI before the

1 Second Judicial District Court, and from time to time thereafter
2 at such times and places as may be ordered and directed by the
3 Court for such proceedings as thereafter may be necessary and
4 proper in the premises, and directing the execution of said Order
5 by the Sheriff of Washoe County, Nevada.

6 DATED: May 20, 1997.

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8 RICHARD A. GAMMICK
DISTRICT ATTORNEY

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TERRENCE P. MCCARTHY
Deputy District Attorney

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Joseph R. Plater, Esq.
Attorney at Law
313 Flint Street
Reno, Nevada 89501

Linda Jackling

FILED

'97 JUN -3 P2:53

No. CR94P0345

Dept. No. 8

JUDICIAL CLERK
BY *W. Stewart*
DEPUTY

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

* * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ORDER TO
PRODUCE PRISONER

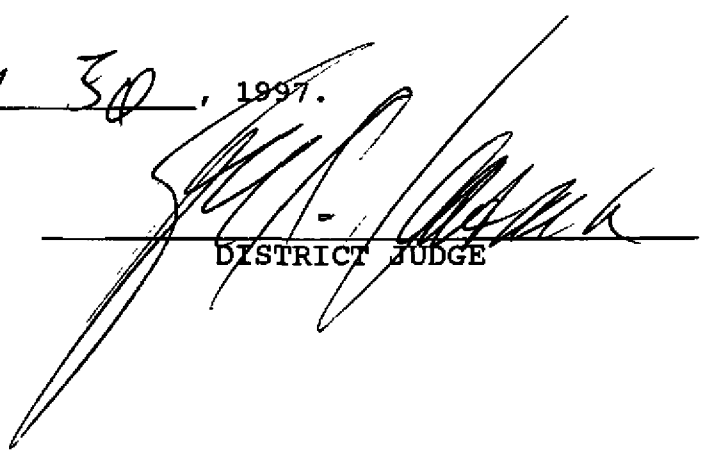
IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that the Petitioner above named, CHARLES MAKI, presently incarcerated in the Nevada State Prison, Carson City, Nevada, be brought before the Second Judicial District Court for a post-conviction hearing in the above-entitled action,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Nevada State Prison, Carson City, Nevada, bring the said CHARLES MAKI before the Second Judicial District Court on Friday, July 11, 1997, at 10:00 a.m., for a post-conviction hearing in the above-entitled action, and from time to time thereafter at such times and places as may be ordered and directed by the Court

CR94P0345
DC-990039496-034
POST: CHARLES JOSEPH MAKI (D 3 Pages
District Court 06/03/1997 02:53 PM
Washoe County 3340
NAC

1 for such proceedings as thereafter may be necessary and proper in
2 the premises.

3 DATED: May 30, 1997.

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6 DISTRICT JUDGE
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1 CERTIFICATE OF MAILING

2
3 Pursuant to NRCP 5(b), I hereby certify that I am an
4 employee of the Washoe County District Attorney's Office and
5 that, on this date, I deposited for mailing through the U.S. Mail
6 Service at Reno, Washoe County, Nevada, postage prepaid, a true
7 copy of the foregoing document, addressed to:

8 Joseph R. Plater, Esq.
9 Attorney at Law
313 Flint Street
10 Reno, Nevada 89501

11 DATED: June 3, 1997.

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13 Linda Jackling
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3-20-98
CR94P0345
OC-9900039456-032
POST CHARLES JOSEPH MAKI ID 3 Pages
District Court 07/15/1997 04 47 PM
Washoe County 1260
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FILED

Case No. CR94P0345

Dept. No. 8

'97 JUL 15 P4:47

JUDICIAL CLERK
BY *S. Davis*
DEPUTY

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA, COUNTY OF WASHOE

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Defendant.

**APPLICATION FOR ORDER
TO PRODUCE PRISONER**

COMES NOW, Petitioner, by and through his counsel, Joseph R. Plater, and alleges as follows:

1. That the above CHARLES MAKI is scheduled for a post-conviction hearing before the Second Judicial District Court on Friday, July 18, 1997, at 10:00 a.m.

2. That MIKE FREID is a necessary witness for Petitioner's hearing, and Mr. FREID is presently incarcerated at the Northern Nevada Correctional Center in Carson City, Nevada.

WHEREFORE, Applicant prays that an Order be made ordering the appearance of the said MIKE FREID before the Second Judicial District Court, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper

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//////

1 in the premises, and directing the execution of said Order by the Sheriff of Washoe County, Nevada.

2 DATED this 15th day of July, 1997.

3
4 *Joseph R. Plater by John N. Schroeder*
5 JOSEPH R. PLATER, Esquire
6 313 Flint Street
7 Reno, Nevada 89501
8 (702) 348-2070

9 ATTORNEY FOR PETITIONER

10 JOHN NICHOLAS SCHROEDER
11 301 Flint Street
12 Reno, Nevada 89501
13 (702) 329-3000
14 Bar Number: 396
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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Flint Street Offices, 313 Flint Street, Reno, Nevada, 89501, and that on this date I caused the foregoing document to be delivered to all parties to this action by:

☒ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada

☐ personal delivery

☐ facsimile (fax)

☐ Federal Express or other overnight delivery

☐ Reno/Carson Messenger Service

addressed as follows:

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
PO BOX 11130
RENO NEVADA 89520



FILED

Case No. CR94P0345

Dept. No. 8

97 JUL 16 P3:33

JUDI BAILEY, CLERK

BY

DEPUTY

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA, COUNTY OF WASHOE

CHARLES MAKI,

Petitioner,

v.

ORDER TO PRODUCE PRISONER

THE STATE OF NEVADA,

Defendant.

IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that, MIKE FREID, presently incarcerated in the Northern Nevada Correctional Center, Carson City, Nevada, be brought before the Second Judicial District Court for a post-conviction hearing in the above-entitled action,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Northern Nevada Correctional Center, Carson City, Nevada, bring the said MIKE FREID before the Second Judicial District Court on Friday, July 18, 1997, at 10:00 a.m., for a post-conviction hearing in the above-entitled action, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises.

DATED this 16 day of July 1997.


DISTRICT JUDGE

CR94P0345
DC-9900039496-031
POST CHARLES JOSEPH MAKI (D 2 Pages
District Court 07/16/1997 03:33 PM
Washoe County
3340
DNC

1
2 **CERTIFICATE OF SERVICE**

3 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Flint Street Offices, 313 Flint Street,
4 Reno, Nevada, 89501, and that on this date I caused the foregoing document to be delivered to all parties
5 to this action by:

6 _____ placing a true copy thereof in a sealed, stamped envelope
7 with the United States Postal Service at Reno, Nevada

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9 ☒ personal delivery

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11 _____ facsimile (fax)

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13 _____ Federal Express or other overnight delivery

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15 _____ Reno/Carson Messenger Service

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17 addressed as follows:

18 WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
19 PO BOX 11130
20 RENO NEVADA 89520

21 Clara Schmidt
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FILED

'97 JUL 24 P4 53

No. CR94P0345

Dept. No. 8

JUD. BAILEY, CLERK

BY [Signature]
DEPUTY

CR94P0345
DC-9900039496-030
POST CHARLES JOSEPH MAKI (D 5 Pages
District Court 07/24/1997 04 53 PM
Washoe County
ncc

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

* * *

CHARLES JOSEPH MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT

This cause came before the court upon a Petition for Writ of Habeas Corpus (Post-Conviction) alleging a myriad of claims of ineffective assistance of trial and appellate counsel. Upon consideration of the evidence adduced at the hearing on the petition, and the records of this court, the court finds as follows:

Petitioner Maki was convicted by a jury verdict of three counts of sexual assault and several counts of lewdness with a child under fourteen years of age. He was sentenced appropriately.

Maki appealed his conviction, but the conviction was affirmed by Order Dismissing Appeal. Subsequently, Maki filed

1 his petition for writ of habeas corpus. The court appointed
2 counsel and allowed counsel the opportunity to supplement the
3 petition. The cause was then set for a hearing on the merits of
4 the petition.

5 Although the petition and the supplement contain a
6 large number of claims of ineffective assistance of counsel, most
7 were unsupported by evidence or argument at the hearing. As to
8 those few claims which Maki pursued, the court finds that Maki
9 has failed to substantiate his claims by clear and convincing
10 evidence. He has failed to meet his burden of persuasion.

11 One who would claim ineffective assistance of counsel
12 must bear the burden of proving by clear and convincing evidence
13 that the conduct of his counsel fell below an objective standard
14 of reasonableness, and that but for counsel's deficient
15 performance a different result was likely. Strickland v.
16 Washington, 466 U.S. 668 (1984).

17 The court has evaluated the testimony presented by Maki
18 in support of his petition. It is in large part incredible and
19 unworthy of belief. The testimony of Maki's former counsel, on
20 the other hand, is more credible.

21 Maki claimed that his counsel failed to adequately
22 investigate and obtain evidence at sentencing. The court finds
23 that counsel acted reasonably under the circumstances and that
24 the evidence which Maki suggests should have been presented was
25 entirely inconsequential.

26 Maki claimed that counsel prohibited him from

1 testifying at trial. His testimony on that subject was false.

2 Maki claimed that his counsel should have presented a
3 slightly different theory in support of an unsuccessful motion to
4 suppress. The court finds that reasonable counsel would not have
5 presented the theory urged by Maki. The court further finds that
6 a motion grounded in that theory would have been unsuccessful.
7 Finally, the court notes that the ruling of the Supreme Court on
8 direct appeal to the effect that Maki was not subjected to
9 custodial interrogation is the law of the case.

10 Next, Maki claims that his trial counsel should have
11 arranged for independent medical and psychological examinations
12 of the child victims before trial. The court finds that no clear
13 or convincing evidence was presented in support of the
14 proposition that reasonable counsel would have sought an
15 examination, that the circumstances would have led the court to
16 allow an examination, or that an examination would have yielded
17 any admissible exculpatory evidence.

18 Maki also claimed that counsel failed to investigate
19 and secure the attendance of witnesses who could attest to his
20 good character at trial. Counsel Janet Schmuck testified that
21 she and her investigators were diligent, but were unable to
22 locate some proposed witnesses, and that those who they were able
23 to find would not have been suitable character witnesses. One
24 potential witness claimed to have been sexually assaulted by
25 Maki, and one claimed to have nothing good to say about him.
26 Under the circumstances, the court finds that counsel did the

1 best she could with what she had to work with.

2 Because Maki failed to support his claims with any
3 credible evidence, the Petition for Writ of Habeas Corpus (Post-
4 Conviction) is denied.

5 DATED this 24 day of July, 1997.

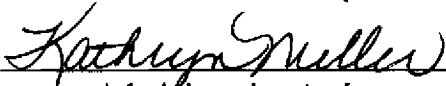
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9 DISTRICT JUDGE
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24 day of July, 1997, she
mailed copies of the foregoing ORDER in Case No. CR 94P0345 to the following:

Terrance McCarthy, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Joseph R. Plater, Esq.
313 Flint Street
Reno, Nevada 89501


Administrative Assistant

FILED

'97 JUL 28 A8 29

JUDI BAILEY, CLERK
BY Mearle
DEPUTY

Case No. CR94P0345

Dept. No. 8

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

CHARLES JOSEPH MAKI

Petitioner,

NOTICE OF ENTRY OF
DECISION OR ORDER

VS.

STATE OF NEVADA

Respondent,

PLEASE TAKE NOTICE that on July 24, 1997, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 28, 1997

JUDI BAILEY
CLERK OF THE COURT
By Mearle
Deputy

FILED

'97 JUL 24 P4:53

No. CR94P0345

Dept. No. 8

JUDI BAILEY CLERK
BY  DEPUTY

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

* * *

CHARLES JOSEPH MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT

This cause came before the court upon a Petition for Writ of Habeas Corpus (Post-Conviction) alleging a myriad of claims of ineffective assistance of trial and appellate counsel. Upon consideration of the evidence adduced at the hearing on the petition, and the records of this court, the court finds as follows:

Petitioner Maki was convicted by a jury verdict of three counts of sexual assault and several counts of lewdness with a child under fourteen years of age. He was sentenced appropriately.

Maki appealed his conviction, but the conviction was affirmed by Order Dismissing Appeal. Subsequently, Maki filed

1 his petition for writ of habeas corpus. The court appointed
2 counsel and allowed counsel the opportunity to supplement the
3 petition. The cause was then set for a hearing on the merits of
4 the petition.

5 Although the petition and the supplement contain a
6 large number of claims of ineffective assistance of counsel, most
7 were unsupported by evidence or argument at the hearing. As to
8 those few claims which Maki pursued, the court finds that Maki
9 has failed to substantiate his claims by clear and convincing
10 evidence. He has failed to meet his burden of persuasion.

11 One who would claim ineffective assistance of counsel
12 must bear the burden of proving by clear and convincing evidence
13 that the conduct of his counsel fell below an objective standard
14 of reasonableness, and that but for counsel's deficient
15 performance a different result was likely. Strickland v.
16 Washington, 466 U.S. 668 (1984).

17 The court has evaluated the testimony presented by Maki
18 in support of his petition. It is in large part incredible and
19 unworthy of belief. The testimony of Maki's former counsel, on
20 the other hand, is more credible.

21 Maki claimed that his counsel failed to adequately
22 investigate and obtain evidence at sentencing. The court finds
23 that counsel acted reasonably under the circumstances and that
24 the evidence which Maki suggests should have been presented was
25 entirely inconsequential.

26 Maki claimed that counsel prohibited him from

1 testifying at trial. His testimony on that subject was false.

2 Maki claimed that his counsel should have presented a
3 slightly different theory in support of an unsuccessful motion to
4 suppress. The court finds that reasonable counsel would not have
5 presented the theory urged by Maki. The court further finds that
6 a motion grounded in that theory would have been unsuccessful.
7 Finally, the court notes that the ruling of the Supreme Court on
8 direct appeal to the effect that Maki was not subjected to
9 custodial interrogation is the law of the case.

10 Next, Maki claims that his trial counsel should have
11 arranged for independent medical and psychological examinations
12 of the child victims before trial. The court finds that no clear
13 or convincing evidence was presented in support of the
14 proposition that reasonable counsel would have sought an
15 examination, that the circumstances would have led the court to
16 allow an examination, or that an examination would have yielded
17 any admissible exculpatory evidence.

18 Maki also claimed that counsel failed to investigate
19 and secure the attendance of witnesses who could attest to his
20 good character at trial. Counsel Janet Schmuck testified that
21 she and her investigators were diligent, but were unable to
22 locate some proposed witnesses, and that those who they were able
23 to find would not have been suitable character witnesses. One
24 potential witness claimed to have been sexually assaulted by
25 Maki, and one claimed to have nothing good to say about him.
26 Under the circumstances, the court finds that counsel did the

1 best she could with what she had to work with.

2 Because Maki failed to support his claims with any
3 credible evidence, the Petition for Writ of Habeas Corpus (Post-
4 Conviction) is denied.

5 DATED this 24 day of July, 1997.

6
7 
8 _____
9 DISTRICT JUDGE
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24 day of July, 1997, she mailed copies of the foregoing ORDER in Case No. CR 94P0345 to the following:

Terrance McCarthy, Esq.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

Joseph R. Plater, Esq.
313 Flint Street
Reno, Nevada 89501


Administrative Assistant

CERTIFICATE OF MAILING


THE UNDERSIGNED HEREBY CERTIFIES THAT ON THE 28TH DAY OF JULY,
1997, SHE DEPOSITED FOR MAILING A COPY OF THE ATTACHED ORDER TO THE
FOLLOWING:

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
APPELLATE DIVISION
(INTEROFFICE MAIL)

ATTORNEY GENERAL'S OFFICE
198 SO. CARSON ST
CARSON CITY, NV 89702

JOE PLATER, ESQ
313 FLINT ST
RENO, NV 89501

CHARLES MAKI
C/O JOSEPH PLATER
313 FLINT ST
RENO, NV 89501


PAT MEACHAM
CRIMINAL DOCKET CLERK

Case No. CR94-0345

Dept. No. 8

FILED

'97 AUG 18 P4:28

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHEO

* * * * *

HUCK J. MAKI,)
)
Petitioner,)
)
vs.)
)
E.K. McDANIEL, Warden,)
)
Respondent.)

NOTICE OF APPEAL

TO: ALL CONCERNED PARTIES:

PLEASE TAKE NOTICE, that aboved named petitioner hereby gives his notice that he is appealing the decision of the district court judge's decision to dismiss petitioner's petition for habeas corpus relief on July 18, 1997. Petitioner has not received a copy of any findings of fact and conclusions of law to know what specifically the court found or dismissed petitioner's petition for. Appeal is taken Nevada Supreme Ct.

Dated this 11 day of August, 1997.

Respectfully submitted,

Chuck J. Maki
CHUCK J. MAKI
P.O. BOX 1989-42820
ELY, NEVADA 89301

Petitioner In Pro Se

V6.110

CR940345
DC-990039496-028
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District Court 08/18/1997 04 28 PM
2515
Washoe County
JYC
RMC

CERTIFICATE OF SERVICE

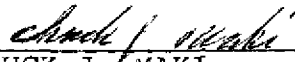
I, the undersigned, do hereby certify that on the 11 day of August, 1997, that I placed a true and correct copy of the foregoing in the United States mail, postage prepaid, addressed as follows:

DISTRICT ATTORNEY
WASHOE COUNTY
P.O. BOX 11130
RENO, NEVADA 89502

Attorney for Respondent

FRANKIE SUE DEL PAPA
NEVADA ATTORNEY GENERAL
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710

Attorney for Respondent



CHUCK J. MAKI
P.O. BOX 1989-42820
ELY, NEVADA 89301

Petitioner In Pro Se

30904

FILED

'97 AUG 18 P5:30

JUDI BAILEY CLERK

BY K. Dimean
DEPUTY

CASE NO. CR-94-0345

DEPT. NO. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

* * *

MAKI CHARLES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that MAKI CHARLES, 42820, hereby
appeals the Court's order denying his petition for writ of habeas corpus,
post conviction, which was entered on or about the 18th day of July,
1997.

DATED this 6th day of AUGUST, 1997.

CHARLES J. MAKI

MAKI CHARLES # 42820
Nevada State Prison
Post Office Box 607
Carson City, Nevada 89702

(APPELLANT IN PROPER PERSON)

///

///

///

///

V6.112

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District Court 08/18/1997 05 30 PM
Washoe County 2515
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Washoe County 1350
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CASE NO. CR94-0345

DEPT. NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

E.K. MCDANIEL,

RESPONDENT.

FILED
97 AUG 19 09:17
JUDI BAILEY, CLERK
DEPUTY

CERTIFICATE OF CLERK

I HEREBY CERTIFY THAT THE ENCLOSED DOCUMENTS ARE CERTIFIED COPIES
OF THE ORIGINAL DOCUMENTS ON FILE WITH THE SECOND JUDICIAL DISTRICT
COURT, IN ACCORDANCE WITH REVISED RULES OF APPELLATE PROCEDURE
RULE D(1).

DATED, AUGUST 19, 1997.

JUDI BAILEY, COUNTY CLERK
BY, Ruth Morgan
RUTH MORGAN
APPELLATE DEPUTY

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

CASE NO. CR94-0345

DEPT.NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

E.K. MCDANIEL,

DEFENDANT.

FILED
97 AUG 19 A9:23
JUDI BAILEY, CLERK
DEPUTY

CERTIFICATE OF TRANSMITTAL

I HEREBY CERTIFY THAT THE ENCLOSED NOTICE OF APPEAL AND OTHER
REQUIRED DOCUMENTS (CERTIFIED COPIES) WERE DELIVERED TO THE SECOND
JUDICIAL DISTRICT COURT MAIL-ROOM SYSTEM FOR TRANSMITTAL TO THE
NEVADA STATE SUPREME COURT ON, AUGUST 19, 1997.

JUDI BAILEY, COUNTY CLERK

BY Ruth Morgan
RUTH MORGAN
APPELLATE DEPUTY

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District Court 08/19/1997 10 38 AM
Washoe County 1310
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CASE NO. CR94-0345

DEPT. NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

CHARLES J. MAKI,

DEFENDANT.

CASE APPEAL STATEMENT

1. THE APPELLANT IS CHARLES J. MAKI.
2. THE APPEAL IS FROM THE ORDER FILED JULY 24, 1997, BY HON. STEVEN KOSACH, DISTRICT JUDGE
3. THE PARTIES BELOW CONSIST OF; THE STATE OF NEVADA IS PLAINTIFF, CHARLES JOSEPH MAKI IS DEFENDANT.
4. THE PARTIES HEREIN CONSIST OF; CHARLES JOSEPH MAKI IS APPELLANT, THE STATE OF NEVADA IS RESPONDENT.
5. COUNSEL ON APPEAL IS; GARY HADLESTAD, CHIEF APPELLATE DEPUTY, P.O. BOX 11130, RENO, NEVADA 89520
6. THE APPELLANT WAS REPRESENTED BY THE PUBLIC DEFENDER IN THE DISTRICT COURT.
7. THE APPELLANT HAS FILED A PROPER PERSON NOTICE OF APPEAL AND HAS NOT REQUESTED COUNSEL FOR APPEAL AT THIS TIME.
8. FEES ARE NOT APPLICABLE
9. AN INFORMATION WAS FILED FEB. 10, 1994.

97 AUG 19 AM 10:38
JUDI BAXLEY, CLERK
DEPUTY

FILED

DATED, AUGUST 19, 1997.

JUDI BAILEY, COUNTY CLERK

BY,

RUTH MORGAN, DEPUTY

Case No. C-94-P0345

Dept. No. 8

SECRET

'97 AUG 26 P 3:50

~~JUDITH A. CLARK~~

~~CONFIDENTIAL~~

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA, COUNTY OF WASHOE

* * * * *

CHARLES MAKI.

Petitioner,

y.

NOTICE OF APPEAL

THE STATE OF NEVADA,

Respondent.

