

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO BRIONES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jan 07 2015 11:19 a.m.
No. 66944 Tracie K. Lindeman
Clerk of Supreme Court

Appeal from a Judgment of Conviction in Case Number CR14-0440B
The Second Judicial District Court of the State of Nevada
Honorable Elliott A. Sattler, District Judge

JOINT APPENDIX

JEREMY T. BOSLER
Washoe County Public Defender

CHRISTOPHER J. HICKS
Washoe County District Attorney

JOHN REESE PETTY
Chief Deputy

TERRENCE P. McCARTHY
Chief Appellate Deputy

350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520

One South Sierra Street, 7th Floor
P.O. Box 11130
Reno, Nevada 89520

Attorneys for Appellant

Attorneys for Respondent

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RPD RP14-001864

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Clerk of the Court
Transaction # 4549045 : shambig

CODE 1800
Richard A. Gammick
#001510
P.O. Box 11130
Reno, NV 89520
(775) 328-3200
Attorney for State of Nevada

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

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No.: CR14-0440B

v.

Dept. No.: D10

FERNANDO BRIONES,

Defendant.

THIRD AMENDED INFORMATION

RICHARD A. GAMMICK, District Attorney within and for the
County of Washoe, State of Nevada, in the name and by the authority
of the State of Nevada, informs the above entitled Court that KELLY
DAVID JOHN and FERNANDO BRIONES, the defendants above named, have
committed the crimes of:

BURGLARY, a violation of NRS 205.060(1), a felony, (F170)
in the manner following:

That defendant FERNANDO BRIONES, on the 28th day of January
A.D., 2014, or thereabout, and before the filing of this
Information, at and within the County of Washoe, State of Nevada, did
willfully and unlawfully enter a certain vehicle: a green Subaru

1 Outback located at or about 1615 North Virginia Street, Washoe
2 County, Nevada, with the intent then and there to commit larceny
3 therein, AND/OR did willfully and unlawfully aid or abet and/or
4 counsel, encourage, or command KELLY DAVID JOHN to do the same.
5

6 All of which is contrary to the form of the Statute in such
7 case made and provided, and against the peace and dignity of the
8 State of Nevada.
9

10 RICHARD A. GAMMICK
11 District Attorney
12 Washoe County, Nevada

13 By: /s/ Adam Cate
14 ADAM CATE
15 12942
16 Deputy District Attorney
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1 The following are the names and addresses of such witnesses
2 as are known to me at the time of the filing of the within
3 Information:

4 RENO POLICE DEPARTMENT

5 OFFICER REED THOMAS
6 OFFICER ROBERT TYGARD
7 OFFICER CHRISTOPHER M. WADDLE

8 KATHLEEN BELL, 1615 N VIRGINIA ST APT #72 RENO, NV 89503

9 ROBYN MAITOZA, 6637 ASTON CI, SPARKS, NV 89436

10 CODY ZIMMERMAN, 4029 KINGS ROW, RENO, NV 89507

11 TOM DRAKULICH, 270 ORRCREST DR., RENO, NV 89506

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

15 RICHARD A. GAMMICK
16 District Attorney
17 Washoe County, Nevada

18 By /s/ Adam Cate
19 ADAM CATE
20 12942
21 Deputy District Attorney

22
23
24
25
26 PCN: RPD1400699C-BRIONES

CR14-0440B
STATE VS. FERNANDO BRIONES (5 Pages
District Court 08/07/2014 08:30 AM
Washoe County 1785

CODE 1785
Richard A. Gammick
#001510
P.O. 30083
Reno, NV. 89520-3083
(775)328-3200
Attorney for Plaintiff

FILED

AUG 07 2014

JOEY HASTINGS, CLERK
By: WMM
DEPUTY CLERK

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

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR14-0440B

FERNANDO BRIONES,

Dept. No. 10

Defendant.

GUILTY PLEA MEMORANDUM

1. I, FERNANDO BRIONES, understand that I am charged with the offense of: BURGLARY, a violation of NRS 205.060(1), a felony.

2. I desire to enter a plea of guilty to the offense of BURGLARY, a violation of NRS 205.060(1), a felony, as more fully alleged in the charge filed against me.

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

A. I waive my privilege against self-incrimination.

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

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

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

6 4. I understand the charge against me and that the
7 elements of the offense which the State would have to prove beyond a
8 reasonable doubt at trial are that on January 28, 2014, or
9 thereabout, in the County of Washoe, State of Nevada, I did,
10 willfully and unlawfully enter a certain vehicle: a green Subaru
11 Outback located at or about 1615 North Virginia Street, Washoe
12 County, Nevada, with the intent then and there to commit larceny
13 therein, AND/OR did willfully and unlawfully aid or abet and/or
14 counsel, encourage, or command KELLY DAVID JOHN to do the same.

15 5. I understand that I admit the facts which support all
16 the elements of the offense by pleading guilty. I admit that the
17 State possesses sufficient evidence which would result in my
18 conviction. I have considered and discussed all possible defenses
19 and defense strategies with my counsel. I understand that I have the
20 right to appeal from adverse rulings on pretrial motions only if the
21 State and the Court consent to my right to appeal in a separate
22 written agreement. I understand that any substantive or procedural
23 pretrial issue(s) which could have been raised at trial are waived by
24 my plea.