Please take notice that Petitioner, CHARLES MAKI, hereby appeals from this Court's Findings of Fact, Conclusions of Law and Judgment entered in the above-referenced case on July 24, 1997 to the Nevada Supreme Court.

DATED this 26 day of August, 1997.

JOSEPH R. PLATER, ESQ.

313 Flint Street
Reno, Nevada 89501
(702) 348-2070

ATTORNEY FOR PETITIONER

1 **CERTIFICATE OF SERVICE**

2 Pursuant to the rules of the above Court, I certify that I am an employee of Flint Street Offices,
3 313 Flint Street, Reno, Nevada, 89501, and that on this date I caused the foregoing document to be delivered
4 to all parties to this action by:

5
6 _____ placing a true copy thereof in a sealed, stamped envelope
7 with the United States Postal Service at Reno, Nevada

8 X personal delivery

9
10 _____ facsimile (fax)

11
12 _____ Federal Express or other overnight delivery

13
14 _____ Reno/Carson Messenger Service

15
16 addressed as follows:
17 WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
18 PO BOX 11130
19 RENO NEVADA 89520

20 DATED this 26 day of August, 1997.

21 
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District Court 02/10/1998 03 33 PM 4185
Washoe County
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FILED

'98 FEB 10 P3:33

JUDI BAKEY, CLERK
DEPUTY

Case No. CR94P0345
Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE STEVEN KOSACH, DISTRICT JUDGE

--oOo--

CHARLES MAKI,)	TRANSCRIPT OF PROCEEDINGS
)	
Petitioner,)	POST CONVICTION
)	
vs.)	
)	
THE STATE OF NEVADA,)	July 18th, 1997
)	
Respondent.)	Reno, Nevada
)	

APPEARANCES:

For the Petitioner:	JOSEPH PLATER, ESQ. Attorney at Law Reno, Nevada
For the Defendant:	TERRENCE MCCARTHY Deputy District Attorney Washoe County Courthouse Reno, Nevada

Reported by: STEPHANIE KOETTING, CCR #207, CP, RPR
Computer-Aided Transcription

ORIGINAL

1 RENO, NEVADA, Friday, July 18th, 1997, 10:00 a.m.

2 --oOo--

3 THE COURT: We are on the record in CR94P0345, Charles
4 Maki, who is present with counsel Joe Plater.

5 And Mr. McCarthy from the Washoe County District Attorney's
6 Office.

7 This is a petition for post conviction relief. I'm ready
8 to proceed. Go ahead, gentlemen.

9 MR. PLATER: Thank you, your Honor. Based on the petition
10 that Mr. Maki has filed, your Honor, I would call him as the
11 first witness.

12 THE COURT: Mr. Maki, come forward, please, to the witness
13 stand. Face the clerk and raise your right hand to be sworn.

14 (The witness was sworn at this time.)

15 THE CLERK: Thank you. Please be seated in the witness
16 chair.

17 THE WITNESS: Your Honor, I have hearing aids.

18 THE COURT: Okay. Any time there's a problem, just let us
19 know.

20 MR. PLATER: I suppose we should invoke the rule of
21 exclusion.

22 THE COURT: Okay. We will invoke the rule of exclusion.
23 Any potential witness please be excused.

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C H A R L E S M A K I

called as a witness on behalf of the Defendant,
being first duly sworn, was examined and
testified as follows:

DIRECT EXAMINATION

BY MR. PLATER:

Q. Would you state your name, please?

A. Charles Joseph Maki.

Q. Can you hear fine, Mr. Maki? Can you hear okay?

A. Kind of.

Q. Is your hearing aid turned all the way up?

A. I've got the right turned up. The left one, it's up,
but it doesn't really -- in this kind of atmosphere, it's kind
of hard. I'm over 60 percent deaf in both ears.

Q. You're presently incarcerated in the Nevada State
Prison?

A. Ely State Prison, yes.

Q. You were convicted in this court pursuant to a jury
trial in 1994, correct?

A. In 1994.

Q. And you filed a petition for post conviction relief?

A. Yes.

Q. And one of the grounds that you allege is ineffective
assistance of counsel?

1 A. What are all the grounds?

2 Q. You allege as one of the grounds ineffective
3 assistance of counsel, right?

4 A. Oh, yeah.

5 Q. You understand that when you allege ineffective
6 assistance of counsel, you're waiving the attorney-client
7 privilege regarding those issues of ineffective assistance?

8 A. I'm not sure I understand that. Could you come up
9 here, please? I'm sorry. I'm trying to strain to hear him.
10 I'm sorry, Judge.

11 MR. PLATER: Whatever is comfortable.

12 THE COURT: Exactly. Wherever is comfortable.

13 BY MR. PLATER:

14 Q. Is this better, Mr. Maki?

15 A. Yes.

16 Q. In your petition, you allege ineffective assistance
17 of counsel; is that correct?

18 A. Yes.

19 Q. Today you want to talk about some of the things you
20 told your lawyer before trial, during trial and after trial?

21 A. Right.

22 Q. If you do that, you'll waive the attorney-client
23 privilege.

24 A. That's fine.

1 Q. All the discussions with your lawyer are no longer
2 privileged and confidential.

3 A. That's fine.

4 Q. You want to bring those out?

5 A. Exactly. Exactly.

6 Q. To prove up your petition. Do you remember who
7 represented you at trial?

8 A. Janet Cobb Schmuck, public defender.

9 Q. Okay. And you remember the jury trial in this case?

10 A. Yes, I do.

11 Q. Okay. You were charged with five counts of sexual
12 assault and five counts of lewdness?

13 A. Correct.

14 Q. All with a minor under 14, correct?

15 A. Correct.

16 Q. One of your grounds in your petition alleges that you
17 were refused the right to testify before a jury. Do you
18 remember that ground?

19 A. Absolutely.

20 Q. In fact, I think Mr. Hardy put it in a supplemental
21 petition.

22 A. Uh-huh.

23 Q. Was it your desire at trial to testify?

24 A. Was it mine?

1 Q. Was it your desire to testify at trial?

2 A. Positively. I absolutely wanted to testify.

3 Q. Did you have a discussion about that with your
4 lawyer?

5 A. Many times, and I even wrote to the Judge that there
6 was a conflict of interest, because she refused to let me
7 testify.

8 Q. When did you make the decision that you wanted to
9 testify?

10 A. Right from the beginning. I wanted somebody to hear
11 my side of the facts.

12 Q. Okay. And did Miss Schmuck visit you in the Washoe
13 County Detention Center and discuss with you your right to
14 testify?

15 A. Wouldn't consider it really a right to testify or a
16 right not to testify. She told me she didn't want me to
17 testify, because she did not want to discredit the district
18 attorney's case at the time.

19 Q. When did she tell you that?

20 A. What day?

21 Q. Was it during trial, before trial?

22 A. It was approximately -- it started approximately a
23 month and a half before trial.

24 Q. And what was your response to that?

1 A. I was extremely angry. I got -- I got angry and
2 asked her, I had a deputy to ask her to be removed from my --
3 moved away from me.

4 Q. Where she was visiting you?

5 A. Yes. That was in unit eight of the Washoe County
6 Jail.

7 Q. Did she discuss with you the dangers of testifying if
8 you took the stand?

9 A. Yes, she did.

10 Q. What did she tell you?

11 A. She told me if I took the stand that the jury would
12 not believe me, that they would not be interested in anything I
13 had to say, and that she doesn't want me to testify.

14 Q. Did she talk about prior convictions?

15 A. No.

16 Q. You had prior convictions, right?

17 A. Yes, I do, prior convictions.

18 Q. Felony prior convictions?

19 A. But not of sexual assault or anything in that
20 respect.

21 Q. And you knew if you took the stand that those could
22 be used against you?

23 A. Oh, sure.

24 Q. You were willing to do that?

1 A. Absolutely. I have nothing to hide. I'm not -- you
2 know, I'm not -- it's not that -- I'm not proud of what I've
3 done in the past, as far as felony convictions, but I'm not
4 ashamed of my future or of my present either. I wanted people
5 to see me as me.

6 Q. Did you continue to tell Miss Schmuck during trial
7 that you wanted to testify?

8 A. I told Miss Schmuck numerous times in trial that I
9 wanted to testify. I wrote it on paper, because the Court
10 asked me to write notes to her. I was wearing hearing aids
11 then. I was writing notes to her explaining that I would like
12 to get up there and testify. All she did is just kept pushing
13 my note paper away from me. And she would tell me -- I can't
14 say exactly what she told me, because I'm in court, but she
15 told me in so many words just to leave her alone, you know, so,
16 and there's nothing I can do about it.

17 Q. Did you ever agree with her that you should not
18 testify?

19 A. Absolutely not.

20 Q. Now, on the record in this case -- well, let me start
21 over. Did you ever tell the Court out loud you wanted to
22 testify and your lawyer was not letting you do so?

23 A. I don't recall.

24 Q. It's not on the record, it's not on the trial

1 transcripts.

2 A. No. I don't recall.

3 Q. That you ever objected to the Court?

4 A. Miss Schmuck did pretty much everything. I mean, you
5 know, the Court asked me to listen to her and let her do
6 whatever for me. I tried to abide by the Court's rule, but to
7 say, I've never been to trial, I've never been in a situation
8 like this, and I knew she was doing me wrong and incorrectly,
9 and I was trying to explain myself, but I was also listening to
10 her and it just got to be a mix-up. The only thing I knew what
11 to do was to write to the Court and say: Hey, you know, she's
12 doing me wrong and I want somebody to help me. I need a new
13 public defender to help me, because she's doing me totally
14 wrong.

15 Q. How come you didn't stand up and tell the judge: I
16 want to testify.

17 A. She told me I couldn't do that.

18 Q. And you followed her advice?

19 A. That's what I was told to do.

20 Q. Okay. You thought that's the way -- how the court
21 system worked?

22 A. Apparently, yeah. I thought that's what normal
23 procedures are.

24 Q. Did you ever write a little note to Judge Kosach

1 during trial saying you wanted to testify, but you were being
2 prevented by your attorney?

3 A. No, I never did that.

4 Q. How come?

5 A. Because the Judge at that time was, I guess, kind of
6 upset with me, because I was making a commotion with my
7 attorney trying to get myself up here and trying to let myself
8 be heard to a degree and the district attorney got mad, because
9 I was making too much of a commotion and asked the Judge to ask
10 me to be quite and just to write notes. So that's -- I was
11 trying to abide by the Court's wishes and just write her notes
12 and they wouldn't go anywhere.

13 Q. Okay.

14 A. She just told me I had to do what I was told to do by
15 her, and that was it.

16 Q. All right. Was there anything that you asked Miss
17 Schmuck to do prior to trial that was not done?

18 A. In regards? I had to do a lot of things.

19 Q. Such as?

20 A. I get witnesses.

21 Q. What types of witnesses?

22 A. I had character witnesses that I wanted brought
23 forth. There was people in the apartment complex that knew of
24 incidents with the father and the two girls that I was accused

1 of. There was a guy whose son was involved directly with one
2 of the girls or both of them.

3 MR. McCARTHY: Your Honor, I object here. I believe this
4 witness has no personal knowledge of what any witnesses would
5 testify to.

6 THE COURT: Let's ask. Go ahead, Mr. Plater, ask.

7 BY MR. PLATER:

8 Q. Well, let's say, other than those character witness,
9 let's say, after -- or during and after the preliminary
10 hearing, were you concerned about some of the statements the
11 two girls had made against you, as you read the preliminary
12 hearing transcript?

13 A. Was I concerned?

14 Q. Right.

15 A. Well, I guess anybody would be concerned, I mean,
16 from the statements that somebody is being accused of something
17 like that, yeah. But I knew that somewhere along the line,
18 they were being coerced in what to say, because they kept
19 changing their statements. They were trying to say it didn't
20 happen.

21 MR. McCARTHY: Objection, again, personal knowledge as to
22 who coerced the witnesses.

23 THE COURT: Mr. Maki, what the objection is, is whether or
24 not you have personal knowledge yourself of what these

1 witnesses are going to say.

2 THE WITNESS: Oh.

3 THE COURT: That's what I meant when I said go ahead and
4 ask.

5 THE WITNESS: Oh, I don't know exactly. I know
6 approximately. I don't know exactly what anybody will say.

7 THE COURT: Objection is sustained.

8 BY MR. PLATER:

9 Q. Let me back up a moment. You said you noted
10 inconsistencies regarding what the victim said?

11 A. Yes.

12 Q. Did you propose anything to Miss Schmuck regarding
13 those inconsistencies that she should do in her representation
14 to you?

15 A. Oh, absolutely.

16 Q. What did you tell her that she should do?

17 A. I told Miss Schmuck during the preliminary trial that
18 when the older girl stated that she took showers with her
19 father to keep on going to see where it would go. And she told
20 me it had nothing to do with me.

21 Q. Did you tell her to do anything else?

22 A. I told her to ask about tattoos on me. I knew nobody
23 knew about tattoos.

24 Q. Anything else besides that?

1 A. Well, there was the discrepancies in their testimony
2 that I asked her to follow up on and she addressed the Court
3 and made a statement to the Court saying she knew there was
4 discrepancies in their testimony. She wouldn't follow-up on
5 it.

6 Q. Did you know, regarding those discrepancies in
7 testimony, of any legal procedure that she could have used
8 before trial and during trial to help you with your defense?

9 A. I'm not sure I understand how to answer that one.

10 Q. Okay. Had you ever heard of an independent --

11 A. A who?

12 Q. Have you -- at that time, had you ever heard of an
13 independent physical or psychological examination could have
14 been done?

15 A. I see where you're going. Absolutely, yeah. Before
16 we went to preliminary, I wanted to have a -- not a
17 psychological at the time, but I wanted to have a physical,
18 medical doctor look at them. But I didn't have a public
19 defender until the day I went to preliminary. When we went
20 back there in this little room where I guess attorneys go with
21 their clients, first thing I asked her was to have a doctor
22 look at them and they could see that there was nothing wrong
23 with them.

24 MR. MCCARTHY: Objection, your Honor.

1 THE COURT: Sustained.

2 BY MR. PLATER:

3 Q. So you made the suggestion to Miss Schmuck that an
4 independent physical exam could be conducted?

5 A. You betcha.

6 Q. Was that ever done to your knowledge?

7 A. To my knowledge, it hasn't been, no.

8 Q. Did she tell you why she would not do it?

9 A. No. She never mentioned anything at all.

10 Q. Did she ever say anything whether she would do it?

11 A. All she told me is she was going to do things her way
12 and that's what she was going to do. That was the first thing
13 that came out of her mouth.

14 Q. Did you have problems getting along with Miss
15 Schmuck?

16 A. Very much so.

17 Q. Why is that?

18 A. Can I put it bluntly?

19 THE COURT: Go ahead.

20 THE WITNESS: Miss Schmuck is two-faced.

21 BY MR. PLATER:

22 Q. Well, wait a second, Mr. Maki. I don't want your
23 conclusions, okay, or your personal feelings about her. But
24 why did you have a conflict with her?

1 A. Miss Schmuck told me that when we were in unit eight,
2 when I was in unit eight, excuse me, in the county jail, Miss
3 Schmuck told me, I asked her to go and talk to people at the
4 apartment complex. And what started it, which got me more
5 pissed than anything else, she went over and she talked to the
6 alleged victims and the father and came back and told me I was
7 guilty.

8 And she tells me that I was guilty and she was sexually
9 assaulted when she was a younger woman and I had to be guilty
10 and it don't matter what.

11 And right there, it started the whole ball of wax. And I
12 don't care who she is or what she is, she ain't got no right
13 telling me that. She's supposed to defend me. She can't put
14 her personal reasons. I don't care what happened to her way
15 back when. And that's what started the whole thing. That's
16 when me and her had very bad feelings and conflicts between
17 each other.

18 Q. Okay. So you felt that she was not defending you
19 properly?

20 A. Absolutely not.

21 Q. Because what she said regarding her own past?

22 A. Absolutely not.

23 Q. And because she said you were guilty?

24 A. She told me straight to my face I was guilty, that

1 the alleged victims are telling the truth and that's all there
2 was to it and that there was nothing I could do. That she's
3 going to go through the motions. Because I told her: Hey, I'm
4 going to have you fired. There ain't no way I'm going to be
5 able to do that, and she apparently was right.

6 Q. You attempt to have her removed or replaced by
7 another lawyer?

8 A. I tried -- I went through Washoe Legal Services. I
9 went to her boss at the time, Mike Specchio. I don't know if
10 he's still the boss or not. I called and wrote him. I wrote
11 to the Honorable Judge Kosach. I wrote to the Burr
12 Association. And then I asked her herself to have herself
13 removed and she told me along with everybody else that it
14 couldn't be done.

15 Q. Do you remember the sentencing in this case?

16 A. Yes.

17 Q. Do you remember before sentencing a Jocelyn Coombs?

18 A. Coombs.

19 Q. Coombs?

20 A. Yeah.

21 Q. You knew before sentencing that she was going to come
22 testify against you at sentencing?

23 A. Yes, I did.

24 Q. And did you have a discussion regarding that with

1 Miss Schmuck?

2 A. Yes, I did.

3 Q. Okay. And did you offer Miss Schmuck any proposed
4 defense?

5 A. Any proposed defense?

6 Q. Any proposed defense in regard to Miss Coombs'
7 anticipated testimony?

8 A. Oh, definitely.

9 Q. What did you tell her?

10 A. I told her I wanted to have my mother, I wanted Mike
11 Fried aka Colonel. I wanted Bob Loyal, aka ACB. That I wanted
12 those two people come down, because I've known her and my
13 family for over 20 years. I wanted my school records to come
14 to show because my sister prior, my other sister told me she
15 was going to come and lie about all this stuff. So I wanted
16 her to use my school records and the F.B.I. report on me to
17 show that Jocelyn was lying.

18 And Miss Schmuck told me to write up a -- I don't know what
19 you would call it, like a summary or something, I guess. I'm
20 not sure how she put it, a background of myself and Jocelyn and
21 the family and everything and that she would use that.

22 Well, I knew how she was doing it all right. What I did
23 was I wrote it, but I addressed it to the Honorable Court,
24 because I knew what she would do like she's done before.

1 That's like put the stuff in the briefcase like she did in
2 trial when I asked her to do it. I addressed it to the court,
3 she took it and stuffed everything in her briefcase that and
4 said it didn't pertain to the sentencing. I turned around and
5 I said it's like this, either you tell the judge that I have
6 this for him or I will tell the judge I have this for him.
7 Either way it's going to work. Finally she turned around and
8 addressed the court. And said hey, Mr. Maki has a letter for
9 you, and the judge looked at it and it was never put into my
10 file, but he did look at it. But she told me that she would
11 not bring in anybody to testify for me as far as Jocelyn is
12 concerned either. And I had one of them sitting right there
13 with me in the county jail. He was in my cell, it was Michael
14 Fried.

15 Q. Okay. Are there any other things you want to bring
16 to the Court's attention regarding your petition?

17 A. Well, I don't know. What am I supposed to do? I
18 don't know.

19 Q. Okay.

20 A. I guess that's why I have an attorney, because I
21 don't know how to address this stuff.

22 MR. PLATER: That's all the questions I have at this time,
23 your Honor.

24 THE COURT: Thank you. Mr. McCarthy?

1 BY MR. MCCARTHY:

2 Q. Mr. Maki, how did you learn that Jocelyn was going to
3 be at your sentencing hearing?

4 A. How did I know that Jocelyn was going to be at my
5 sentencing hearing?

6 Q. Right.

7 A. Two ways, my sister Ester Chong, who is the sibling
8 between myself and Jocelyn, came up here to the jail -- the
9 jail and told me during visiting and Miss Coombs -- or Miss
10 Schmuck told me about two days before Jocelyn actually came.

11 Q. How long before your sentencing hearing was it that
12 your sister came up to the jail and told you that Jocelyn was
13 coming to the sentencing hearing?

14 A. It's hard to remember. I would say approximately
15 three weeks, maybe.

16 Q. So at that time, you immediately sat down and wrote a
17 letter to Janet Schmuck and told her about that, is that right?

18 A. No. No.

19 Q. You called her on the phone to tell her?

20 A. I called Janet Schmuck, yeah. And told her that I
21 believe that Jocelyn was on her way.

22 Q. So when Janet Schmuck later told you that Jocelyn was
23 coming, you both already knew that?

24 A. Pretty much, yeah.

1 Q. And that's why she felt it necessary to tell you, do
2 you think?

3 A. I can't answer for that. I don't really know.

4 Q. Did you give Miss Schmuck a letter at your sentencing
5 hearing?

6 A. Yes.

7 Q. That has some names in it?

8 A. Yes.

9 Q. People that could help you?

10 A. Yes.

11 Q. Did you give her that before your sentencing hearing?

12 A. No. She told me not to. She told me to bring it
13 during the sentencing hearing, because I talked to her on a
14 Friday, and I believe the sentencing was on a Monday, and she
15 told me during the weekend to write it out and bring it to her
16 during the hearing and she would do appropriately what was to
17 be done, but she didn't.

18 Q. That's not the same letter you sent to Judge Kosach?

19 A. That's the same letter I gave to Judge Kosach.

20 Q. Now, did you send it to Judge Kosach because you
21 believe that Miss Schmuck was going to stuff it under her
22 briefcase or because she told you to?

23 A. No. No. She did stuff up underneath her briefcase
24 like she did my other paper work during trial saying it did not

1 pertain to anything. But yet she told me to write this out. I
2 knew because of prior experience with her that she was going to
3 do this, so I addressed it to Judge Kosach and made a fuss
4 about it. Either she will give it to him so he can see it
5 personally or I'll be asked to give it to him. So she turned
6 around and finally did give it to him.

7 Q. Okay. I understand. Did you read your petition,
8 sir, before you signed it?

9 A. Yes. I'm not really good. I've got a fifth grade
10 reading level, but I read it.

11 Q. Did you know you were swearing it was all true?

12 A. I was swearing what I was reading was supposed to be
13 true, yeah.

14 Q. Okay. Did Janet Schmuck tell you what she was going
15 to do to prevent you from testifying?

16 A. Did she tell me what she was going to do to prevent
17 me from testifying?

18 Q. Right.

19 A. She told me she wasn't going to put me up on the
20 witness stand.

21 Q. And she told you that regardless of what you wanted
22 to do, she had the authority to prohibit you from testifying?

23 A. Exactly.

24 Q. Okay. Did Judge Kosach tell you that, too?

1 A. No, he did not, not that I recall.

2 Q. Did he tell you that you had the right to testify?

3 A. Judge Kosach never told me anything that I can
4 remember.

5 Q. Okay.

6 A. We're speaking during trial?

7 Q. Yeah.

8 A. No. He never -- no, not that I can recall he never
9 said nothing.

10 Q. Okay.

11 MR. McCARTHY: May I have this marked, please, as A?

12 THE CLERK: State's Exhibit A marked.

13 MR. McCARTHY: I'm sorry, your Honor. I didn't make
14 copies.

15 THE COURT: Is that a copy of the transcript?

16 MR. McCARTHY: The transcript speaks for itself. I don't
17 feel a need to introduce it.

18 BY MR. McCARTHY:

19 Q. Mr. Maki, I'll show you what's been admitted as
20 Exhibit A. Would you look at that, please?

21 A. You want me to read the whole thing?

22 Q. My question is, Mr. Maki, does that look familiar to
23 you?

24 A. Not really.

1 Q. You've never received that letter?

2 A. I can't say if I have or not. I don't recall that
3 letter. I couldn't have, not this long. She's never written
4 me anything this long since I known her.

5 Q. Is it your testimony that Exhibit A was not sent to
6 you or not received by you?

7 A. As far as I can remember, no.

8 Q. Okay.

9 A. No. I can't recall something like this, no.

10 Q. Sir, is it that you don't recall or is that you never
11 saw that letter before?

12 A. I say I don't recall. It's a possibility. You're
13 talking three and a half years ago.

14 Q. You recall when she called you, that you do not have
15 a right to testify over her objections, is that right?

16 A. Oh, yeah.

17 Q. You recall that in some detail?

18 A. Pretty much so, you bet.

19 Q. If she had said something to the contrary, would you
20 recall that?

21 A. Define "this."

22 Q. Skip it.

23 THE COURT: May I see it, please?

24 MR. McCARTHY: I can't offer it. I'll authenticate it

1 later. Unless there's an offer to stipulate.

2 MR. PLATER: Probably. Did she write it?

3 MR. McCARTHY: Yeah.

4 MR. PLATER: Sure.

5 BY MR. McCARTHY:

6 Q. Did I hear you correctly when I said that Janet
7 Schmuck told you that the reason you would not be allowed to
8 testify, because she didn't want to hurt the prosecutor's case?

9 A. Exactly what she told me.

10 Q. She was afraid if you testified, that you might be
11 acquitted, is that right?

12 A. I couldn't give you her reason.

13 Q. But that's the reason she told you?

14 A. She didn't tell me that.

15 Q. She told you if you testified, it might hurt the
16 government's ability to prosecute you, is that right?

17 A. No, you're changing it around.

18 Q. Tell me.

19 A. She told me that she didn't want to discredit the
20 case, the district attorney's case.

21 Q. She wanted the DA's case to be a good, strong case,
22 is that what she said?

23 A. She told me that she would not discredit the State's
24 case. She didn't go any farther, no less, no more.

1 Q. Did she tell you any other ways in which she did not
2 want to discredit the DA's case?

3 A. She said the jury wouldn't be interested in what I
4 had to say.

5 Q. I don't quite understand.

6 A. Neither do I. I didn't understand none of it.

7 Q. Did she tell you things like she would refuse to
8 present evidence, because it might help you?

9 A. No, she did not say that.

10 Q. Did she tell you that she would refuse to present
11 evidence, because she didn't want to hurt the DA's case?

12 A. She stated that she would not discredit the district
13 attorney's case.

14 Q. Did she give you any other ways in which she would
15 not discredit the District Attorney's Office?

16 A. She told me just like she told me. I'm not telling
17 you any differently. I'm telling how she told me.

18 Q. Was it only that the one time, when it was the
19 question of whether you would testify?

20 A. She told me two times that I can recall.

21 Q. Both dealing with the question of whether you would
22 testify or was there something else?

23 A. Well, it was basically with testifying, yes.

24 Q. Okay. Where did this conversation take place, sir?

1 A. One of them took place in the County Jail and the
2 other one took place at that table right there.

3 Q. In the trial?

4 A. During the trial.

5 Q. Do you remember at what stage of the trial?

6 A. I think it was before I asked her to bring the
7 pictures out. She refused to bring the photographs out of me.
8 When the trial was just about over with and the two alleged
9 victims did there thing up on the stand, I felt that it was
10 time for her to bring out the photographs that I wanted taken
11 of myself. And she told me then, even, that she refused to
12 bring the photographs out, because I'm the one that wanted them
13 taken. Okay. So I told her again I wanted, you know, her to
14 bring them out or I'll ask the judge or make some kind of a
15 fuss about it because I want these photographs brought out, so
16 she brought them out.

17 Q. Was there a witness on the stand when that happened?

18 A. I think. Oh, gosh, it's hard to say. I think that
19 the witnesses were pretty well done. I think so. I can't
20 really recall.

21 Q. Was that before or after Mike O'Brien testified?

22 A. That would be after Michael O'Brien.

23 Q. He's the guy who took the photographs, right?

24 A. Yes.

1 Q. It would be after him? So after Mike O'Brien
2 testified, then you and Miss Schmuck had a dispute about
3 whether or not to introduce photographs in evidence?

4 A. Right. Maybe before. It's sometime during that. I
5 can't be sure. But it's sometime during that period, yeah.

6 Q. Okay. Was it that you wanted the girls to see the
7 photographs while they were testifying? Is that what you told
8 her?

9 A. I wanted her to get up and ask the girls about the
10 tattoos, because the detective stated there was no tattoos.
11 The girl stated there was no tattoos. I knew nobody knew about
12 tattoos and I wanted the evidence brought out that in fact
13 there were tattoos.

14 MR. McCARTHY: I move to strike everything after the word
15 "no" as nonresponsive.

16 THE COURT: I'll strike it.

17 BY MR. McCARTHY:

18 Q. If you could just try to answer what I'm asking you.

19 A. I thought I was.

20 Q. Was it that you and Miss Schmuck had a dispute about
21 the best time in the trial to introduce the photographs?

22 A. Say again, now?

23 Q. Did you and Janet Schmuck have a dispute about what
24 was the best time to present the photographs?

1 A. That's a tricky question. I wouldn't say the best
2 time. I would just say we had a dispute that she was going to
3 introduce the photographs or not.

4 Q. Okay. So until you told her you were going to make a
5 fuss, she had told you that she had no intention of introducing
6 those photographs in evidence, is that right?

7 A. Pretty close. Pretty close.

8 Q. Can you make it closer?

9 A. Well, there was a time when I wanted her to bring the
10 photographs out, she told me that -- your Honor, I have this
11 stuff wrote down that when I was in trial, and going through
12 trial, I took notes, very specific notes. May I get them?

13 THE COURT: Yes.

14 MR. PLATER: You want the other package?

15 MR. McCARTHY: It might be easier if one of his hands was
16 loose.

17 THE COURT: That's fine with me.

18 THE WITNESS: Okay. I'm getting close here. It takes me a
19 second to go over it. Okay. Now, what was your question
20 again? I wanted to make sure I got the part here about the
21 tattoos.

22 MR. McCARTHY: I have no idea what the question was. Can
23 you tell me?

24 (Whereupon the reporter read the record.)

1 BY MR. McCARTHY:

2 Q. Did you hear that?

3 A. Excuse me. It sounded like mumbles.

4 (Whereupon the reporter read the record.)

5 BY MR. McCARTHY:

6 Q. So we're trying to get it clear that Janet Schmuck
7 told you she had no intention of introducing those photographs
8 into evidence and that's the way it was until you made a fuss
9 about it?

10 A. Right.

11 Q. When was it that you made that fuss?

12 A. Okay. It was, according to my notes, it was after
13 Desiree Came back or was in there. It was sometime after
14 Desiree testified, I asked Janet to say something, because she
15 tells me why you're the one that wanted the pictures taken.
16 That's what Janet said to me right there.

17 Q. Do you remember what it was you said that inspired
18 the response why you're the one who wanted the pictures taken?

19 A. That I can't answer, really.

20 Q. Was it something you said?

21 A. Was it something that I said? Well, probably I told
22 her. I haven't gotten that part wrote down. When I told her
23 that I seen that the two alleged victims could not identify and
24 the detective could not identify the tattoo, I wanted the

1 pictures brought out so that the identity could be shown.

2 Q. Okay. Well, the photographs of your tattoos were in
3 fact admitted into evidence, were they not?

4 A. They were in evidence. I guess you call it evidence.

5 Q. Did the judge get it?

6 A. Janet Schmuck had them.

7 Q. Did the jury get to see the pictures?

8 A. Yes. She stated here is the pictures of my client.
9 As you see, he has tattoos all over. Girls said no tattoos in
10 penis area. You can see there is. So apparently, yes, she did
11 show the jury that, yes.

12 Q. Okay. But you thought she should have done it at
13 some different point in the trial, is that right?

14 A. Well, no. I thought that she should have done it on
15 her own. She wasn't going to do it until I made a mention of
16 it.

17 Q. Okay. I understand. Do you recall what witnesses
18 you asked her to try to get on your behalf at trial?

19 A. Yes. Pretty much all of them, yes.

20 Q. Can you give us some names, please?

21 A. Give you all of them.

22 Q. All those that you told Janet Schmuck that you wanted
23 to hear from?

24 A. I wanted Paul Grubbs, Linda Stalling, Gail Thomas or

1 this is during trial only.

2 Q. Yeah.

3 A. There was a guy named Jay downstairs. I don't know
4 what his name. Daniel Johnson, Ken Daniels,

5 Q. I'm sorry. What are you reading from, sir?

6 A. My notes. You can look at them.

7 Q. That's all right. Those are the notes you took at
8 trial?

9 A. These are the notes I took from the day I was
10 arrested to the day I went to prison. It's like a diary. You
11 might say of everything, every conversation, phone call, person
12 who visited me, everything that took place, I wrote it all down
13 so I wouldn't forget.

14 Q. Great. Perhaps you can tell us, then, if you gave
15 these names to Janet Schmuck.

16 A. Okay. April 2nd to April 4th, 1994 was the one that
17 I got down here also. It was April 1st and March 26th and
18 that's basically it.

19 Q. When did you prepare this diary that you have?

20 A. From -- if you'd look to see it. I have no objection
21 to you looking at it.

22 Q. Thank you. May I approach?

23 A. These are other notes right there of when I was in
24 prison. Now, the dates might be a day or two off, but because

1 I didn't have no calendar.

2 Q. So you wrote this diary that you're reading from like
3 each day. You would sit down and say today Janet Schmuck came
4 to visit me?

5 A. It wasn't just Janet Schmuck. It was other attorneys
6 that came to seen me. Janet Schmuck, my sister, anybody that
7 visited me in jail. The conversation I had with the police
8 after I was arrested, when I didn't have an attorney present,
9 everything and anything, what happened between myself and the
10 judge, what happened in the courtrooms, everything.

11 Q. Okay. So, for instance, conversation you had with
12 the police, later that day, you sat down with the paper and
13 pencil and you wrote down, today I had a conversation with the
14 police, something along those lines?

15 A. Something along those lines.

16 Q. It wasn't later, right?

17 A. No. It was within the reasonable time that I had. I
18 mean, if I was here, of course, I couldn't do it, so I had to
19 wait until I got back to my little cell back there and took out
20 pencil and paper and start scratching notes.

21 Q. Can I see that once again, please? When did you
22 write down the part at the top, page one, side one?

23 A. Oh, probably about a year after I've had this.

24 Q. Okay. So that wasn't written there in the beginning?

1 A. Oh, no. I sent a copy of this to my sister and I
2 sent a copy of this to my attorney and my appeal attorney,
3 David Hardy. I sent a copy of this also to Robin Wright, but
4 in case this got lost in transit. My sister on the street had
5 a copy and so did Daniel Johnson.

6 Q. Now, did you give us the whole list of names that
7 you'd asked Janet Schmuck to acquire, people you'd asked her to
8 bring in for you?

9 A. Well, you want the whole list? I got pretty much all
10 of them, I think. Ken Daniels, Linda Stallings, Carla Scarpa,
11 Daniel Johnson, Gail Thomas. Those are the people I wanted at
12 trial initially, plus I wanted -- I knew that Paul Grubbs
13 wouldn't be able to come.

14 Q. Why not?

15 A. Because he moved.

16 Q. Okay. I'm sorry. Go ahead. Was there more?

17 A. There was a guy named Jay, I don't know his last
18 name. Miss Schmuck told me that he wouldn't come unless he
19 was, what do you call it, subpoenaed. Yeah, I would say that's
20 basically about it, yeah.

21 Q. How about your sister Jackie? Did you suggest to
22 Janet Schmuck that your sister Jackie should come to the trial?

23 A. Yeah. I wanted her to come, but Janet told me that
24 the district attorney had a tape in his possession of Jackie,

1 my sister you're speaking of, threatening Jocelyn that if
2 Jackie came, as you call her, her real name is Ester, but if
3 she came, that the district attorney would probably arrest her.
4 Q. Now, that supposed tape of Ester threatening Jocelyn?
5 A. Right.
6 Q. That was after the trial and before sentencing, was
7 it not?
8 A. I assume.
9 Q. Okay. For trial purposes, did you suggest to Janet
10 Schmuck that she have your sister Ester come to the hearing?
11 A. Yes. Yes, I did.
12 Q. Okay.
13 A. Yes, I did.
14 Q. Did Janet Schmuck tell you that she would not do
15 that?
16 A. Well, I know she did, but I'm trying to see the
17 reason why.
18 Q. So she told you that she refused?
19 A. You wanted me, to put it bluntly, Janet Schmuck told
20 me that my family was fucked up if the ladies will excuse my
21 words.
22 Q. All right.
23 A. Yeah.
24 Q. Now, tell me also, this conversation where Janet

1 Schmuck told you that you were guilty?

2 A. Uh-huh.

3 Q. Do you recall if the word "credibility" entered into
4 that conversation at all?

5 A. Did -- and which part now?

6 Q. The word "credibility," did that arise in that
7 conversation?

8 A. On whose part?

9 Q. I'll rephrase it. When Janet Schmuck told you that
10 she was guilty, that you were guilty, excuse me, did she do
11 that by telling you she had met with the girls and she found
12 them to be credible?

13 A. Yes.

14 Q. Okay. Did she tell you that she thought a jury would
15 believe them?

16 A. Yes.

17 Q. Did she tell you that because of that, she would not
18 defend you to the best of her abilities?

19 A. In part.

20 Q. Explain if you would "in part?"

21 A. She told me she went and talked to the two girls and
22 their dad. When I asked her to go talk to other people in the
23 apartment complex, she stated that she talked to them, that she
24 felt that they were telling the truth, that I was lying and a

1 jury would not find me, as you put it, credible, and that I was
2 guilty. Period.

3 Q. But did she go on to say, because you were guilty she
4 would not put forth her best efforts?

5 A. No. She would find a way, yeah, she told me she was
6 assaulted prior to sometime in her lifetime, she didn't get
7 into the details, and the girls had to be telling the truth and
8 that's all basically how it goes.

9 Q. Okay.

10 A. That I had to be the guilty party.

11 Q. Okay. And speaking of Desiree Summer, the girls, as
12 we call them, can you recall, sir, if it was ever a time when
13 they could have seen the tattoos on your abdomen?

14 A. My stomach?

15 Q. Yes.

16 A. Hundreds of times. Everybody sees them. I've got
17 them on my back, my stomach and my arms. I take out my
18 garbage, I'm sitting in my house, I work on my truck, I go next
19 door, I'm sitting on the front porch, you know, enjoying a cool
20 drink of cool aid or something or a cold beer on a summer
21 night. Hundreds of times, thousands of people could see it. I
22 play baseball.

23 Q. Now, are there some tattoos they never would have
24 seen on you?

1 A. Absolutely.

2 Q. And what tattoo is that?

3 A. At that time to down below my penis area, from my
4 belly button down to my scrotum.

5 MR. McCARTHY: May I have just a moment, your Honor?

6 May I have these marked, your Honor?

7 THE CLERK: State's Exhibit B1 and B2 marked for
8 identification.

9 BY MR. McCARTHY:

10 Q. Mr. Maki, I'll show you what's been marked as
11 Exhibits B1 and about B2, are these photographs of you, sir?

12 A. Yes. Kind of rough looking, aren't I? Yeah, that's
13 me.

14 MR. McCARTHY: I'll offer B1 and B2.

15 THE COURT: Any objection?

16 MR. PLATER: No.

17 THE COURT: B1 and B2 will be admitted.

18 BY MR. McCARTHY:

19 Q. Now, those photographs show two photographs, two
20 tattoos, is that right?

21 A. Yes.

22 Q. And it's your belief that thousands of people might
23 have seen the upper tattoo, but very few people were ever going
24 to see that lower tattoo, is that right?

1 REDIRECT EXAMINATION

2 BY MR. PLATER:

3 Q. Mr. Maki, Mr. McCarthy went through a list of
4 witnesses you gave to Miss Schmuck?

5 A. Uh-huh.

6 Q. And what was the purpose of giving those witnesses to
7 Miss Schmuck for?

8 A. I wanted them to testify. Most of those people have
9 kids have known me, I've dated them, I've known them for years
10 and all of them have kids and I wanted the jury to see that I
11 not this animal that the State has made me out to be, that I've
12 been around kids all my life. I've got kids of my own.
13 They're grown up a little bit now. I still have kids of my
14 own. I wanted them to be able to see through someone else's
15 eyes besides the State's eyes of who I was.

16 Q. You wanted to present witnesses to show the jury that
17 you had been around children and you never molested them or
18 assaulted them?

19 A. All my life I've been around them.

20 Q. You presented one witness at trial to testify to
21 that?

22 A. Excuse me?

23 Q. You presented of a witness at trial to testify to
24 that?

1 A. Yes, Daniel Johnson.

2 Q. And that was not sufficient in your mind?

3 A. Absolutely not.

4 Q. Why not?

5 A. Daniel Johnson, I haven't seen for six years and she

6 lived 400 miles away and when she found out that I was in

7 trouble up here, she came to my rescue, so to speak, because

8 she knew what type of person I was and who I was. She traveled

9 400 miles out of her way to come up here and testify for my

10 behalf.

11 Q. She had not seen you for six years?

12 A. She had not seen me for six years.

13 Q. At the time of the trial?

14 A. At the time of the trial.

15 Q. So these other witnesses would have presented more

16 recent testimony about your relationship with their children?

17 A. Absolutely.

18 Q. So these were going to be used as character

19 witnesses?

20 A. I guess that's what you call them, yes.

21 Q. And what were their names?

22 A. It was Linda Stalling, I dated her. She has two

23 young boys. There's a -- I've known Linda when I was in the

24 hospital. I met her there. I knew her for approximately a

1 year and a half, two years. Up to date at the time of the
2 trial, as a matter of fact, I just seen her a few weeks prior
3 to my arrest.

4 Carla, I've known Carla for approximately up to the date of
5 the trial, about 18 years. Ken, I knew him, God, years. Ken
6 Daniels, I've known him 15 years up to the date of the trial.
7 He's got two young girls.

8 Linda Stallings, I've known her for two years, plus dated
9 her five months. She's got two young boys. Carla Scarpa, I've
10 known 15 years plus dated a couple of months. She's got one
11 boy I've known since two years old. Daniel Johnson, I lived
12 with her for nine months. I helped her baby sit a couple of
13 kids off and on.

14 Gail Thomas, I knew her for two years, dated her off and
15 on. She has two kids and three grand kids and those are my
16 character witnesses that I wanted to come to testify about me,
17 about what I was like, who I am, who I really am, not what the
18 State thinks I am.

19 Q. And you also mentioned that there was a person or
20 that you knew of some prior sexual activity of the little girls
21 in this case?

22 A. Yes.

23 Q. You gave that to Miss Schmuck?

24 A. I told Miss Schmuck, positively, I told Miss Schmuck,

1 more than once, my sister told her also.

2 Q. Did you ever personally observe any sexual activity
3 of the young children?

4 A. Truthfully, no. I can't say that I did. No. I wish
5 I could say that, but I can't.

6 Q. Did you ever see the young children in inappropriate
7 circumstances or behavior yourself?

8 A. Yes.

9 Q. What was that?

10 A. I caught the young girl and the older girl both in
11 compromising positions with young boys

12 Q. Let's take Desiree first. What did you see?

13 A. The first time was with Summer, the younger girl, and
14 that was with little John downstairs. That was approximately
15 November of 1993. They were in her bedroom with the older
16 girl. John was what they call playing doctors, both, you know,
17 all kids do it, you know, when they're that age, I guess. They
18 were playing doctors, as I they called it. I told the dad that
19 night when he got home from work and he said it was no big
20 deal.

21 Q. What did you see?

22 A. John had his pants to the ankles, Summer had no pants
23 on and he was on top of her trying to have sex with her.

24 Q. And you saw that?

1 A. Positively.

2 Q. And what did you do about it?

3 A. I pulled John up by his arm, kind of out of my way,
4 scolded him to a degree, took him down stairs to his -- it
5 wasn't really his stepfather. It was to be stepfather. And I
6 told him about it and I told the mother about it and he was
7 restricted from seeing the girls at that point, to my
8 knowledge, anyway. And I waited until later that night and
9 told Gary, the father, Gary Mineese of what was going on with
10 Summer and John and he told me, it was no big deal, this
11 happened before, you know, they're just kids.