25 6. I understand that the consequences of my plea of guilty
26 are that I may be imprisoned for a period of 1-10 years in the Nevada

1 State Department of Corrections and that I am eligible for probation.
2 I may also be fined up to \$10,000.00.

3 7. In exchange for my plea of guilty, the State, my
4 counsel and I have agreed to recommend the following: The State will
5 be free to argue for an appropriate sentence. The State will not file
6 additional criminal charges resulting from the arrest in this case.
7 The State will not seek the habitual criminal enhancement.

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

12 9. Where applicable, I additionally understand and agree
13 that I will be responsible for the repayment of any costs incurred by
14 the State or County in securing my return to this jurisdiction.

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

1 11. I understand and agree that pursuant to the terms of
2 the plea agreement stated herein, any counts which are to be
3 dismissed and any other cases charged or uncharged which are either
4 to be dismissed or not pursued by the State, may be considered by the
5 court at the time of my sentencing.

6 12. I understand that the Court is not bound by the
7 agreement of the parties and that the matter of sentencing is to be
8 determined solely by the Court. I have discussed the charge(s), the
9 facts and the possible defenses with my attorney. All of the
10 foregoing rights, waiver of rights, elements, possible penalties, and
11 consequences, have been carefully explained to me by my attorney. My
12 attorney has not promised me anything not mentioned in this plea
13 memorandum, and, in particular, my attorney has not promised that I
14 will get any specific sentence. I am satisfied with my counsel's
15 advice and representation leading to this resolution of my case. I
16 am aware that if I am not satisfied with my counsel I should advise
17 the Court at this time. I believe that entering my plea is in my
18 best interest and that going to trial is not in my best interest. My
19 attorney has advised me that if I wish to appeal, any appeal, if
20 applicable to my case, must be filed within thirty days of my
21 sentence and/or judgment.

22 13. I understand that this plea and resulting conviction
23 will likely have adverse effects upon my residency in this country if
24 I am not a U. S. Citizen. I have discussed the effects my plea will
25 have upon my residency with my counsel.

26 14. I offer my plea freely, voluntarily, knowingly and

1 with full understanding of all matters set forth in the Information
2 and in this Plea Memorandum. I have read this plea memorandum
3 completely and I understand everything contained within it.

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

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

9 17. I do hereby swear under penalty of perjury that all of
10 the assertions in this written plea agreement document are true.

11 AFFIRMATION PURSUANT TO NRS 239B.030

12 The undersigned does hereby affirm that the preceding
13 document does not contain the social security number of any person.

14 DATED this 7th day of August, 2014.

16 Jermiah Briones
17 DEFENDANT

18
19 TRANSLATOR/INTERPRETER

20 Evelyn L. Hill
21 Attorney Witnessing Defendant's Signature

22 [Signature]
23 Prosecuting Attorney

1 CODE: 4185
2 MARIAN S. BROWN PAVA, CCR #169
3 Peggy Hoogs & Associates
4 435 Marsh Avenue
5 Reno, Nevada 89509
6 (775) 327-4460
7 Court Reporter

8 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

11 --oOo--

12 STATE OF NEVADA,

Case No. CR14-0440B

13 Plaintiff,

Dept. No. 10

14 vs.

15 FERNANDO BRIONES,

16 Defendant.

17 TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT

18 Thursday, August 7, 2014

19 APPEARANCES:

20 For the Plaintiff

SEAN NEAHUSAN, ESQ.

Deputy District Attorney

1 South Sierra Street, 4th Floor

Reno, Nevada 89501

21 For the Defendant

EVELYN GROSENICK, ESQ.

Deputy Public Defender

350 South Center Street

Reno, Nevada 89501

22 For Parole and Probation

LEN FRISCH

1 -oOo-
RENO, NEVADA, THURSDAY, AUGUST 7, 2014, 9:09 A.M.
2 -oOo-

3 THE COURT: The next matter is the State of Nevada
4 versus Fernando Briones, CR14-0440B. Mr. Briones appears in
5 court in custody with his attorney, Ms. Grosenick; Mr. Neahusan
6 is here on behalf of the State of Nevada; Mr. Frisch is here on
7 behalf of the Division of Parole and Probation. This is a
8 continued arraignment.

9 We were here last on July 24th of 2014. At that point
10 Ms. Grosenick indicated that she would like a little additional
11 time to speak to the defendant.

12 The Court is in receipt of a Third Amended
13 Information, filed on August 6th of 2014.

14 Are we ready to go forward this morning?

15 MS. GROSENICK: We are, Your Honor. And I just had
16 the Guilty Plea Memorandum in my hand. May I please --

17 THE COURT: Take a second.

18 MS. GROSENICK: -- take a second? Thank you.

19 THE COURT: Ms. Grosenick, I will provide you a copy
20 of the Third Amended Information and ask if your client's name
21 is spelled correctly, are you familiar with the contents, do
22 you waive the formal reading? And I will take back the Guilty
23 Plea Memorandum from you.