12 Q. Regarding Desiree, you saw something else also?

13 A. Desiree, it was a few weeks later, I think it was
14 school time when they had, what do you call it, school
15 vacation.

16 Q. Thanksgiving break or Christmas?

17 A. Summer or Christmas break or whatever it is. Anyway,
18 it was a big kid up there, he's wearing what I believe to
19 have -- I always heard as these gang clothes, those were
20 Oakland Raiders things. I assumed he was one of these gang
21 member things. I've never really seen one so I don't know.

22 He was up there. Anyway, he was a big kid. He was almost
23 my size. He looked like 17 years old. He was in there with
24 Desiree on the bed. He had her pretty well depants and he was

1 trying to do things with her.

2 I grabbed that boy by his hair, threw him down the stairs
3 and that's when I told Jay, the guy downstairs, of what I've
4 done, because he seen the guy tumbling down the stairs and I
5 told Jay what happened. And asked Jay his opinion if I should
6 tell the father about this, because apparently the dad just
7 don't give a hoot.

8 And he said, yeah, he thought it would probably be better
9 if I told him and he would back me up on it. And I said fine.
10 And I went up there and told Desiree. I'm going to have to
11 tell your dad about what I saw. And Desiree got upset, called
12 me names, told me it was none of my business. It was her boy
13 friend and got upset about everything and I just-- that's how
14 it has to be.

15 So Gary come home that night fairly intoxicated about 9:30.
16 I pulled him up. I told him: This time I caught Desiree in
17 there with a young boy. She says it's her boyfriend. And Gary
18 acknowledged the fact that he knew this kid, that he was from
19 the neighborhood somewhere and he's been up there before. And,
20 again, it was no big deal.

21 Q. And what was your purpose in telling Miss Schmuck
22 about these incidents?

23 A. Well, Gary told me when I first met Gary
24 approximately three months after I met Gary Mineese, he told me

1 when we were drinking, we were having a couple of beers on the
2 porch that night one night. He told me he was pulled up by the
3 Reno Police Department and the welfare department for taking
4 showers and running around the house nude with his daughters.

5 MR. MCCARTHY: Your Honor, if this is offered for the truth
6 of the matter asserted, then I object.

7 BY MR. PLATER:

8 Q. I'm asking why did you want -- why did you bring
9 these incidents to Miss Schmuck's attention?

10 A. Oh, you mean about the kids?

11 Q. Right.

12 A. Because I wanted her to know what kind of girls these
13 were. I wanted her to know. I mean, everybody is painting
14 them as these two angels. These are no angels by no means.
15 When the DA had them sitting up here in white dresses with
16 little teddy bears and stuff, you know, I asked Miss Schmuck
17 what's going on. She said: It's a DA's trick to make them
18 look innocent. They're not innocent by no means. Let's get to
19 the heart of the matter. Let's show what they really are.

20 Q. Okay. That's all I have.

21 THE COURT: Anything else?

22 MR. MCCARTHY: If I may.

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1 adult pizza joint where the college kids hang out. The kids
2 are coming up to the house when he's not home. His buddy
3 Frances takes them out when he didn't know where they are.

4 I catch boys in the room having sexual activities with the
5 girls, and they tell me it don't matter. I'm the one that
6 called the welfare. I told them. Again, I put my nose where
7 it didn't belong. I think they were sexually active. You're
8 doggone right. I seen they're sexually active. To what
9 degree, I couldn't tell you for sure. But they were
10 definitely, what do you call it, exploring. I'll put it that
11 way.

12 Q. Do you think they were seductive?

13 A. Do I think they were seductive?

14 Q. Yeah.

15 A. Hell if I know.

16 Q. Did you have an opinion about who is the initiator
17 in this sexual activity?

18 A. I couldn't tell you.

19 Q. What you saw, did it appear to be voluntary?

20 A. It appeared to be.

21 Q. Ever try to seduce you?

22 A. No.

23 Q. They never did?

24 A. Never.

1 Q. Never wanted to have sex with you?
2 A. Who.
3 Q. They never wanted to have sex with you?
4 A. No, absolutely not.
5 Q. Those girls ever see you naked?
6 A. Absolutely not.
7 Q. Never saw you in the shower?
8 A. One of them did, yes. I can't lie about that. She
9 seen my back of my butt.
10 Q. She -- could she have seen your genitals?
11 A. Absolutely not.
12 Q. Could any of them ever see you getting in or out of
13 the shower?
14 A. No.
15 Q. Any of those girls ever see you getting dressed?
16 A. Absolutely not.
17 Q. Were you ever wearing a bathrobe in the presence of
18 Summer and Desiree?
19 A. Oh, probably. Yeah. But I would have something
20 underneath it. It wasn't like I would go out there and just,
21 you know, wear a bathrobe. I would have short pants or my
22 drawers on or something. I'm lounging around in my house,
23 sure. Is there something wrong with laying around with having
24 bathrobe on closed.

1 Q. When you say "drawers" on, you mean briefs?

2 A. Boxers, I usually wear.

3 MR. MCCARTHY: That's all I have.

4 MR. PLATER: Nothing else.

5 THE COURT: You can step down, Mr. Maki.

6 THE COURT: Take a short break.

7 (A short break was taken at this time.)

8 THE COURT: Okay. Mr. Maki is present with counsel, Mr.
9 Plater. Mr. McCarthy is present. You can call your next
10 witness.

11 MR. PLATER: Call Mr. Fried, your Honor.

12 THE CLERK: Raise your right hand to be sworn.

13 THE CLERK: Thank you. Be seated.

14 M I C H A E L R. F R I E D

15 called as a witness on behalf of the Defendant,
16 being first duly sworn, was examined and
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. PLATER:

20 Q. Would you state your name, please?

21 A. Michael Ray Fried.

22 Q. Mr. Fried, you're an inmate at NNCC in Carson City?

23 A. Correct.

24 Q. Do you know Mr. Maki?

1 A. Yes, I do.

2 Q. And do you know a Jocelyn Coombs?

3 A. Yes, I do, but the name wasn't Coombs when I knew

4 her.

5 Q. Okay. Was it Maki at that time?

6 A. Yes.

7 Q. And you went out with her?

8 A. Yes, I did.

9 Q. Okay. And that was some time ago?

10 A. Yes.

11 Q. When was that?

12 A. I believe it to be 1979 or 1980.

13 Q. Okay. And at that time, did you have problems

14 regarding her credibility?

15 A. As far as problems, I don't know. I've heard some

16 tails that I don't say I could believe, but I've had no proof

17 to back them up either.

18 Q. Were you aware of her reputation regarding

19 credibility?

20 A. Yes, I was.

21 Q. What was that?

22 A. She was very, how would you say, I don't know if I

23 want to say insecure -- let's see if I can explain. How about

24 her word wasn't to be trusted, because she liked to manipulate

1 male people for favors or whatever she could get out of
2 somebody.

3 Q. And that was during a time that you went out with
4 her?

5 A. Yes.

6 Q. That you knew of her reputation?

7 A. Right.

8 Q. Did you ever see her under the influence of
9 controlled substances?

10 A. Yes, I have.

11 Q. How often?

12 A. Well, every time I seen her, which probably would be
13 once or twice weekly for the span we were together.

14 Q. What type of substances did she take?

15 A. Usually marijuana and speed.

16 Q. Speed being methamphetamine?

17 A. Right.

18 Q. And what was she like under the influence?

19 A. Happy-go-lucky, want to go party some more,
20 carefully.

21 Q. Did it affect her memory or --

22 A. It's really hard for me to say on that one, because
23 it's a short span that I was with her.

24 MR. PLATER: That's all I have, your Honor.

1 THE COURT: Mr. McCarthy, questions?

2 CROSS EXAMINATION

3 BY MR. MCCARTHY:

4 Q. Do you recall where you were living, sir, in the
5 Summer of '94?

6 A. Pardon me?

7 Q. Do you recall where you were living in the Summer of
8 1994?

9 A. Virginia Motor, I believe.

10 Q. Did you spend any time in the county jail that year?

11 A. Yes, four months.

12 Q. Were you in the county jail at the time Charles Maki
13 was sentenced?

14 A. Yes.

15 MR. MCCARTHY: That's all I have.

16 MR. PLATER: That's all.

17 THE COURT: Thank you, Mr. Fried. You can step down.

18 MR. PLATER: Your Honor, I will call -- what is your
19 calendar like today?

20 THE COURT: I'll go until about noon, then I have a 1:30.
21 Then we can resume this after approximately half an hour of
22 that 1:30. We can start up at about 2:00. But we've got
23 roughly half an hour to go this morning.

24 MR. PLATER: It might be quicker if I called Miss Schmuck

1 right now and we can go right through that.

2 THE CLERK: Thank you, please be seated.

3 J A N E T C O B B S C H M U C K

4 called as a witness on behalf of the Defendant,

5 being first duly sworn, was examined and

6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. PLATER:

9 Q. Would you state your name, please?

10 A. Janet Cobb Schmuck.

11 Q. Miss Schmuck, you're a licensed attorney, is that
12 correct?

13 A. That's correct.

14 Q. You have a license to practice law in the State of
15 Nevada?

16 A. Yes.

17 Q. Are you licensed in the Federal Court District of
18 Nevada also?

19 A. Yes.

20 Q. You're a lawyer in the Washoe County Public
21 Defender's Office?

22 A. That's correct.

23 Q. You've been a lawyer there for how many years?

24 A. It will be seven years in October.

1 Q. Okay. When did you pass the bar?

2 A. 1990.

3 Q. And you went straight to work for the Public
4 Defender's Office?

5 A. That's right.

6 Q. You know Charles Maki?

7 A. Yes, I do.

8 Q. And you represented him at trial?

9 A. That's correct.

10 Q. And that was in 1994?

11 A. Yes.

12 Q. When did you start doing trial work for the Public
13 Defender's Office?

14 A. I think I went into the trial division in November of
15 1993.

16 Q. Okay.

17 A. I know it was just when Mr. Specchio had started as
18 the public defender.

19 Q. Okay. Prior to that time, what were you doing?

20 A. I was in the appellate division.

21 Q. Okay.

22 A. And prior to that, I had been in the municipal court
23 doing trial work.

24 Q. Okay. With the Public Defender's Office?

1 A. That's correct.

2 Q. Okay. So in November of '93, you started doing
3 felony trial work?

4 A. That's right.

5 Q. Okay. So do you remember when you first received
6 this case regarding Charles Maki?

7 A. I believe it would have been in February, probably
8 around the first of February or late January, since I think
9 that's when the preliminary hearing was conducted.

10 Q. Of 1994?

11 A. That's right.

12 Q. Okay. Now, I take it you had numerous conversations
13 and meetings with Mr. Maki?

14 A. That's correct.

15 Q. Okay. And during the process of representing him,
16 it -- you eventually had going to trial, right?

17 A. That's right.

18 Q. And in the beginning, you conducted a preliminary
19 hearing, right?

20 A. That's right.

21 Q. And he was arraigned in district court after that?

22 A. That's right.

23 Q. And you then you began to file pretrial motions,
24 right?

1 A. That's right.

2 Q. And one of the pretrial motions you filed was a
3 motion to suppress statements that he had made to RPD officers,
4 right?

5 A. That's right.

6 Q. Do you remember that motion that you filed?

7 A. Yes, I do.

8 Q. Do you remember the grounds that you raised in the
9 motion?

10 A. I believe the grounds for the motion was his
11 indication of his rights not to continue the questioning that
12 he wanted to speak with an attorney.

13 Q. Right. And I'll represent to you, I've reviewed the
14 motion and maybe you can look at it if you want to.

15 MR. PLATER: May I approach, your Honor?

16 BY MR. PLATER:

17 Q. You recognize that document?

18 A. Yes.

19 Q. Okay. That's the motion you filed on behalf of Mr.
20 Maki?

21 A. That's right.

22 Q. To suppress statements that he made to officers?

23 A. That's correct.

24 Q. Is it accurate to say that you raised, I believe, two

1 grounds in that motion to suppress his statement? One was that
2 he was entitled to a Miranda warning, because at the very
3 beginning of the interview with the officers, he was -- it was
4 in your argument a custodial interrogation. And, secondly, you
5 wanted to suppress all statements he made after he told
6 officers he didn't want to talk to them anymore?

7 A. That's correct.

8 Q. Okay. So you raised two grounds?

9 A. That's right.

10 Q. Okay. Now, you did that because you were a lawyer
11 who was appointed to represent Mr. Maki and you were doing that
12 in your best professional judgment, right?

13 A. That's correct.

14 Q. What did you see your -- what was your role as Mr.
15 Maki's counsel?

16 A. My role as his counsel was to represent him in all
17 court proceedings, to zealously advocate his position, to
18 protect his constitutional rights, to make sure that he had a
19 fair and sound representation and that he was defended
20 properly.

21 THE COURT: I'm sorry? What?

22 THE WITNESS: That he was defended properly.

23 BY MR. PLATER:

24 Q. That's why you filed the motion, right?

1 A. I filed that motion for those reasons and because I
2 thought there was a rule issue as far as the tapes that he had
3 made and there was an issue presented to the Court in terms of
4 those statements being suppressed.

5 Q. And you filed other motions on behalf of Mr. Maki
6 also, right?

7 A. That's right.

8 Q. You did that because you understand your duty as his
9 attorney to protect his constitutional rights and zealously
10 advocate all issues that might favor the outcome, or that might
11 be favorable to his particular case, right?

12 A. Yes.

13 Q. And you also filed those motions because, is it fair
14 to say, you sensed this case might be going to trial?

15 A. That's very true, yes.

16 Q. In other words, you don't -- as a trial lawyer, even
17 though you have a potentially meritorious motion, you don't
18 file every motion, even if it's potentially meritorious, if you
19 don't see the case going to trial. Is that a fair statement?

20 A. That's a fair statement.

21 Q. Because sometimes during plea negotiations, the State
22 will recognize it has a weak issue and as a defense you have a
23 strong issue and you agree to waive filing of a certain motion
24 and the State will give you something in return for your not

1 pursuing the defense by motion or otherwise and so you don't
2 file all of the motions that are possible in every case?

3 A. That's true.

4 Q. But in this case, is it fair to say that based on
5 your relationship with Mr. Maki, you saw that this case was
6 probably going to trial?

7 A. Yes.

8 Q. That's one of the reasons you filed the motion to
9 suppress statements that he made?

10 A. Yes.

11 Q. And you raised two issues in the motion to suppress
12 that were basically based both on the Miranda decision,
13 correct?

14 A. Correct.

15 Q. And can you quickly tell us what Miranda provides?

16 MR. MCCARTHY: Your Honor, I'm going to object. Not to the
17 question, but to the line of questioning. The motion to
18 suppress was litigated in this court and in the Supreme Court.
19 There's been a judgment on the merits. It's a res judicata,
20 your Honor. So the admissibility alone of the statements has
21 been decided by the Court of final -- the final court in this
22 state.

23 THE COURT: I don't think that's where he's going with it.
24 It's more tactics, I think.

1 MR. PLATER: Well, Mr. McCarthy is right in that the habeas
2 provisions provide that if something has been litigated to the
3 Court, especially of highest appeal, that issue is barred from
4 post conviction relief, and it's true that Miranda and/or it's
5 true that the voluntariness of his statements as they were
6 presented by his trial counsel were litigated and decided
7 against him, but I'm going to a different area that was not
8 used by his trial counsel.

9 THE COURT: I'll let you go into the different area.
10 That's what I meant. So overruled.

11 BY MR. PLATER:

12 Q. Okay. Could you tell us what you understand Miranda
13 to be real briefly. We don't need an expert, full, broad
14 definition?

15 A. Particularly with respect to this, my understanding
16 is that someone who is the subject of an investigation should
17 be warned that the subject of an investigation and told you --
18 everything you say can be used against you. If you want a
19 lawyer, you should let us know, and if you can't afford a
20 lawyer, one will be appointed to represent you.

21 Q. And Miranda does not apply to every scenario of
22 investigations, does it?

23 A. No.

24 Q. Under what circumstances of investigation does it

1 talk about generally speaking?

2 A. Usually, we're talking about a custodial -- custodial
3 interrogation when someone is not free to leave.

4 Q. Okay. And you raised the fact that in your mind,
5 based on what you saw in the transcript of the interview
6 between officers and Mr. Maki, you thought that there was an
7 issue that that was a custodial interrogation from the very
8 beginning, right?

9 A. Yes.

10 Q. And you raised that despite the fact that the
11 officers told Mr. Maki he was free to leave, he was voluntarily
12 coming with them, and that he didn't have to do anything with
13 them, right?

14 A. Yes.

15 Q. And why did you think it was custodial at that time,
16 at that very outset when Mr. Maki was down at the police
17 station answering their questions?

18 MR. MCCARTHY: Your Honor, that is the precise question
19 that has a res judicata effect. He is not custodial as a
20 matter of law.

21 MR. PLATER: I agree with that. It's been litigated. I'm
22 leading into something.

23 THE COURT: I'll give you some leeway.

24 MR. PLATER: Maybe I'm taking too long.

1 THE WITNESS: Could I hear the question again?

2 BY MR. PLATER:

3 Q. Let me try it a different way. Okay. You thought
4 that -- you thought that Mr. Maki's answering questions from
5 the very beginning with the police officers at the police
6 station was a custodial interrogation, right?

7 A. Yes.

8 Q. And you lost the issue?

9 A. That's right.

10 Q. Filed a motion, had a hearing, Judge Kosach ruled
11 against you, right?

12 A. Right.

13 Q. And the Supreme Court agreed with Judge Kosach on
14 that issue, do you know that?

15 A. I do.

16 Q. It's a matter of record. Okay. The order dismissing
17 appeal rules that way. Okay. I guess I'll get straight to the
18 issue. Did you ever consider when you were filing your
19 suppression motion to add a third ground and say in the
20 alternative if Mr. Maki was not in custody while he's being
21 interrogated at the beginning of the interview, he certainly
22 was in a custodial interrogation at some point later during the
23 interview, but before the officers themselves decided it was
24 custodial and gave Miranda warnings?

1 MR. McCARTHY: Your Honor, I think now that we have what
2 the issues all about, I repeat, the Supreme Court has decided
3 this individual is not subject to custodial interrogation. As
4 the law of the case is a res judicata effect, as a matter of
5 law, he could not have prevailed on that prong.

6 THE COURT: Yes, but the question was alternatively, so
7 I'll overrule it as far as for the purposes of this question.

8 THE WITNESS: Let me make sure. Did I consider raising in
9 the alternative that he was in custody before the police
10 officers knew he was in custody?

11 BY MR. PLATER:

12 Q. Okay. I'll try to phrase it better.

13 A. Okay.

14 Q. Do you remember during the interrogation, at one
15 point the officers advised Mr. Maki of his Miranda rights?

16 A. Yes.

17 Q. And do you remember the officers testifying they did
18 that because they thought they had probable cause to arrest him
19 at that point?

20 A. Yes.

21 Q. And you based part of your motion -- well, strike
22 that. Did you think that or did it ever cross your mind that
23 if this was not a custodial interrogation at the very
24 beginning, it may have become a custodial interrogation at some

1 other point during the interview especially before the officers
2 read Miranda rights to Mr. Maki?

3 A. I can't say that I recall thinking of it that way.

4 Q. Do you remember during the interview in the beginning
5 Mr. Maki denied allegations of any wrongdoing with the girls?

6 A. Yes.

7 Q. Okay. And this was before officers read Miranda to
8 him, is that right?

9 A. That's right.

10 Q. Before they read Miranda to him at a later point, but
11 at the beginning of the interview, he did admit to bathing with
12 Summer, do you remember that?

13 A. Yes.

14 Q. He admitted she washed his back and maybe she touched
15 his genitalia?

16 A. Uh-huh.

17 Q. Do you remember that he admitted that he was guilty
18 with Summer, that he had a buzz and I did something wrong?

19 A. Yes, I do remember that.

20 Q. Okay. At that point, had Mr. Maki committed --
21 admitted that he had committed a crime?

22 A. I think so.

23 Q. And that would have been at least lewdness?

24 A. Yes.

1 Q. Okay. Did the officers have probable cause to arrest
2 him at that point, after he had made those admissions about
3 Summer and the lewdness?

4 A. Based upon the comments that he made, at that point I
5 would think that the officers had probable cause to Mirandize
6 him at that point, at least.

7 Q. Okay. When he was Mirandized, he invoked his right
8 to remain silent, right?

9 A. My -- I can't remember exactly. I know he invoked in
10 such a way. I don't remember exactly if he said, I don't want
11 to talk anymore, or if he actually said, I want a lawyer. It
12 may have been that I don't want to talk to him.

13 Q. That's what he said. He said I don't want to talk.
14 Okay. So after he made those statements that we referred to,
15 you believe there was probable cause to arrest him for
16 lewdness, right?

17 A. Well, I didn't say probable cause to arrest. I said
18 that I think there was a -- at that point, there would have
19 been a reason for the officers to Mirandize him.

20 Q. Because it would have been -- because he would have
21 been in custody at that point?

22 A. I'm hesitating because I'm trying to remember from
23 reading the police reports. It was at the time when I was
24 going through all this and developing the motion to suppress,

1 it was my opinion that Mr. Maki was the subject of the
2 investigation when the police officers went over to the
3 apartment house and asked him to accompany them down to the
4 police station. And that basically he was in custody at that
5 point.

6 Q. You believed that the officers had probable cause to
7 arrest him for sexual assault and lewdness, even before the
8 interview began, right?

9 A. Yes.

10 Q. Now, assuming that -- I guess my question is: Why
11 did you not argue that assuming Miranda did not have to be
12 followed at the beginning of the interrogation, why did you not
13 argue that it should have been followed by officers earlier
14 than they actually gave the warning such as when Mr. Maki
15 admitted to being guilty with Summer, having committed lewdness
16 with her and the officers had probable cause to arrest him for
17 sexual assault?

18 MR. MCCARTHY: Your Honor, I have a different objection at
19 this point. I was just looking, I can't find where this issue
20 was pleaded, either in the petition or in the supplement. If
21 it's appropriate at all, it ought to be in the successive
22 petition.

23 MR. PLATER: I think there is a Fifth Amendment right filed
24 in there.

1 MR. McCARTHY: It's very lengthy and wordy and it's hard to
2 say, but I looked and I can't find it in there.

3 THE COURT: I'm going to overrule the objection. We can
4 proceed with that.

5 BY MR. PLATER:

6 Q. Do you remember my question?

7 A. Is your question that I should have -- did I consider
8 arguing that he should have been Mirandized immediately.

9 Q. No. You argued that, right?

10 A. That's what I --

11 Q. Okay. And did you consider that if that argument
12 were not successful, that Miranda -- he should have been
13 Mirandized, even if it were later, at an earlier time than the
14 officers actually did it, for example, after he confessed to
15 lewdness with Summer, and he said he was guilty, he said he
16 knew he did something wrong, and the officers have probable
17 cause to arrest him right there. In your mind, shouldn't they
18 have -- isn't that -- everything after that a custodial
19 interrogation?

20 A. I don't remember -- I don't remember considering that
21 when I was writing this.

22 Q. Would that have been a reasonable consideration?

23 A. I would say that at this point, listening to the
24 questioning this morning, it doesn't sound like an unreasonable

1 thing to do, but I'm also trying to recall a time what I was
2 considering as reasonable and I -- I just don't remember
3 thinking that as a reasonable argument to bring up.

4 Q. You don't remember whether it was a reasonable
5 argument?

6 A. I don't remember thinking of it as a reasonable
7 argument.

8 Q. Okay. You're not saying that you thought it was an
9 unreasonable argument?

10 A. No.

11 Q. You probably don't remember the specific counts in
12 the information in this case, but do you remember the first
13 five counts were counts of Sexual Assault against Mr. Maki?

14 A. Yes.

15 Q. The next five were Lewdness counts against him with a
16 person under 14 years old?

17 A. Yes.

18 Q. I'll represent to you that Count Four in the
19 information charged Mr. Maki with sexual assault against a
20 minor under 14 years of age and that was Desiree, and it
21 alleged that he sexually assaulted her with his finger. There
22 was testimony at the preliminary hearing that Desiree said this
23 occurred during another sexual assault when he was sexually
24 assaulting her with his penis. In essence, she said she

1 assaulted me with his finger and his penis during the same
2 time. Do you remember that testimony at all?

3 A. I remember at the preliminary hearing?

4 Q. Right.

5 A. I can't say right now that I actually remember the
6 testimony. I mean, I've reviewed the preliminary hearing
7 transcript to say I actually remember the testimony, no.

8 Q. And if Desiree had said during the preliminary
9 hearing testimony that she was sexually assaulted by Mr. Maki's
10 finger, during the time that she was sexually assaulting her
11 with his penis, do you think it would have been a reasonable
12 argument that that constituted one offense as opposed to two?

13 A. No. Because what you've described to me is if there
14 was a sexual assault using the penis and there was a sexual
15 assault using the finger, I would see it as two separate or two
16 different incidents.

17 Q. Okay. And what if they occurred simultaneously?

18 A. I don't remember anything about that being said.

19 Q. Okay. If it were simultaneous, would that be
20 considered in your opinion one criminal act as opposed to two?

21 A. That's possible. But, I mean, I possibly would have
22 considered that and done some research on it.

23 Q. Well, let's talk about Count V. That was a Sexual
24 Assault count against Mr. Maki where he alleged -- where it was

1 alleged that he assaulted Summer?

2 A. Yes.

3 Q. She was the youngest of the two girls. And she
4 testified to that at trial in front of a jury. Do you remember
5 that she was sexually assaulted by him?

6 A. Yes.

7 Q. Do you remember during the preliminary hearing where
8 Summer said that she was never sexually assaulted by Mr. Maki?

9 A. No.

10 Q. Maybe it would refresh your recollection if I gave
11 you a transcript?

12 A. Sure.

13 MR. McCARTHY: Your Honor, as far as I can tell, this is
14 the third area we're getting into that hasn't been pleaded. I
15 don't know how I respond if I'm not put on notice.

16 MR. PLATER: Well, it's relevant because it shows
17 inconsistencies in the victim's statements that should have put
18 counsel on notice to file a request that the Court order a
19 mental health and a physical and psychological examination of
20 the victim.

21 MR. McCARTHY: That's pleaded.

22 MR. PLATER: That's pleaded.

23 THE COURT: Well, yeah. We can pursue that.

24 MR. McCARTHY: Okay. I didn't understand that.

1 THE COURT: You didn't know where we were going.

2 MR. MCCARTHY: What is your direct is a question of, for
3 instance, ineffective assistance or failure to pursue a
4 pretrial writ. I would object to any argument concerning any
5 such assertion.

6 THE COURT: I understand. Let's take the lunch break. I'd
7 say be back here at 2:00. I have a 1:30. So let's go ahead
8 and be back at 2:00 o'clock.

9 (A lunch break was taken at this time.)

10 THE COURT: Okay. We're on the record. Mr. Maki is
11 present with counsel. State's represented. Miss Schmuck is on
12 the stand. We can proceed.

13 BY MR. PLATER:

14 Q. Miss Schmuck, before Mr. Maki went to trial, were you
15 aware that you could file a motion to the Court seeking the
16 Court to order an independent physical and/or psychological
17 evaluation of the victims in this case?

18 A. Yes.

19 Q. And did you make a decision one way or the other to
20 file such a motion?

21 A. Yes, I did.

22 Q. What was the -- what decision was that?

23 A. I decided not to.

24 Q. And why is that?

1 A. Specifically, for the psychological exam, I had been
2 informed by the State that they were not calling witnesses who
3 would or experts who would testify as far as psychiatric
4 testimony was concerned.

5 Also, in this particular case, there was no indication or
6 any information that I had the children had received any sort
7 of counseling. If memory serves me correctly, the incidents
8 were alleged to have occurred in December of that year and the
9 reports were made very soon thereafter to the police and there
10 was no indication at all that the children had been seen by any
11 psychiatrist.

12 As far as a physical exam is concerned, I believe I
13 received the Saints exam later in the discovery process. I
14 think there was a hearing at which that was addressed that I
15 had not received, the Saints exam, and I did not see the need
16 at that point when I did receive the Saints exam to ask for a
17 physical exam independently.

18 Q. Okay. So there were two reasons you didn't ask for a
19 psychological examination. One was there was no psychological
20 evidence that you saw that was forthcoming from the State?

21 A. The State had not endorsed an psychiatric expert. I
22 believe Mr. Greco informed me that he was not calling a
23 psychiatric expert.

24 Q. The second reason in terms of the psychological a

1 motion for the psychological evaluation that the children had
2 had no counseling?

3 A. That primarily. The -- what I was looking for was if
4 there was a possibility that the children had been questioned
5 by an expert, if there was any possibility of coaching or
6 suggesting that had been made to them. And because of the
7 amount of time that had elapsed and the information that I have
8 that there was -- that they had not been counseled, I did not
9 see the reason for that. I also did not have any or did not
10 gain any information during the course of the investigation of
11 this case that led me to believe that the children had any
12 prior sexual activity going on in their lives, prior to their
13 allegations that Mr. Maki had sexually molested them.

14 Q. Okay. Is it your understanding that you couldn't ask
15 the Court for a psychological evaluation merely because you
16 didn't expect the Court -- merely because you didn't expect the
17 State to offer psychological testimony?

18 A. No. That's not my testimony. I think I still could
19 have asked for one. I made a decision not to ask for one.

20 Q. Based on the fact that the State wasn't going to
21 produce such evidence and because the kids had no counseling?

22 A. The information that I had received, yes.

23 Q. Okay.

24 A. And because I could not -- I could not establish that

1 there had been sort of any prior incidents of sexual
2 molestation of the children by anyone else. There was no -- I
3 couldn't establish that there had been any sexual activity by
4 them.

5 Q. In your mind, was that required? Did you have to
6 make such a showing in a motion before the Court?

7 A. No, I didn't think I had to make such a showing. I
8 also knew that Mr. Maki was very concerned about that and had
9 informed me of his very strong beliefs that the children had
10 engaged in sexual activity. And because he had informed me of
11 that, I tried to find out about that, I asked people, we did
12 investigations of that.

13 Q. Okay. Would it be fair to say that a psychiatric
14 evaluation that's proposed by the defense can be used to gain
15 evidence or determine the credibility of the victim who is
16 going to testify at trial?

17 A. I suppose it would be fair to say, yes.

18 Q. And the same thing with the physical examination,
19 right?

20 A. Yes.

21 Q. Okay. So did you make -- based on that, did you make
22 a determination that there were no credibility issues regarding
23 the children who are going to testify against Mr. Maki?

24 A. Yes. I found in my own, because I was there at the

1 preliminary hearing, and the follow-up investigations that we
2 did, no -- I found the children to be credible and also viewing
3 the video tapes that were done by the police.

4 Q. Okay. So in terms of the credibility, you didn't
5 make a motion for psychiatric evaluation, because the children
6 seemed credible to you?

7 A. Yes.

8 Q. And that assessment that you made was based on doing
9 a preliminary examination of the children, is that correct?

10 A. That's right.

11 Q. Reviewing discovery in the case?

12 A. Yes.

13 Q. Which would have included reviewing the taped
14 interviews of the children?

15 A. Yes.

16 Q. Police reports?

17 A. Yes.

18 Q. Speaking with the district attorney about his case?

19 A. Yeah.

20 Q. Reviewing everything that you had in terms of
21 investigation and discovery?

22 A. Yes.

23 Q. Okay. And would that reasoning also apply to why you
24 elected not to make a motion for an independent physical

1 examination of the children?

2 A. Yes.

3 Q. Basically -- okay. Because you thought they were
4 credible witnesses? Okay. Now, you mentioned that the Saints
5 exam also was a factor in your decision not to ask the Court
6 for such an evaluation, the physical part?

7 A. Yes.

8 Q. Okay. And what was it about the Saints exam that led
9 you -- that you didn't need to make or petition the Court for
10 an independent physical examination of the children?

11 A. Because my belief at that point was that there had
12 been an exam done, the exam results were not especially -- I
13 believe it was the older child, Desiree, that there was no --
14 the Saints exam wasn't real clear that there had been trauma to
15 her, that there had actually been sexual assault.

16 Q. In fact, the Saints exam regarding Desiree said that
17 the hymen was normal and they could find no signs of sexual
18 abuse, right?

19 A. Yes.

20 Q. Did you find that report consistent with Desiree's
21 allegations that she had been sexual assaulted four times by
22 Mr. Maki?

23 A. Of course, it's not consistent. I mean, but in the
24 sense that they were finding that they -- there was no trauma.

1 But I'd also heard the child testify at preliminary hearing.
2 She had been pretty consistent throughout all the statements
3 she made at the preliminary hearing and to the police and I
4 realize that one of the things that we would be able to do with
5 the Saints exam was argue that in front of the jury.

6 Q. And would it have been consistent with your reasoning
7 not to get a psychological evaluation of the children that
8 although the Saints exam showed no sexual abuse, nevertheless,
9 Desiree was claiming that Mr. Maki had sexually abused her four
10 times?

11 A. I'm not quite following that. Could you ask that
12 again?

13 Q. When you decided not to pursue a psychological
14 evaluation of Desiree, did you factor in your decision the fact
15 that although the Saints exam said she had not been abused,
16 that she'd nevertheless herself claimed she had been abused
17 sexually four times by Mr. Maki?

18 A. Yes.

19 Q. So is it fair to say from your testimony, then, that
20 you didn't seek either a psychological or physical examination
21 from the Court based on your assessment of the credibility of
22 the children?

23 A. That was part of it, yes.

24 Q. Okay. Not entirely, though?

1 A. No.

2 Q. Okay. Let me ask you, then, regarding your
3 assessment of credibility, did your assessment take into
4 account the fact that Summer testified at the preliminary
5 hearing at one point that no sexual assault had ever occurred
6 on her in December?

7 A. I can't -- right now, I don't remember that
8 particular testimony at the preliminary hearing. Just --

9 Q. Would it help if I provided a transcript?

10 A. Sure.

11 MR. PLATER: Okay. For counsel's benefit, I'm referring to
12 preliminary hearing transcript, page 42.

13 BY MR. PLATER:

14 Q. Miss Schmuck, on page 42 of this transcript, I refer
15 you to lines 12 through 17. You're done?

16 A. Yes.

17 Q. Do you remember that testimony?

18 A. I remember. I can't say that I remember specifically
19 the child giving the testimony. I remember now the preliminary
20 hearing transcript.

21 Q. Okay.

22 A. And, yes, I did take that into account.

23 Q. On line 15 it says: Summer, did his private ever go
24 inside your private in December? Answer: No. Did you take it

1 to mean from Summer that she is saying Mr. Maki never sexually
2 assault her in December?

3 A. I -- in taking that in isolation, yes, I think that's
4 what you would have to, but I also was aware and what I took
5 into my consideration that my opinion of this were the video
6 tapes as well.

7 Q. Okay. So in any event, you're saying you took that
8 into consideration when you made the decision that they were
9 credible witnesses?

10 A. Yes.

11 Q. Do you have any background in psychiatry?

12 A. I think I took a class when I was college.

13 Q. Or psychology?

14 A. Psychology 101.

15 Q. In your experience as an attorney, do you think this
16 type of information could have been a reasonable -- could have
17 been part of a reasonable -- could have been a reasonable basis
18 for a motion to the Court that the Court should have ordered an
19 independent examination of Summer based on the fact that under
20 oath, at one point she said she had never been sexually
21 assaulted, even though at another time under oath she said she
22 had?

23 A. I made a decision in this case not to seek the
24 psychological examination based upon the information that I had

1 and my training and in my evaluation of the situation. I
2 certainly think that there are cases where it could be very
3 reasonable to do that.

4 Q. In this particular situation, given these facts,
5 would it have been reasonable for counsel for Mr. Maki to make
6 such a motion based on the testimony of Summer?

7 A. I think if that were the only thing that we had, this
8 be it would become more reasonable.

9 Q. So as I understand your testimony, you took it upon
10 yourself to make the decision whether the children were
11 credible?

12 A. I did make a decision, yes.

13 Q. Did you ever seek an independent professional in the
14 field of psychiatrist, psychology or medicine to help you with
15 your assessment whether the children were credible?

16 A. No.

17 Q. In your decision regarding the credibility of the
18 children -- strike that.

19 I'll represent to you that also during this preliminary
20 hearing, Summer at one point testified that she was never
21 rubbed or touched so as to constitute lewdness by Mr. Maki. Do
22 you remember that testimony?

23 A. Not right off the top of my head, no.

24 Q. The reference is page 46 of the preliminary hearing.

1 Miss Schmuck, if you could read lines three through six?
2 Just a short paragraph.

3 A. Okay.

4 Q. On line three, the question was asked by the
5 prosecutor at the preliminary hearing: Oh, Summer, besides the
6 time when Chuck put his penis inside your private, did he ever
7 touch his private to the outside of your private? Answer: No.
8 Do you remember that testimony?

9 A. Yes, now, that I read the transcript.

10 Q. Now, there was a charge of lewdness against Mr. Maki.
11 In fact, two charges that he touched or rubbed Summer's vagina
12 and that he rubbed his penis on her vagina. Do you remember
13 those two counts of lewdness?

14 A. In the information?

15 Q. Right.

16 A. Yes.

17 Q. So given Summer's testimony at the preliminary
18 hearing that Mr. Maki never did touch his private to the
19 outside of her private, did you use that in your decision
20 regarding the credibility of Summer regarding the two lewdness
21 counts?

22 A. Yes.

23 Q. That she was alleging against him?

24 A. Yes.

1 Q. What did you decide that she was not telling the
2 truth at the preliminary hearing when she made the statement or
3 she was inaccurate?

4 A. What I decided was that I knew there was going to be
5 an argument about the video tape as far as her testimony that
6 was made that would be child hearsay and that we were -- that I
7 knew I was going to have to deal with that as far as a motion
8 was concerned, because I -- at that point, I'm not sure I had
9 seen the video tape at the preliminary hearing or when she
10 testified at the preliminary hearing. But I knew there was
11 going to be a question as to the video tape being introduced
12 and the testimony as well. And ultimately took all of those
13 into consideration in making the decision.

14 Q. Do you remember during the preliminary hearing where
15 Summer said she was not sure if Mr. Maki had rubbed or touched
16 her?

17 A. No. Not -- I don't remember that -- the preliminary
18 hearing specifically her saying that.

19 Q. I'd like to refer you to page 41 and 42 of the
20 preliminary hear. Could you read lines 23 through 25 on 41 and
21 then one through 11 on 42?

22 A. Okay.

23 Q. Does that sound familiar?

24 A. Yes. It sounds familiar in the sense that I recall

1 reading transcript.

2 Q. Okay. On the top of 42, Mr. Greco said: Now, when
3 you say he moved his private on yours, did he start with
4 rubbing it around your private? Answer: I forget. Question:
5 All right. When you say he moved your private around, what do
6 you mean? Answer: He moved around, I think, on the outside.
7 Okay. He touched his private to the outside of your private?
8 Answer: I think. And in your mind, was Summer somewhat unsure
9 of what happened, according to her testimony at the preliminary
10 hearing?

11 A. To the passage that you just read, yes, she seemed
12 somewhat uncertain.

13 Q. Did you factor that into your decision regarding the
14 fact that there was no problem regarding the credibility of the
15 children?

16 A. Yes.

17 Q. And is that the reason why you didn't bring out these
18 inconsistencies at trial? In other words, when Summer took the
19 stand, you didn't take a preliminary hearing transcript and
20 say: Summer, you know, at the preliminary hearing, you were
21 kind of unsure, isn't this true? And present the jury with her
22 testimony?

23 A. Well, at the trial, and I can't answer that
24 because -- I mean, I don't remember exactly in terms of

1 questioning the child at the trial. But at the trial, the
2 focus of the defense was that Mr. Maki did not do this. No
3 matter what the children claimed at all, Mr. Maki did not do
4 this. And the evidence that we had were the tattoos and I
5 don't remember exactly when you asked me if that was why I
6 didn't ask the child at the trial, I don't know. But I know
7 that we were really concentrating on the fact that there were
8 the tattoos and Mr. Maki was not saying to anyone on that jury
9 this didn't happen. That was not the defense in this case.
10 The defense was Mr. Maki did not do this.

11 Q. And so if I understand your testimony, you're saying
12 and the defense was based on the fact that they were mistaken
13 about the tattoos, about the tattoos on his body?

14 A. Well, the children didn't talk about the tattoos at
15 the preliminary hearing, if I understand your question
16 correctly.

17 Q. The defense at trial was that Mr. Maki didn't do
18 this?

19 A. Yes.

20 Q. As part of your defense strategy, then, based on your
21 idea of what the defense was, was it your decision not to use
22 inconsistent statements of the victims?

23 A. I -- as well as I can remember, my feeling about this
24 was that the children were going to testify however they chose

1 to testify. And I was -- I don't remember making a conscious
2 decision not to come in and say: Okay, this is what you said
3 at the preliminary hearing. This is what you're saying now.
4 What I was concerned about and wanted to make clear to the jury
5 was that no matter what they were saying, this could not have
6 been Mr. Maki, because they never talked about some very
7 visible tattoos he had on him.

8 Q. And would it be inconsistent with that defense to
9 also show or to question the credibility of the children
10 themselves?

11 A. No, not necessarily.

12 Q. The children could have been credible and Mr. Maki
13 could still not have done this?

14 A. Well, I think that's possible. I think the children
15 could have been credible and I think -- and he still couldn't
16 have done it. I guess, looking at the total picture, we were
17 not able to establish and what we looked for very intensely was
18 whether or not these children had had any sort of prior sexual
19 exposure to anyone, because in that sense, that might make
20 their testimony quite credible. And I had been assured by Mr.
21 Maki that he had not done this, so we looked and spoke to
22 everyone that we possibly could to try to establish what I had
23 been told from him that the children had been sexually active
24 with someone else, not him.

1 Q. So was it your belief if you pursued this defense, it
2 was possible that the children actually thought this had
3 occurred to them by Mr. Maki, but it hadn't?

4 A. No. I think the defense was that the children were
5 telling the truth that someone had done it to them, but that it
6 wasn't him. Mr. Maki believed that they were saying this, that
7 they had been sexually molested by someone else and they were
8 saying this about him, specifically because of problems that he
9 had had with the shoulder.

10 Q. So in that regard, the children would not have been
11 telling the truth regarding who did it to them?

12 A. Yes.

13 Q. That's an issue of credibility regarding their own
14 stories and their own testimony, right?

15 A. Sure.

16 Q. As a practicing lawyer, inconsistent statements are
17 often used to attack the credibility of somebody who is saying
18 something under oath, isn't that true?

19 A. Yes.

20 Q. So as I understand it -- is it because Mr. Maki
21 denied this and that the children did not have testimony about
22 the tattoos and that possibly they had been molested by other
23 people, that is the reason you didn't bring out these
24 inconsistencies in testimony?

1 A. I couldn't establish that they had been molested by
2 someone else or I couldn't -- I could never get any information
3 on that, but, yes.

4 Q. Okay. At the preliminary hearing, I'll represent to
5 you that on page 12, talking about Desiree, Desiree testified
6 that in relation to where she was when she was being babysat,
7 she said I guess in our house, I'm not sure, given the fact
8 that she testified under oath that she was not sure where she
9 was when she was being babysat by Mr. Maki, do you also factor
10 that into your decision regarding their credibility?

11 A. You'll have to help me out with that one. I remember
12 the testimony at the preliminary hearing about sexual assaults
13 taking place in two different places, at Mr. Maki's apartment
14 and at the children's apartment.

15 Q. Okay. On page 12 of the preliminary hearing, have
16 you read lines four through eight?

17 A. Okay.

18 Q. Do you remember that testimony?

19 A. Yes, now that I've looked at it.

20 Q. Okay. It says: All right. Was Chuck baby sitting
21 you that day in December? Answer: Yes. Question: And where
22 was he baby sitting you at? Answer: I guess at our house.
23 I'm not sure. Given the fact that she was not sure where she
24 and Mr. Maki were at the time he was baby sitting her, did you

1 factor that in in determining her credibility?

2 A. Yes.

3 Q. Or, in fact, regarding her recollection?

4 A. I think I factored that in as well as the fact that
5 in other places of the testimony she seemed to be pretty clear
6 about what happened at his apartment and then what happened at
7 her family's apartment.

8 Q. Do you remember during the preliminary hearing that
9 Desiree testified in response to Mr. Greco that during the
10 first sexual assault Mr. Maki's penis was going down?

11 A. Yes, I do remember that.

12 Q. Later on, she testified she wasn't sure if she ever
13 saw the penis up a little bit. Did you use that in your
14 decision?

15 A. Yes.

16 MR. PLATER: Your Honor, I'm wondering how much time did
17 you want to take on this?

18 THE COURT: I want to finish.

19 MR. PLATER: Keep going.

20 THE COURT: I hope you can go quickly. But you've got to
21 pursue your issues.

22 MR. PLATER: Okay.

23 BY MR. PLATER:

24 Q. Miss Schmuck, do you remember any other

1 inconsistencies in the testimony by either girl and their trial
2 testimony?

3 A. No, not right now.

4 Q. Or statements they gave to other people?

5 A. Not at this moment, no.

6 Q. Do you remember in your investigation observing or
7 concluding that there were inconsistencies by either girl
8 insofar -- while comparing their statements from a court
9 hearing or from a statement with police officers or other
10 people?

11 A. No, I don't.

12 Q. So you have no recollection that there was -- are
13 saying that you did not feel there were inconsistencies?

14 A. I'm saying I didn't have any recollection of that.

15 MR. PLATER: Maybe, your Honor, for the purposes of time, I
16 have a number of what I perceive to be inconsistencies where
17 the child said one thing one time or another during a prelim as
18 opposed to trial as opposed to somebody else.

19 To save time, I think Miss Schmuck would testify that she
20 remembers each of them if she were presented with each
21 instance, that she considered it and she was -- she made her
22 decision, based on what she said not to go forward to have the
23 court order independent physical or mental evaluation. So I
24 could perhaps just then save some of this examination for

1 argument, either in written form or orally.

2 THE COURT: Okay. I see what you're saying.

3 MR. PLATER: I could keep going on. I have a lot of it.

4 THE COURT: You've asked the generic question. That's fine
5 with me.

6 MR. MCCARTHY: The only thing I'd suggest is ask the
7 witness if this offer of proof sounds reasonable to her.

8 THE COURT: That's what I meant by the generic question.

9 THE WITNESS: It's fine. Yes.

10 MR. MCCARTHY: I have no objection to it.

11 MR. PLATER: Or I really do have it outlined.

12 THE COURT: No.

13 MR. PLATER: This is tedious.

14 THE COURT: Just shorten it up. Ask the generic question
15 and we can move on to other issues and we'll do the same with
16 other issues.

17 MR. PLATER: And then I'll be able to show the Court later
18 on what the inconsistencies that I would have brought out and
19 Mr. Maki would have used in application of the Court for a
20 motion for independent psychological and physical or physical
21 examination. Is that okay.

22 THE COURT: Okay.

23 MR. MCCARTHY: I'd ask that he exclude everything that was
24 raised at trial, because by that point it was far too late to

1 seek examination.

2 MR. PLATER: That's fine. Okay. I think that's all I
3 have, then, at this point.

4 THE COURT: Any questions, Mr. McCarthy?

5 MR. MCCARTHY: Yes, your Honor.

6 CROSS EXAMINATION

7 BY MR. MCCARTHY:

8 Q. Miss Schmuck, have you tried other cases involving
9 child victims?

10 A. Yes, I have.

11 Q. Is it your experience that child victims or other
12 witnesses are always 100 percent consistent in their relation
13 of the events?

14 A. No.

15 Q. As a trial lawyer, do you sometimes become aware of
16 minor inconsistencies and elect not to bring it out?

17 A. Yes.

18 Q. Why?

19 A. Well, there's several reasons. I think primarily
20 because if they're minor inconsistencies, especially with
21 children, I think it's better to let it go than have the jury
22 look like you're beating up on kids.

23 Q. You perceive a risk that the jury will perceive you
24 as being overly picky?

1 A. Yes.

2 Q. In your experience, do juries expect some
3 inconsistencies with child witnesses?

4 A. Yes.

5 Q. You were asked to read a couple of lines of page 12 a
6 couple of minutes ago. It was read into the record the
7 question where was he baby sitting at. The answer: I guess at
8 our house. I'm not sure. Can you read the rest of that page,
9 read the rest of that -- the rest of that page. Taking the
10 testimony as a whole, do you find that those two lines that
11 were read into the record to be clearing any inconsistencies?

12 A. No.

13 Q. Let's do the same at page -- I think we're at 42, 43
14 before and there were a couple of things of those pages were
15 read into the record.

16 A. Okay. I've got page 42.

17 Q. Okay. Take a look at page 42 and 43, and if you can
18 recall which lines we read into the record before. I don't.

19 A. Okay.

20 Q. So on those pages, do you find that the testimony as
21 a whole has glaring inconsistencies?

22 A. No.

23 Q. Is it your experience in most courts when you choose
24 to impeach a witness with prior inconsistent testimony, that

1 the prosecutor can insist that that the greater portion also be
2 read to the jury?

3 A. Yes.

4 Q. Do you perceive any disadvantage had that happened in
5 this case?

6 A. Yes.

7 Q. Might that go into your decision to not bring out
8 these inconsistencies at trial?

9 A. Yeah.

10 Q. When we were discussing your evaluation and
11 credibility of the children, correct me if I'm wrong, I kind of
12 got the impression that sometimes you were talking about your
13 opinion of whether they are telling the truth and sometimes
14 you're talking about the perception of the jury of whether they
15 were telling the truth. Am I correct?

16 A. Yes.

17 Q. Okay. Is that part of your job as a trial lawyer to
18 anticipate what the jury might believe?

19 A. Yes.

20 Q. Are you any good at it?

21 A. I like to think so.

22 Q. Could you describe for the Court the nature of your
23 strategy relating to the tattoos?

24 A. The tattoos came to my knowledge immediately

1 following the preliminary hearing. Mr. Maki told me about the
2 tattoos, especially the tattoos around his pubic area.

3 At that point, I also was very careful about looking at the
4 children's tape or the video tapes of the children and what
5 they had to say there. And I believe one of the children, at
6 least Desiree, said there was no tattoos around there. While
7 Chuck had tattoos all over his body, but none down there. I
8 had an investigator go out and make photographs of Mr. Maki for
9 the tattoos and our strategy was that had Mr. Maki been the
10 person who committed these offenses, it would have been
11 extremely hard for the tattoos to have been missed. They're
12 very apparent, they're very colorful, and this is something the
13 children would really zero in on.

14 Q. And so did you have a plan on how to inform the jury
15 of the existence of the tattoos?

16 A. We were going to have and did have the investigator
17 from my office, who made the photographs of Mr. Maki, come in
18 to have the photographs entered as evidence through his
19 testimony.

20 My intent always had been to argue to the jury these
21 tattoos are so clear and so obvious that these children would
22 have automatically mentioned them under any questioning and to
23 show -- and we did show the jury the pictures of the tattoos.

24 Q. Did you intend to argue if they had seen Mr. Maki

1 without clothes, that in response to the question, you know,
2 describe what you saw, the children would have on their own
3 mentioned the tattoos?

4 A. Exactly.

5 Q. Yes. And that's why you didn't ask the children on
6 the witness stand about the existence of tattoos?

7 A. Yes.

8 Q. And then in the defense case, you did present the
9 jury with pictures of the tattoos?

10 A. Yes.

11 Q. Did you ever tell Mr. Maki anything along the lines
12 of that because you had been assaulted yourself, you were not
13 going to put forth your best efforts on his behalf?

14 A. No.

15 Q. Did you ever tell him that you had been assaulted
16 yourself?

17 A. No.

18 Q. Did you ever tell him that there was any reason at
19 all why you wouldn't put forth your best efforts?

20 A. No.

21 Q. Did you tell him you thought he was guilty?

22 A. No.

23 Q. Did you tell him that he would be found guilty?

24 A. Yes.

1 Q. Do you make it a habit of telling your clients what
2 you think is the proper result, whether you think they are
3 guilty.

4 A. No, I don't. I don't see any place for that.

5 Q. Do you make it a habit to give them frank advice
6 about the probable outcome of a trial?

7 A. Yes.

8 Q. Did you do that in this case?

9 A. Yes, I did.

10 Q. Mr. Maki gave you some names prior to trial of people
11 who might have helpful evidence, is that right?

12 A. That's correct.

13 Q. Did you employ an investigator in this case to assist
14 you in trying to find any witnesses?

15 A. Yes, I did.

16 Q. Can you give us kind of a synopsis of the results of
17 those efforts?

18 A. I had actually two investigators from my office
19 working on this case. Initially, Bob Howell was involved in
20 working on the case and he spoke with several people or tried
21 to speak with several people that Mr. Maki had put us in touch
22 with, one of which was a guy named Frances that Mr. Maki had
23 explained he was kind of like a Dutch Uncle to the girls and
24 spent a lot of time with them and was very involved with them.

1 And he believed that there could have been something -- that he
2 could have been the person who had actually done this.

3 Mr. Howell was in touch with him and he could provide us no
4 information at all. It was my understanding, and this, again,
5 came through from Mr. Howell, that he was of no help in terms
6 of providing any information in this case and did not know
7 anything.

8 I know he also contacted -- tried to contact the downstairs
9 neighbors. There was a lady named Doris, who was the
10 grandmother of the boy John who Mr. Maki believed was having
11 some sort of sexual relationship with at least one or both
12 Desiree and Summer. Mr. Howell left -- I know on a lot of
13 occasions left cards on the door to have Doris contact him.
14 She never responded to any of those requests for him to contact
15 her.

16 There was another neighbor named Jay that Tim Ford
17 contacted and so spoke with him and we had been told that he
18 knew about a particular incident with the two girls and with
19 John in which there was something -- some kind of physical
20 relationship. Whether the kids were playing doctor, it wasn't
21 exactly clear.

22 Tim Ford did speak with Jay, and Jay told him that he only
23 knew about this incident from Mr. Maki. And he was somewhat
24 reluctant to provide any information or to come in and help us

1 out at all.

2 Q. He didn't claim to have any firsthand knowledge?

3 A. Exactly. We -- I had an investigator speak with a
4 woman named Carla who was a friend of Mr. Maki's. I believe
5 she spoke with Carla on two separate occasions. I had some
6 real concerns about her because I think she was extremely
7 inebriated at least on one occasion when he talked to her very
8 early in the morning.

9 MR. McCARTHY: Your Honor, could you instruct the
10 petitioner to quit making gestures, shaking his head, if he
11 disagrees.

12 THE COURT: I'm sorry. I had my head down.

13 MR. McCARTHY: I'm sorry, your Honor. I catch it out of
14 the corner of my glasses.

15 THE COURT: Mr. Maki and I have had a run in with that
16 stuff before, so just knock it off. Go ahead.

17 THE WITNESS: I'm trying to remember the other names. Mr.
18 Maki gave me the name of a woman named Linda, and I believe her
19 last name was Stallings and I spoke with her. I made contact
20 with her specifically to ask her. He felt as though she would
21 be a good character witness at the sentencing and she informed
22 me that she would not choose under any circumstances to come in
23 and testify in his defense and he had in fact assaulted her on
24 one occasion and she was quite sure he was capable of doing

1 these things.

2 BY MR. McCARTHY:

3 Q. Was she in your opinion a good character witness for
4 Mr. Maki?

5 A. No, she was not.

6 Q. Were there any witnesses who -- or potential
7 witnesses whose names were given to you by Mr. Maki who claimed
8 to have no knowledge of him?

9 A. I'm trying to remember, because there was quite a few
10 people that we contacted. There was a man named Ken Daniels
11 who did call me before the trial and left a message for me to
12 call him back. It was -- I remember this, because I have a
13 memo specifically about this, and it was late in the afternoon.
14 I asked my investigator, Tim Ford to call him, and he called
15 him the next day and Mr. Daniels said: I don't know anything
16 about this. And I didn't call him.

17 I talked to Mr. Maki at some point after that, and he said
18 Mr. Daniels will only talk to you, he won't talk to your
19 investigator. So I called Mr. Daniels again and spoke with him
20 about any information he could give about the case. And he
21 said that what he knew about the case came from Mr. Maki also
22 and whether I spoke with him specifically about coming in and
23 testifying to Mr. Maki's good character or bad character, he
24 basically said, I don't know him. I don't know anything good,

1 I don't know anything bad about him.

2 Q. Prior to reading the petition for habeas corpus in
3 this case, did you ever hear the name Paul Grubbs?

4 A. No.

5 Q. Did you attempt to get Jackie Maki to appear?

6 A. Yes, we did.

7 Q. Run into some difficulty?

8 A. Yes. I had a lot of contact with Jackie Maki, Mr.
9 Maki's sister. She called me regularly and would talk to me
10 about his case and agreed on several occasions to provide us
11 with particularly with clothes and we were having concerns
12 about his hearing aids and she was going to help us out with
13 those kinds of things.

14 I also wanted her to come in and testify, specifically at
15 the sentencing hearing, and this was even before I knew about
16 his sister Jocelyn coming to testify. We tried on at least two
17 different occasions to subpoena Miss Maki, because I could
18 never see her face-to-face and I became increasingly concerned,
19 because I could never see her face-to-face, only talk to her on
20 the phone. And my investigator could never talk to her
21 face-to-face, that we really needed to have her under subpoena.

22 I know Tim tried to have her subpoenaed. Both times he was
23 unsuccessful. In the one occasion where we actually got close
24 enough to her to talk to her, she came to our office, I believe

1 the afternoon before trial, and did bring some clothes for Mr.
2 Maki to wear at trial. She did not bring the hearing aid and
3 she ran out the door before anyone could have contact with her.
4 In fact, I think Tim even tried to follow her down the street
5 and couldn't catch her.

6 I've never seen the woman face-to-face. I've only talked
7 to her on the phone.

8 Q. Would you have any hesitations about putting her on
9 as a witness if she had appeared?

10 A. Yes, I would have had some hesitations about putting
11 her on as a witness, without having a chance to actually see
12 her face-to-face and speak with her. That was one of the
13 primary reasons, again, because we had been trying to subpoena
14 her.

15 MR. McCARTHY: Can I have Exhibit A? Is that around here?

16 BY MR. McCARTHY:

17 Q. Miss Schmuck, I'll show you what has been marked as
18 Exhibit A and ask if you can identify that?

19 A. Yes. That's a letter that I wrote to Mr. Maki.

20 Q. Was it sent out in the ordinary course?

21 A. Yes.

22 MR. McCARTHY: I'll offer A, your Honor.

23 THE COURT: Any objection?

24 MR. McCARTHY: I still didn't make a copy for Mr. Plater.

1 He might want to take a minute to read it.

2 MR. PLATER: I have no objection.

3 THE COURT: A will be admitted.

4 BY MR. MCCARTHY:

5 Q. Miss Schmuck, did you and Mr. Maki ever discuss his
6 right to testify at trial?

7 A. Yes, we did.

8 Q. Can you tell the Court the nature of those
9 discussions?

10 A. I explained to Mr. Maki that he had the right to
11 testify at the trial. The choice to testify or not testify was
12 solely his and that if you chose not to testify, the State
13 could not use that against him.

14 I believe I spoke with him about that on several occasions
15 from reviewing my memos, because I know that was of concern to
16 him. And I remember going into trial and not knowing whether
17 or not he was going to testify.

18 Q. Did you ever tell him that you had the authority to
19 prohibit him from testifying in his own behalf?

20 A. No, I never told him that.

21 Q. Did you give him your frank advice?

22 A. Yes, I did.

23 Q. What did you tell him?

24 A. That I didn't think he should testify.

1 Q. Why not?

2 A. The primary concerns that I had were, one, about his
3 prior record, that that would be brought in against him. And
4 the other concerns that I had were because Mr. Maki was very
5 prone to try to plug up all the holes, so to speak, in terms of
6 explaining everything and I had talked to him about that and I
7 believe that I referred to that in the letter. I was very
8 concerned about his attempts to do that.

9 And I was very concerned about his ability to maintain his
10 composure on the stand, I think that was my primary concern,
11 under cross examination.

12 Q. Do you recall at the trial the Court informed Mr.
13 Maki of his right to testify?

14 A. I don't remember that in the trial.

15 Q. In any event, did he eventually accept your advice
16 and not testify?

17 A. I know he didn't testify. I don't know if it was
18 based on my advice. I know that he didn't testify.

19 Q. Okay. Do you recall photographs being produced as a
20 result of the Saints exam?

21 A. Vaguely, I remember some photographs, yes, or
22 photographic evidence.

23 Q. I'm sorry?

24 A. Yes, some photographic evidence.

1 Q. Okay. Do you have any reason -- withdraw that.

2 MR. MCCARTHY: May I have a moment, your Honor?

3 BY MR. MCCARTHY:

4 Q. Did Mr. Maki ask you to make a motion to withdraw
5 from the case?

6 A. No.

7 Q. As I recall earlier, quite a bit earlier, we were
8 talking about Miranda and such things. Let me ask your legal
9 opinion here. Is it your opinion that the concepts of probable
10 cause and the concepts of custody are equivalent?

11 A. No.

12 Q. Okay. So if, for instance, a police officer on the
13 side of the road has probable cause to believe someone has
14 committed a crime, we'll say, for instance, DUI, and that
15 police officer asks that suspect, have you been drinking,
16 there's no Miranda violation?

17 A. Yes. I agree.

18 Q. Because the person is not in custody?

19 A. Yes.

20 Q. Okay. Is that your opinion alone or nine learned
21 individuals also agree with that?

22 A. Yes.

23 Q. I withdraw that. That was inappropriate, too. I
24 can't help it, Judge. It's my nature.

1 THE COURT: Go ahead.

2 BY MR. MCCARTHY:

3 Q. Do you recall being asked by Mr. Maki to secure the
4 attendance of someone named Fried or Fried for sentencing?

5 A. The only knowledge I have of that name was from a
6 letter that Mr. Maki gave me the day of sentencing. I believe
7 that name was in there.

8 Q. Mr. Maki gave you a letter at the sentencing hearing?

9 A. Yes.

10 Q. That letter, he suggested that this individual would
11 be a good sentencing witness for him?

12 A. I think so. I think that his name was in the letter.

13 Q. Did you have any notice of that, the existence of
14 that individual, before the sentencing hearing?

15 A. No.

16 Q. Were you licensed to practice law in this state at
17 the time you represented Mr. Maki?

18 A. Yes.

19 MR. MCCARTHY: That's all I have.

20 THE COURT: Redirect?

21 MR. PLATER: Just a couple.

22 REDIRECT EXAMINATION

23 BY MR. PLATER:

24 Q. Miss Schmuck, regarding your testimony about whether

1 minor inconsistencies should be brought in or not, I take it
2 that if had you see a major inconsistency in a witness'
3 testimony at trial as opposed to what he or she testified to at
4 another date, that's something you want to bring out?

5 A. Yes.

6 Q. And you said that it was -- you said that Mr. Maki
7 did not testify, but you weren't sure what his thinking process
8 was?

9 A. What I -- yes, that's exactly what -- I didn't say I
10 wasn't sure what his thinking process was. I said I wasn't
11 sure why he chose not to testify. I knew we had discussed
12 whether or not he was going to testify, and I did not know at
13 the time -- at the beginning of trial or even at the -- I'm not
14 even sure at the close of the State's case whether or not he
15 was going to testify. When he chose not to testify, that I
16 cannot recall right now what his reasoning was or if he told me
17 why he was not testifying.

18 Q. Okay. So you remember after the State's case in
19 chief that had you sat down with Mr. Maki and you had a
20 discussion?

21 A. No. I don't remember that. I remember having
22 discussions with him prior to the trial, the beginning of
23 trial, several times, weeks before the trial. But I don't
24 remember specifically sitting down with him when the State

1 closed its case and having a discussion like that.

2 Q. So you don't remember him ever telling you: I'm not
3 going to testify.

4 A. I don't remember him saying specifically: I'm not
5 going to testify.

6 MR. PLATER: That's all I have.

7 MR. McCARTHY: Nothing. Thank you.

8 THE COURT: Thank you, Miss Schmuck. You can step down.

9 MR. PLATER: I don't have any other further witnesses.

10 THE COURT: Okay. Let's take a break and we can sum up.

11 (A short break was taken at this time.)

12 THE COURT: We're back on the record. Mr. Maki is present
13 with counsel. Mr. McCarthy is here for the State.

14 Mr. McCarthy, do you have anything to present prior to
15 argument?

16 MR. McCARTHY: I have two stipulations, your Honor. No
17 evidence.

18 THE COURT: Okay.

19 MR. McCARTHY: The parties agree that at the time she
20 represented Mr. Maki, she represented Mr. Maki Robin Wright was
21 regularly licensed to practice law in the State of Nevada.

22 Also, Mr. Plater has a whole series of document. I agree
23 those were all generated by the State provided to the public
24 defender as part of the discovery.

1 THE COURT: Okay. How do you want to mark them?

2 THE CLERK: Defendant's one, two, three, four marked for
3 identification.

4 MR. MCCARTHY: With that, the State has no additional
5 evidence.

6 THE COURT: Okay. Let's go ahead and sum up. Mr. Plater?

7 MR. PLATER: Your Honor, basically, Mr. Maki's petition
8 alleges ineffective assistance of counsel. You know the
9 standard, it's a two-prong test. You have to show that a
10 counsel's actions or decisions were deficient. Number two,
11 that if they were, they prejudiced the client so that the acts
12 or omissions, if they didn't occur, or would have occurred,
13 there's a probability that a different result would have been
14 obtained.

15 In this case, the probably is the best issue, as I see it,
16 is the fact that counsel did not petition the Court to have
17 these victims undergo an independent physical and/or
18 psychological examination. And that would have been important,
19 even though, and Mr. Maki went to trial on ten counts, he was
20 acquitted of the first sexual assault and I believe that was on
21 Desiree. He was acquitted of that one and the jury couldn't
22 reach a decision, I believe, on Count Two, which was sexual
23 assault against Desiree. So two of the five were gone, but he
24 suffered three convictions for sexual assault and five

1 conviction for lewdness.

2 Now, the case law in Nevada and Miss Schmuck's testimony
3 was that she doesn't -- she decided not to do one of these
4 motions to the Court, because, basically, as I understand it,
5 she thought the credibility of the children was fine and really
6 the defense was focused on Mr. Maki's tattoos had not been
7 properly identified by the children.

8 Although she conceded that the children were not correct or
9 possibly were not telling the truth that it was Mr. Maki, the
10 defense was that, well, they had been probably assaulted, but
11 they were identifying Mr. Maki and he was the wrong
12 perpetrator.

13 So she did afterwards concede the fact, well, their
14 credibility would have been an issue, because they're saying
15 when they knew better that it was Mr. Maki who had done this.
16 So that's why I think still the position about getting an
17 examination was important, because these examinations are to
18 test the credibility of the people involved. And that's what a
19 psychological or a psychological doctor or psychiatrist could
20 have done, could have examined the children or a medical doctor
21 in terms of their physical appearance.

22 Now, we didn't bring in the doctor, but I think under the
23 circumstances, if you found that one of these motions should
24 have been made, that it should be presumed prejudicial against

1 Mr. Maki, because obviously at this point, a doctor can't go
2 examine them physically and psychologically. We couldn't have
3 gotten an order from the Court allowing it at this point in
4 time.

5 But the reason I think this should have been done are
6 inconsistencies that the children made and these aren't minor
7 inconsistencies. These are fairly major. The most major one
8 is that under oath at the preliminary hearing, it was Summer
9 who said, and I'll quote on page 42 of the preliminary hearing
10 transcript: Question, and then later on, did he ever put his
11 private inside your private? Answer: I'm not sure. Question:
12 Summer, did his private ever go inside your private in
13 December? Answer: No. That's pretty clear. Is that a minor
14 inconsistency regarding Count Five where Summer alleges Mr.
15 Maki sexually assaulted her with his penis? That's a glaring
16 inconsistency.

17 Now, later on, in examination, right after that, Mr. Greco
18 said: Wait a minute, Summer, didn't you tell an officer when
19 he interviewed you that Mr. Maki assaulted you? Yeah. Did you
20 tell him the truth? Yes. But the point is, whether you want
21 to believe it, your Honor, this was really good ammunition.
22 This was real good information that a defense lawyer could have
23 used to present the Court such as yourself after a preliminary
24 hearing to say: Judge, this is the basis of a motion to have

1 the Court order this child to undergo an independent
2 examination, because she says one thing under oath, completely
3 denies it happened and then she says in the next sentence it
4 happened.

5 And Summer was a young girl. Who knows why it happened.
6 It may have been for independent innocent reasons, but the
7 point is, it's a pretty good basis upon which to base this type
8 of motion.

9 It doesn't stop there, Judge. If you review the
10 preliminary hearing transcript, the material that was provided
11 to counsel before trial, such as the statements from the
12 children, Mr. Maki's statement, the video taped statements, the
13 statements from Detective Bohach, you'll see some pretty
14 inconsistent statements by these children and these exams
15 should have been ordered.

16 And another inconsistency is Detective Bohach. He
17 interviewed -- he interviewed that I guess I put it into
18 evidence. But he interviewed. It wasn't Bohach. It was
19 Officer Ballue. He interviewed Desiree. When he got the
20 report, he ran over to the girls' apartment and he spoke
21 briefly with Desiree and then the next day both girls were
22 taken down to RPD for a formal interview.

23 But he -- Desiree told that she was touched three times all
24 together and that was it. Twice at Mr. Maki's apartment and

1 once at her apartment.

2 Now, at trial, and it all occurred on the same day. But
3 she said all together there's only three times, but at trial
4 she testified to seven times. Another inconsistency was that
5 Summer testified at the preliminary hearing she was not sure if
6 Mr. Maki rubbed or touched her. And, in fact, later on, on
7 page 46, she completely denied it. She said, no, it never
8 happened.

9 Now, those are minor inconsistencies, and I'll concede the
10 point, but it seems to me those are pretty important statements
11 that somebody would want to look into and why they were said.
12 What was the mental process of the child? What was the
13 physical condition of the child such that perhaps we need an
14 independent witness. And on the case law this has been
15 established through State v. Kenney, that's a Nevada case, and
16 it says whenever you present a compelling reason to the Court,
17 the Court can order an independent examination. One of the
18 things you look at is does the State have its own expert and
19 did the expert testify at trial. And that's what occurred
20 here. The State had an expert, Miss Peele, testified who
21 testified that the girls had been abused.

22 One of the other things that made this look like it was
23 somewhat suspicious is the fact that Miss Peele testified that
24 Desiree's exam showed a normal hymen. There was no sign of

1 abuse. But, nevertheless, Desiree testified she had been
2 sexually assaulted four different times by Mr. Maki. And Miss
3 Peele testified there was no healing, no signs of anything
4 wrong. So, again, that's some -- there's some point as to
5 whether this should have been pursued.

6 Summer testified -- Miss Peele testified that Summer had
7 suffered chronic sexual assault, meaning more than once, and
8 yet Summer only testified at trial and the State agreed to this
9 that she was only sexually assaulted once by Mr. Maki. And
10 yet, according to Miss Peele, she showed signs of having been
11 sexually assaulted on more than one occasion. You'll probably
12 remember the picture of her that was taken and described by
13 Miss Peele.

14 If that was the case, if there was chronic assault going
15 on, an independent evaluation might have revealed who was
16 responsible, who else was responsible, even if it had been Mr.
17 Maki, but it certainly -- it certainly lends credence to the
18 argument that maybe somebody else was involved in this.

19 Miss Peele testified that there was behavior problems with
20 Summer. She couldn't pinpoint when they began. They may have
21 begun prior to these allegations and she tried to tie in the
22 fact that these behavior problems were the result of a sexual
23 abuse, but she couldn't say when they were started.

24 Some of the other problems we touched on that showed that

1 there was conflicts and inconsistencies in the statements given
2 by the victims were that Desiree testified at the prelim she
3 was not sure where she was being babysat. She said she guesses
4 she was at home with Mr. Maki. She said also during the first
5 sexual assault, she said at one point that his penis was going
6 down, another point, she said I'm not sure if I ever saw it up
7 a little bit. This was during the first sexual assault. And
8 another time apparently his penis was sticking straight out.
9 She even said at one point she wasn't sure if it even went in.
10 At one time she thought it was outside and then she changed her
11 testimony on that.

12 She testified also that nothing else happened that day
13 after the third sexual assault so that one might infer that
14 there was no lewdness that ever occurred between him and
15 Summer.

16 These are just things that should have been -- that could
17 have been brought out in a motion for an independent
18 examination.

19 They also -- Summer, or I mean Desiree at one point said
20 all of this occurred before Christmas. And then at another
21 statement in the discovery, she said she wasn't sure when it
22 occur. Summer said, on the other hand, this occurred after
23 Christmas.

24 Regarding Summer, she said -- she said he humped with me

1 and Desiree also used the word humped. Desiree used the word
2 to mean sexual assault. That was in the preliminary hearing.
3 When Summer used the word humped, she meant it to be lewdness.
4 That was explained in her testimony. I think it would have
5 been helpful for an independent person to inquire what these
6 girls meant by these words and what occurred in that sense.

7 At one point, Summer said during the first lewdness charge,
8 she said he moved his hand around my private part and moved his
9 private part on hers. Then she said she couldn't remember if
10 he started rubbing, if he started rubbing with his private part
11 under her private part. She said he moved it around, I think,
12 on the outside and then she appeared to completely deny it on
13 page 46 of the preliminary hearing.

14 And, of course, we already went over the fact that she
15 completely denied any sexual penetration at one point, but
16 asserted it later on.

17 There are other inconsistencies we can talk about, but the
18 point is, this is something that should have been done by trial
19 counsel.

20 As far as Miranda is concerned, the only point is that the
21 Supreme Court ruled Miranda didn't apply when Mr. Maki was
22 first in custody, because it was not a custodial situation.
23 But after some period of time, it becomes pretty clear that it
24 was a custodial interrogation, because Mr. Maki admits to

1 lewdness with Summer. He said, yeah, I'm guilty with Summer.
2 She washed my back, maybe she touched my genitalia. He said
3 it's hard to get it outright. I got to get this off my chest.
4 It had to come out sooner or later and it was all -- I did
5 something wrong.

6 And at that point, it's pretty clear there's probable cause
7 to arrest him for lewdness, and, of course, the sexual assault.
8 Nevertheless, the officers didn't do anything. They kept
9 questioning this person, Mr. Maki, and finally when he made an
10 admission regarding Desiree that he was guilty of what she said
11 he had done, they said: Okay. We're going to Mirandize you
12 now. He said: I'm going to be under arrest? And they said:
13 No, you're not. There was no question in their mind it was
14 custodial at that point.

15 But the inquiry should be, and it is, according to case
16 law, not what the officers think custodial means or when it
17 occurs, but what a reasonable person would believe given the
18 circumstances. And certainly a reasonable person would believe
19 after he confessed to lewdness and there's police arrested for
20 sexual assault that it was a custodial interrogation after
21 everything after that.

22 I think reasonable counsel would have argued that Miranda
23 should have been read to him after he made the first confession
24 regarding Summer and that because it wasn't done, everything

1 else should not have been used against him at trial.

2 Regarding sentencing, what Mr. Fried would have done, Mr.
3 Maki maintains he the anticipated testimony of Jocelyn Coombs
4 and what could have been done to rebut that and Mr. Fried would
5 have been one of those people, according to him, she was less
6 than credible person who had a real drug addiction problem.

7 So those are the reasons, your Honor, we'd ask that you
8 grant his petition.

9 THE COURT: Thank you. Mr. McCarthy?

10 MR. MCCARTHY: Preliminarily, your Honor, there are a
11 number of other issues raised in the petition which have not
12 been addressed either by evidence or argument. I'd ask the
13 Court at the conclusion summarily rule those are unsupported by
14 evidence and no relief shall be granted on those.

15 As to the things that are the subject of the hearing today,
16 Mr. Plater and I agree on a lot. But primarily, the standard.
17 The petitioner bears the burden of showing by clear and
18 convincing evidence the representations by his attorney fell
19 below an objective standard of reasonableness, not that they
20 were bad, not that could have been better. But they fell below
21 an objective standard of reasonableness, such that no
22 reasonable lawyer could do this, and that but for those
23 counsel's failings, the result may well have been different.

24 So the first alleged failing that we have here, your Honor,

1 is in the failure to seek independent examinations of these
2 child victims. Your Honor may recall that they were eight and
3 eleven years old at the time.

4 The first question that I have that isn't answered by
5 anything I've heard here today is: Is there any reason to
6 believe this Court would have allowed such a thing had the
7 motion been made? Would the Court have granted it?

8 Unfortunately, your Honor, there's only one person in this room
9 that can tell us the answer to that. That, of course, would be
10 yourself. I just have to ask you, when it comes time to rule,
11 I guess I'm going to ask I can't argue to you what your ruling
12 would have been, but I can point out that I haven't heard
13 anything compelling here today.

14 There are a number of factors that would have been
15 considered had the motion been made. They are more recently in
16 the State v. Griego, 111 Nevada 444.

17 There are four primary factors to be considered. One of
18 them is whether or not it's necessary to level the playing
19 field.

20 Did the State employ a psychiatric or psychological witness
21 to testify about the psychological makeup of the children and
22 their voracity, their credibility? No. In fact, as I read
23 Griego, if any of those questions are answered no, that's the
24 end of the hunt, then there's no need to appoint or to allow an

1 independent examination. Other people read it differently.
2 Other people say you balance all four factors. Frankly, I
3 don't know the answer to that. But there are others. One of
4 them is there has to be a showing to the Court that there's
5 something about the psychological makeup of the children that
6 affects their credibility.

7 Not that there are questions about their credibility. And
8 inconsistent statements by any witness gives rise to questions
9 about that witness' credibility. That's what a jury does. But
10 sometimes you say there's something about the psychological
11 makeup of the witness, something in that person's past,
12 something about what has happened to that person, something
13 about their id.

14 If Miss Schmuck wanted an examination, she would have had
15 to come to your Honor and in good faith point out some reason
16 to believe there was something about the id of these children
17 that affected their credibility. Well, if there is, I haven't
18 heard it. There's at least two factors, two of the four which
19 would weigh in favor saying, no, you may not have this
20 independent examination.

21 But the bigger question, your Honor, what's the result of
22 the exam? Would it have changed the outcome? Well, got to
23 hear from the doctor, or at least hypothetically. Let's get a
24 psychologist up here, find a psychologist, some psychologist in

1 the world, geez, if I had been asked I would say any child that
2 makes these kinds of inconsistent statements must be crackers,
3 unworthy of belief. And I don't have to say part. You're not
4 allowed to say unworthy of belief.

5 But there's something I can tell from these things, someone
6 would say, the psychologist, that this person is unable to
7 perceive and relate the truth. Is there any reason at all to
8 believe from the evidence presented here today that there's any
9 psychologist, any therapist or any quack in the world who is
10 willing to come before your Honor and testify in that fashion?
11 If there is such evidence, I haven't heard it.

12 The next question on the same subject. Would that have
13 affected the verdict? If you could find some psychologist come
14 in here and say, yes, there's something about the psychological
15 makeup of these children that affects their credibility, would
16 the 12 people in the box gasp in horror and return not guilty
17 verdicts? That's another reason why we need to know what the
18 testimony of this proposed psychologist would have been so your
19 Honor could tell if it would have affected the verdict.

20 There was a comment that the failure to have an exam should
21 be presumed prejudicial, because we can't have one now. Your
22 Honor may recall that in Chapter 34 proceedings, there can be
23 discovery as under the civil rules upon motion. We didn't have
24 any. You have an opportunity for full discovery just like in

1 any civil case and present it and if the party who bears the
2 burden of proof doesn't present it, there are certain
3 consequences to that.

4 But at least we could have done hypothetical questions. We
5 could have gotten in the psychologist and asked him
6 hypothetically, but we don't even have that.

7 There was no expert by the State about -- no psychiatric
8 expert. Miss Peele is a nurse. She made physical observations
9 and related her opinions about those physical observations,
10 nothing more.

11 And just in passing, I just happened to think of this.
12 There also seems to be an assumption going on here that
13 penetration in the sexual assault must be -- how do I say it
14 delicately -- as complete as possible. That is not the law,
15 your Honor, and that was not the testimony. So these alleged
16 inconsistencies about the hymen not being damaged since you can
17 have penetration however slight, including fellatio and
18 cunnilingus. I don't see that as any big problem. That was
19 kind of an aside. Something I happened to think of. I didn't
20 want to forget it.

21 But the primary question on the first issue about this
22 independent investigate examination, the one we cannot get
23 past, is was it unreasonable for Miss Schmuck to make the
24 determination that it's not going to help. It's not going to

1 be sufficiently helpful to ask the Court for an independent
2 examination. Would all reasonable lawyers have acted to the
3 contrary? If not, then this individual is not entitled to
4 relief.

5 And as I was saying, even if you did fall below the
6 subjective standard of reasonableness, there's no prejudice.
7 At least no showing, because the Court wouldn't have ordered
8 and there's no psychologist available and it wouldn't have
9 affected the verdict anyway.

10 On the proposed additional motion to suppress, the
11 variation in the theory, your Honor, I'll repeat what I said
12 before. The Supreme Court ruled that all statements made by
13 him were not the product of custodial interrogation.

14 That should be the end of it. It was litigated here and
15 reviewed by the Court of last resort. I don't think this Court
16 ought to be authorized to revisit that question. If you are,
17 though, well, let's do it. It seems to be a theory proposed
18 that when an officer has probable cause to arrest, then the
19 suspect is in custody, is subject to custodial interrogation.

20 Well, you know, that's not right, your Honor. That's not
21 the law. Never has been. I doubt if it ever will be. I mean,
22 if it was, then the Supreme Court was wrong because your Honor
23 may recall the officers had probable cause when they went to
24 pick Mr. Maki up at his house. They had child victims

1 identifying him as a perpetrator of a sexual assault. If
2 having probable cause means that any questioning is custodial
3 interrogation, then the Supreme Court was wrong, he's been
4 unlawfully convicted and so has damn near everybody else in
5 Nevada State Prison and we ought to go kick them all loose.

6 I don't suggest that, because that's not the law, and it's
7 very simple decision.

8 Finally, there is the jailhouse sentencing witness, who was
9 not called as a witness at sentencing. Your Honor may recall
10 the testimony was that for reasons of his own, Mr. Maki elected
11 not to tell his lawyer about his sentencing witnesses until the
12 morning of sentencing. Even if you believe that's why he did
13 it, she still couldn't act. They don't let her have the keys.
14 I don't know why they won't let her have the keys and run down
15 and get whoever she wants out of the jail. They're very picky.
16 They insist on orders to produce and things like that.

17 But supposing the reasonable lawyer would have found a way
18 to get that witness here. Again, we would have had the
19 question: Would it have made a lick of difference to the Court
20 that in 1979 this person was a junkie. This person was not
21 trustworthy. I can think of one way where that kind of
22 evidence would backfire.

23 Suppose the Court believed both. Yes, Jocelyn the sister
24 was abused as a child by Mr. Maki, and yes, in 1979 she was a

1 an untrustworthy junky. The Court could see a cause and effect
2 and be inclined to be somewhat more harsh. So even if Miss
3 Schmuck had the opportunity to present this witness, I don't
4 think it's possible to say that there was any prejudice arising
5 from her failure to do so, certainly not to the point where the
6 Court can rule -- should rule that a different sentence would
7 have been imposed. And so, your Honor, I'd ask that for the
8 issues argued here today and the issues acknowledged in the
9 petition, that the petition be denied in its entirety. Thank
10 you.

11 THE COURT: Thank you. Mr. Plater?

12 MR. PLATER: Your Honor, when the State cites Griego,
13 Griego is just a reiteration of what the Court in Kenney v.
14 State, 109 Nevada 200 something. I've got 224, somewhere
15 around 220. But -- and Mr. McCarthy is right. I don't read
16 Kenney and Griego like he does. The Court says a general
17 psychological examination should be permitted if the defendant
18 has submitted compelling reasons therefor. And it goes on to
19 state several factors that can be used in a psychological
20 examination of a sexual assault case, but it certainly doesn't
21 say this is -- these are necessary elements that have to be
22 met.

23 Number one, if the State has employed an expert, that's
24 something you look at. Had the State employed an expert in

1 this case? No question about it. Miss Peele was an expert in
2 terms of her physical diagnosis of the children. She related
3 based upon her findings, she was an expert in terms of that.
4 She did more than the State offers in this hearing. She didn't
5 merely just say there are physical findings. She also said in
6 terms of Desiree, I think she was physically or sexually
7 abused, even though I found no physical signed of that. And
8 what was the basis of that?

9 It was based on the interview that she did with her when
10 Desiree said I was touched by Mr. Maki. I submit that's a
11 psychological finding, because she made no physical finding
12 otherwise, yet she testified that Desiree was abused. So the
13 State had its expert.

14 The second factor is the victim is not shown by compelling
15 reasons to be in need of protection and that could have been
16 avoided by an independent examination.

17 Evidence of the crime has little or no corroboration beyond
18 the testimony of the victim. That is the third factor. In
19 terms of a sexual assault, that was true as to Summer. In
20 fact, she even denied it happened.

21 And then the one that the State was concerned about, is
22 there a reasonable basis for believing that the victim's mental
23 or emotional state may have effected his or her voracity.
24 That's hard to say when you come into a case when you don't

1 know anything about the children in the first place and the
2 State is the one that has the discovery and the evidence and
3 certainly the defense can't go to those people and say: Well,
4 you know, will you submit, give us your medical records, submit
5 to the examination.

6 That's why you have to have apply to the Court for the
7 examination. I think if you go come in with their inconsistent
8 statements, and they're substantial, you can infer there's a
9 basis for believing there's an emotional or mental situation
10 that may have affected the voracity. So I don't think that the
11 case law says you got to come in with independent evidence, but
12 if you have evidence that suggests that it might be there, it
13 affects voracity, then it's okay.

14 So I think she should have gone ahead and at least tried.
15 I agree, we did not present an expert at this point and an
16 expert could not have told us what he would have observed, a
17 medical doctor, for example, something that occurred back in
18 December of 1993. That obviously is impossible.

19 In terms of the psychological state of the children back
20 then, the best he could have given us was hypothetical
21 situations that would have said: I would have had a concern
22 given the state of the evidence at this time and I would have
23 liked to have examined the children. But beyond that, we can't
24 show any more prejudice. That's why we suggested it ought to

1 be presumed.

2 In terms of the Miranda, I don't argue probable cause
3 should be the basis for determining custodial interrogation,
4 because that's not what the Supreme Court said. I gave you the
5 test. The test is what a reasonable person would perceive in
6 the circumstances of a criminal defendant who is being
7 interrogated.

8 I suggest a reasonable person in Mr. Maki's situation,
9 after he was down in police custody and after he had confessed
10 to lewdness on one of the children, would have believed at that
11 point he was in custody and not free to leave. It's not what
12 the police believed. It's not whether there's probable cause,
13 like Mr. McCarthy says, but it's what a reasonable person would
14 believe. That's why a motion should have been filed
15 challenging the lack of Miranda warnings that were not given up
16 for him, but were delayed until later on. Thank you.

17 THE COURT: Submit it, gentlemen?

18 MR. PLATER: Yes.

19 MR. MCCARTHY: Yes.

20 THE COURT: The petition is denied. The biggest and the
21 most talked about issue is the ineffective issue, and I find
22 that Miss Schmuck's conduct did not fall below the acceptable
23 standards and therefore did not change anything. This happens
24 an awful lot when somebody -- never mind. I'm not going to

1 comment on it. Miss Schmuck's conduct was -- she did the best
2 she could with what she had. We'll be in recess.

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1 STATE OF NEVADA)
2 County of Washoe) ss.

3 I, STEPHANIE KOETTING, a Certified Shorthand Reporter
4 of the Second Judicial District Court of the State of Nevada,
5 in and for the County of Washoe, do hereby certify;

6 That I was present in Department No. 8 of the
7 above-entitled Court on Friday, July 18th, 1997, at the hour of
8 10:00 a.m., and took verbatim stenotype notes of the
9 proceedings had upon the post conviction in the matter of
10 CHARLES MAKI, Petitioner, vs. THE STATE OF NEVADA, Respondent,
11 Case No. CR94P0345, and thereafter, by means of computer aided
12 transcription, transcribed them into typewriting as herein
13 appears;

14 That the foregoing transcript, consisting of pages 1
15 through 129, both inclusive, contains a full, true and complete
16 transcript of my said stenotype notes, and is a full, true and
17 correct record of the proceedings had at said time and place.

18 DATED: At Reno, Nevada, this 10th day of February, 1998.

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24


STEPHANIE KOETTING, CSR #207

CR94P0345 DC-9900039496-021
POST CHARLES JOSEPH MAKI (D 5 Pages
District Court 06/17/1998 10:52 AM
Washoe County 3370
JYOS-
DEAL

Case No. CR94P0345

Dept. No. 8

FILED

'98 JUN 17 A10:52

JUDI BAILEY, CLERK
BY 
DEPUTY

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

* * * * *

CHARLES MAKI,

Petitioner,

vs.

ORDER

THE STATE OF NEVADA,

Respondent.

This matter having come before the Court on the Final Claim for Compensation by JOSEPH R. PLATER, ESQ., the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED that JOSEPH R. PLATER be compensated for services rendered on behalf of the Petitioner in the above-captioned action in the amount of \$1660.27, as provided by NRS 7.155

DATED this 15 day of June, 1998


DISTRICT JUDGE

Voucher No. _____

WASHOE COUNTY

Reno, Nevada, June 2, 1998, 19 98Dr. to JOSEPH R. PLATER

Fund _____

Address 5341 Vista Larga Cir., Reno, Nevada 89523

DATE	ITEMS	AMOUNT
	COURT APPOINTMENT: CHARLES MAKI POST-CONVICTION APPEAL	
	<u>CHARLES MAKI vs. THE STATE OF NEVADA</u>	
	Case No.: CR94P-0345	
	Department No.: 8	
	Case Concluded: Still pending in Nevada Supreme Court	
	Appointed by: Judge Steve Kosach	
	I hereby certify the above claim is correct:	
	TOTAL ---	\$1,660 27
		\$1,567 50
	AMOUNT ALLOWED BY THE BOARD OF COUNTY COMMISSIONERS ---	

STATE OF NEVADA }
COUNTY OF WASHOE }

ss.

The undersigned, being duly sworn, deposes and says that the above bill is correct and just, and that neither the whole nor any part thereof has been previously presented to nor allowed or rejected by the Board of County Commissioners.

Subscribed and sworn to before me this _____

day of _____, 19 _____

COUNTY CLERK

By _____
DEPUTY

Approved _____, 19 _____

by Board of County Commissioners

CLAIMANT

Audited _____, 19 _____

From _____ Fund

\$ _____

COUNTY AUDITOR

DISTRIBUTION

Adm. _____

Gen. _____

C. H. _____

Jud. _____

Prot. _____

Dev. _____

Roads _____

Ind. _____

Debts _____

State _____

Misc. _____

1 Case No. CR94P0345

2 Dept. No. 8

3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 * * * * *

9 CHARLES MAKI,

10 Petitioner,

11 vs.

FINAL CLAIM FOR COMPENSATION

12 THE STATE OF NEVADA,

13 Respondent.

14 STATE OF NEVADA)
15 COUNTY OF WASHOE)ss.

16 I, JOSEPH R. PLATER, ESQ., being first duly sworn under penalty of perjury, do hereby
17 depose and state:

18 1. That I am an attorney duly licensed to practice law in the State of Nevada.
19 2. That on or about January 29, 1997, I was appointed, pursuant to NRS 7.135, to
20 represent Charles Maki in the above-entitled action.

21 3. That in pursuing the defense of the above-named petitioner, I devoted time as
22 follows:

23 SEE ATTACHED BILLING

24 ///

25 ///

26 ///

27 ///

28 ///

Case No. CR94P0345

Dept. No. 8

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

* * * * *

CHARLES MAKI,

Petitioner,

vs.

FINAL CLAIM FOR COMPENSATION

THE STATE OF NEVADA,

Respondent.

3/2/98	Prepare opening brief	1.1
3/10/98	Write opening brief	5.0
3/11/98	Write opening brief	3.8
3/12/98	Finish Writing and editing brief	5.1
5/26/98	Write and edit reply brief	5.9
Costs	Kinko's copy costs-Opening brief	\$84.03
	Kinko's Reply brief	\$8.74
20.9 hours @ \$75.00 per hour		\$1567.50
TOTAL		\$1660.27

1 WHEREUPON, I respectfully request that NRS 7.125 be waived and that I be paid the
2 sum of \$1660.27, as provided by NRS 7.155.

3 DATED this 9 day of ~~May~~, 1998.

June

[Signature]

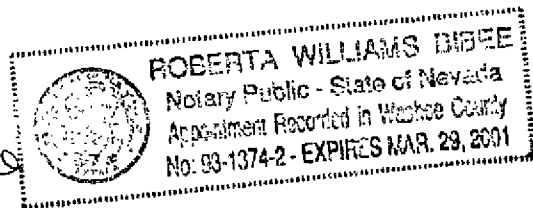
Joseph R. Plater
5341 Vista Larga Circle
Reno, Nevada 89523
(702) 746-2164

7 SUBSCRIBED and SWORN TO before me

8 this 9th day of ~~May~~, 1998.

June

10 *Roberta Williams Bibe*
11 NOTARY PUBLIC



HS
548
Approving
fees

ORIGINAL
FILED

FILED
2000 JUL 14 AM 9:59
FILED IN ERROR
AMY HARVEY, CLERK
BY _____
DEPUTY

1 Code: 3105

2000 JUL 14 PM 1:28

AMY HARVEY, CLERK

BY _____
DEPUTY

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

CHARLES MAKI,
Petitioner/Appellant,

vs.

STATE OF NEVADA,

Respondent.

Case No. ~~CR97P2099~~
~~CR97P2105~~
Dept. No. 8

CR94P0345

ORDER APPROVING FEES AND COSTS OF
COURT-APPOINTED ATTORNEY

Upon the request of KARLA K. BUTKO, the appointed attorney
for CHARLES MAKI, Petitioner/Appellant:

IT IS HEREBY ORDERED that attorney fees in the amount of
\$2,122.50 and advanced costs of \$72.68 are approved, and the
total amount of \$2,195.18 be paid directly to KARLA K. BUTKO,
Esq., by the State of Nevada Public Defender's office, for her
legal services incurred to date during the representation of
Petitioner in this matter.

DATED this 12 day of July, 2000.

DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

NOV -9 A9:27

Supreme Court No. 30904

District Court Case No. CR940345

AMY HARVEY, CLERK
BY *[Signature]*

REMITTITUR

TO: Amy Harvey, Washoe County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 7, 2000

Janette M. Bloom, Clerk of Court

By: *J. Richards*
Chief Deputy Clerk

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on Nov 9, 2000.

Amy Harvey
County Clerk

00-17948
V6.254

CR940345 DC-990039454-007
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District Court 11/09/2000 09:27 AM
Washoe County 4/45
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FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

'00 NOV -9 A9:27

CHARLES JOSEPH MAKI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

AM: H. BLOOM, CLERK

Supreme Court No. 30904

BY

[Signature]

District Court Case No. CR940345

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "... we affirm the judgment of the district court."

Judgment, as quoted above, entered this 10th day of October, 2000.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 7th day of November, 2000.

Janette M. Bloom, Supreme Court Clerk

By:

[Signature]

Chief Deputy Clerk

CR940345
DC-9900039454-008
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District Court 11/09/2000 09:27 AM
Washoe County 1350
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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,

No. 30904

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 10 2000

WACITE M BLOOM
CLERK OF SUPREME COURT
J. Richards
RECORDS GROUP

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

On May 17, 1994, appellant Charles Joseph Maki was convicted, pursuant to a jury verdict, of three counts of sexual assault of a child under age fourteen and five counts of lewdness with a child under age fourteen. Maki was sentenced to serve consecutive terms of life imprisonment with the possibility of parole, along with lesser terms of imprisonment. This court dismissed Maki's direct appeal. See Maki v. State, Docket No. 26049 (Order Dismissing Appeal, October 4, 1995).

On May 9, 1996, Maki filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed supplemental points and authorities in support of the petition. After holding an evidentiary hearing, the district court denied Maki's petition. This appeal followed.

Maki claims that he demonstrated that he received ineffective assistance of counsel and that the district court erred in denying him relief. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102

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(1996). We conclude that Maki has not shown that the district court erred in denying him relief on his claims. We will address each claim in turn.

Maki first argues that his trial counsel was ineffective for failing to request independent physical and psychological/psychiatric examinations of the two victims. However, the evidence adduced at the post-conviction hearing demonstrates that counsel acted reasonably in deciding not to request independent examinations.¹ Trial counsel testified that she did not request independent physical examinations of the victims, in part because she was satisfied with the examinations that had been performed and reported to the defense. Trial counsel cited several reasons why she did not request independent psychological or psychiatric examinations. Having reviewed the documents before this court, we conclude that the reasons cited by counsel are legitimate.

For example, one reason counsel cited was that she was informed that the State would not call an expert witness in psychiatry or psychology. Counsel also explained that she had not received any information that the victims had received counseling or been seen by a psychiatrist. These facts are relevant both to the reasonableness of counsel's decision and to the question of whether Maki would have been entitled to an examination upon request. See *Keeney v. State*, 109 Nev. 220, 224-26, 850 P.2d 311, 314-15 (1993). Maki has not shown that the State employed an expert witness in psychology or

¹We note that the district court found trial counsel's testimony at the evidentiary hearing to be "more credible" than Maki's testimony, which the court characterized as "in large part incredible and unworthy of belief." We defer to these factual findings. See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (indicating that a district court's factual findings regarding claims of ineffective assistance of counsel are generally entitled to deference).

psychiatry.²

In ruling that counsel acted reasonably, we are cognizant of Maki's claims that the victims expressed uncertainty and made inconsistent statements about the relevant events prior to trial. However, we emphasize that the victims' allegations were at least partially corroborated by Maki's own incriminating admissions that he had engaged in sexual misconduct with the victims. An important factor in determining the need for independent psychological or psychiatric examinations is whether there is "little or no" corroborative evidence. See Keeney, 109 Nev. at 226, 850 P.2d at 315.

Accordingly, we conclude that Maki failed to overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. Maki has not demonstrated that counsel acted unreasonably, let alone that he would have been entitled to independent examinations of the victims had counsel requested such examinations. See Keeney, 109 Nev. at 224, 850 P.2d at 314 ("Generally, a psychological examination of a sexual assault victim should be permitted if the defendant has presented a compelling reason therefor.").

Additionally, Maki has another hurdle to overcome. To properly demonstrate prejudice he must show a reasonable probability that counsel's deficient performance affected the outcome of the proceedings. Maki argues, without citation to supporting authority, that prejudice should be presumed, given the amount of time that has passed and the difficulty of showing what independent examinations would have yielded. We reject

²Maki notes that a nurse testified about behavioral problems that one of the victims was experiencing and the possible source of those problems. It also appears that the nurse concluded that this victim was sexually abused, although that finding appears to be primarily based on the physical examination. Maki has not shown that the nurse was qualified as an expert in psychology or psychiatry; nor could her testimony be reasonably viewed in this light.

this argument. Maki was required to show that such evaluations had a reasonable probability of affecting the outcome of the proceedings. He failed to do so.

Maki next claims that his counsel was ineffective, at trial, for failing to more effectively cross-examine the victims to reveal allegedly inconsistent and exculpatory prior statements. We question whether this issue was properly presented in the district court.³ In post-conviction cases, this court will generally decline to review issues not properly raised in the district court. See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Further, Maki has not included a complete copy of the trial transcript in the documents submitted to this court, or even the full portion of the transcript detailing the trial testimony of the victims. Accordingly, it is impossible to properly evaluate Maki's claim. Under these circumstances, the deficiency should be resolved against Maki. It is his responsibility to provide the materials necessary for appellate review. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

Maki also argues that his counsel was ineffective for failing to properly cross-examine the victims on tattoos in Maki's genital area, which apparently extended downward from Maki's lower abdomen. It is similarly impossible to properly evaluate this claim because of Maki's failure to include all relevant portions of the trial transcript. We further note that the documents before this court, particularly the post-conviction evidentiary hearing transcript, reflect that trial

³The issue of the victims' prior statements was discussed, and testimony adduced on this point, at the post-conviction evidentiary hearing. However, the discussion and testimony appear to have been related to Maki's claim that counsel should have requested independent examinations of the victims. At one point the State asked to "exclude everything [regarding the victims' inconsistencies] that was raised at trial, because by that point it was far too late to seek examination." Post-conviction counsel responded, "That's fine."

The trial transcript and analysis of all the evidence in relation to all the charges are necessary to properly resolve this and Maki's even less specific contentions of insufficient evidence and other duplicative charges.⁵ Again, it was Maki's responsibility to provide the materials necessary for our review as well as relevant authority and cogent argument.⁶ See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

Maki next claims that appellate counsel was ineffective for failing to argue that the district court erred in failing to sanction the State or grant Maki a continuance, after the State disclosed evidence, shortly before trial, concerning physical examinations of the victims. Again, Maki has failed to include pertinent documents in the appendix on appeal. Maki has not included transcripts of the proceedings concerning the State's disclosure of the report and Maki's motion for the continuance. Thus, it is impossible to determine whether the district court acted improperly.

For the reasons cited above, and after further review

⁵We are not persuaded by Maki's specific contention that counsel was ineffective for failing to challenge the charge of digital penetration prior to trial. A victim did testify that the incident of digital penetration occurred "[w]hen he was doing the same thing in our room," meaning "[w]hen he was putting his penis inside" of her. However, a reasonable reading of this victim's testimony does not necessarily suggest that the digital penetration occurred simultaneously with the other charged offense, but simply that the two incidents were part of the same molestation episode. We emphasize that the trial transcript could clarify the relationship between the act of digital penetration and the other offenses. We also note that the jury did not return guilty verdicts on each of the charges of sexual assault, and thus the question of prejudice is also speculative.

⁶We also note that Maki has failed to include specific citation to the appendix indicating how these claims were raised in the district court in the post-conviction proceedings. Indeed, Maki's argument on these claims in the supplemental opening brief is quite general and arguably insufficient to even state a valid claim.

counsel did present pictures to the jury showing Maki's tattoos and that counsel argued this issue to the jury. Counsel indicated that an important point of the defense was that the victims would have mentioned the tattoos, on their own, had they observed Maki's genital area.

Maki also claims that his prior counsel was ineffective for failing to more effectively argue that certain statements made by Maki to police were erroneously admitted pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Because the Miranda issue was fully litigated in the district court and on direct appeal, Maki's claim is barred by the doctrine of the law of the case. See *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975). Although Maki attempts to reformulate his argument in terms of ineffective assistance of counsel, this court has fully considered issues pursuant to Miranda, and this court reviewed the complete transcript of the police interview in resolving these issues.⁴ Maki may not avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See *Hall*, 91 Nev. at 316, 535 P.2d at 799.

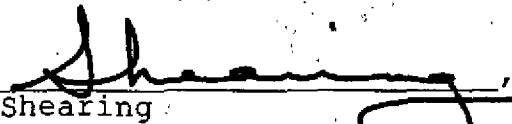
Maki next claims that trial and appellate counsel were ineffective for failing to raise issues of duplicative and redundant charges and sufficiency of the evidence. Maki specifically notes that at the preliminary hearing one of the victims testified that an incident involving digital penetration occurred at the same time as one of the incidents in which Maki placed his penis in her vagina. He contends that this constituted only one sexual assault and therefore counsel should have sought dismissal of the digital penetration charge.

⁴This court held that Maki "was not 'in custody' before he was read his Miranda warnings" and that, after Maki was read the warnings and invoked his rights, police failed to scrupulously honor Maki's invocation of his right to remain silent. This court noted, however, that only one incriminating statement made after Maki invoked his rights was admitted at trial, and concluded that admission of this statement was harmless error.

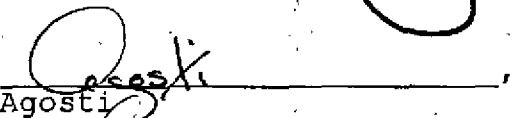
of the briefs and appendix, we conclude that Maki has not shown that he is entitled to relief. In closing, however, we admonish Maki's former appellate counsel, Joseph R. Plater, and his current counsel, Karla K. Butko. On several occasions, counsel failed to cite to relevant portions of the appendix and discuss how issues were raised in the district court, discussed at the post-conviction evidentiary hearing (if applicable), and resolved by the district court. The critical issue to be resolved in a post-conviction appeal is whether the district court erred in denying the post-conviction petition. Counsel should not relegate to this court the task of parsing the record to resolve appellate claims. See NRAP 28.

Having concluded that Maki has not demonstrated error, we affirm the judgment of the district court.

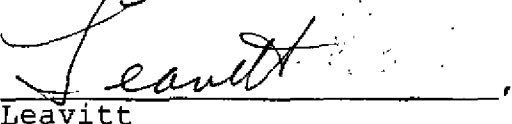
It is so ORDERED.


Shearing

J.


Agosti

J.


Leavitt

J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Joseph R. Plater
Karla K. Butko
Washoe County Clerk

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CHARLES MAKI
NDOC #42820
Northern Nevada Correctional Center (NNCC)
Post Office Box 7000
Carson City, Nevada 89702-7000

FILED

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HOWARD H. CONYERS

BY *[Signature]* DEPUTY

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

CHARLES MAKI,
Plaintiff,

Case No. CR-94-0345

vs.

Dept No. 8

STATE OF NEVADA
Respondent. /

MOTION FOR TRIAL COURT RECORDS

COMES NOW, I, CHARLES MAKI, Plaintiff, In Proper Person request copies of the trial court records for case number CR-94-0345 to include all papers, exhibits, transcripts of proceedings, district court minutes, and docket entries by the district court clerk.

These records are requested for use in my Writ of Habeas Corpus petition.

DATED this 25 day of NOVEMBER, 2008.

Respectfully Submitted

Charles Maki
Charles Maki, Plaintiff,
In Proper Person

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

MOTION FOR TRIAL COURT RECORDS

(Title of Document)

filed in case number: CR-94-0345

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 11-25-2008

Charles Maki
(Signature)

CHARLES MAKI

(Print Name)

IN PROPER PERSON

(Attorney for)

V6.264

*COURTS
copy*

CHARLES MAKI
NDOC #42820
Post Office Box 7000
Carson City, Nevada 89702-7000

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HOWARD L. CONYERS
BY *[Signature]*
DEPUTY

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

CHARLES MAKI
Plaintiff

vs

STATE OF NEVADA
Respondent

Case No: CR-94P0345

REQUEST FOR SUBMISSION

Comes now, Plaintiff, CHARLES MAKI (hereinafter "Plaintiff"),
appearing in proper person, and files this Request for Submission, in the above entitled action.

This Request is made pursuant to District Court Rules , whereas, Plaintiff respectfully
request that his

MOTION FOR TRIAL COURT RECORDS, be
submitted to the appropriate Honorable Court for a review and a decision.

Dated this 25th day of NOV., 2008.

Charles Maki
CHARLES MAKI
Proper Persona Plaintiff

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

REQUEST FOR SUBMISSION

(Title of Document)

filed in case number, CR-94-0345

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 11-25-2008

Charles Maki
(Signature)

CHARLES MAKI

(Print Name)

IN PROPER PERSON

(Attorney for)

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District Court
Washoe County
Nevada

CODE 2840

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JAN 30 2009

HOWARD W. CONYERS, CLERK
By: *K. Rogers*
DEPUTY CLERK

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

CHARLES MAKI,

Petitioner,

vs.

Case No. CR94P0345

STATE OF NEVADA,

Dept. No. 8

Respondent.

ORDER DENYING MOTION FOR TRIAL COURT RECORDS

The Court has learned that Mr. Maki has received two complete copies of his court records from his previous counsel, Karla Butko, Esq. Therefore, the Court hereby orders Mr. Maki's Motion DENIED.

Dated this 29 day of January, 2009.

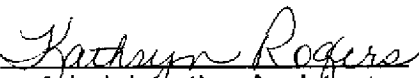
[Signature]
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30 day of January, 2009,
she mailed copies of the foregoing ORDER DENYING MOTION FOR TRIAL COURT
RECORDS in Case No. CR94-0345 to the following:

Charles Maki, #42820
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702-7000

Rex Reid
Offender Management
Nevada Dept. of Prisons
P.O. Box 7011
Carson City, NV 89702


Administrative Assistant