24 MS. GROSENICK: Thank you, Your Honor.

1 Mr. Briones has received a copy of the Third Amended
2 Information. His name is spelled correctly on line 12. He's
3 familiar with the contents and he waives the formal reading.

4 THE COURT: And are there plea negotiations in the
5 case?

6 MS. GROSENICK: There are, Your Honor. Today
7 Mr. Briones will be entering a plea of guilty to the sole count
8 contained in the Information, burglary, a felony. He
9 understands the minimum and maximum penalties for the charge
10 are one to ten years in prison, up to a \$10,000 fine, and he is
11 eligible for probation.

12 At sentencing both parties will be free to argue for
13 an appropriate sentence, and the State agrees not to pursue any
14 transactionally related charges or enhancements, including the
15 habitual criminal enhancement.

16 THE COURT: Is that an accurate statement of the
17 negotiation, Mr. Neahusan?

18 MR. NEAHUSAN: It is, Your Honor.

19 THE COURT: Is there restitution in the case?

20 MR. NEAHUSAN: Your Honor, I'm not aware of any
21 documentation of restitution.

22 MS. GROSENICK: Nor am I.

23 THE COURT: Okay. Can we please swear in Mr. Briones
24 so he can enter a guilty plea.

1 THE CLERK: Raise your right hand.

2 (The oath was administered to Mr. Briones.)

3 THE COURT: Mr. Briones, did you hear the negotiations
4 stated by your attorney and by the attorney for the State?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Are you in agreement with those
7 negotiations?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Sir, am I pronouncing your name correctly?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. How old are you, Mr. Briones?

12 THE DEFENDANT: Thirty-seven.

13 THE COURT: Are you a citizen or lawfully in the
14 United States?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Which one?

17 THE DEFENDANT: A citizen.

18 THE COURT: Are you under the influence of any drugs,
19 alcohol or medication this morning?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: You're not taking any prescribed
22 medication at the jail?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: How far did you get in school?

1 THE DEFENDANT: I completed -- I got my GED
2 completion.

3 THE COURT: Excellent. Do you read and understand the
4 English language?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Did you read and understand the Guilty
7 Plea Memorandum that Ms. Grosenick just provided to the Court?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Are you in agreement with all of its
10 terms?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Did you sign it on the last page?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Was she available to answer any questions
15 that you may have had about the Guilty Plea Memorandum prior to
16 your signing it?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Mr. Briones, are you aware that by
19 pleading guilty this morning you will be waiving or giving up
20 very important constitutional rights?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: One of those is a right to a jury trial
23 within 60 days of today's date. You're giving up that right.

24 Do you understand that?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: At that trial the State would be forced to
3 prove every element of this offense beyond a reasonable doubt
4 to the jury. You're giving up that right, as well.

5 Do you understand that?

6 THE DEFENDANT: Yes, sir. Yes, Your Honor.

7 THE COURT: You are also giving up your right to have
8 your attorney confront or cross-examine all the witnesses the
9 State would call against you.

10 Do you understand that?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Sir, you are giving up your right to use
13 the subpoena power of the court to force or compel other people
14 to come and testify for you.

15 Do you understand that?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Briones, you are also giving up your
18 right against self-incrimination, because when you plead guilty
19 to this charge you will incriminate yourself.

20 Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: What I mean by that -- and I know you just
23 looked at Ms. Grosenick, so you are free to ask her any
24 questions that you want to.

1 But by "incriminate," I'm telling you that as you
2 stand here right now, you're not guilty in my eyes; but once
3 you say you are guilty, you've incriminated yourself, that is,
4 you've admitted you've committed a crime.

5 Do you understand that?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Do you have any questions about that, sir?

8 THE DEFENDANT: No questions, Your Honor.

9 THE COURT: Mr. Neahusan, could you please read the
10 elements of the offense to the defendant.

11 MR. NEAHUSAN: Yes, Your Honor. Thank you.

12 Mr. Briones, do you understand that today you are
13 pleading to a felony charge of burglary, in that on or about
14 the 28th day of January, 2014, within the County of Washoe,
15 State of Nevada, you did willfully and unlawfully enter a
16 certain vehicle with the intent then and there to commit
17 larceny therein, and/or you did willfully and unlawfully aid or
18 abet and/or counsel, encourage or command Kelly David John to
19 do the same?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Mr. Briones, did you commit the acts with
22 the intent stated by the prosecutor in this charge?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Are you aware of the potential penalty for

1 this offense?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Can you tell me what it is?

4 THE DEFENDANT: It could be a maximum of anywhere from
5 one to ten in state prison.

6 THE COURT: That's correct. Up to ten years in the
7 Nevada State Prison, and a fine of up to \$10,000 or both, and
8 you are eligible for probation.

9 Do you understand that?

10 THE DEFENDANT: Yeah, I understand.

11 THE COURT: Sir, are you aware that I'm not bound by
12 any plea negotiations in your case? And, actually, in your
13 case there aren't any negotiations. I'll listen to your
14 attorney and I'll listen to the attorney from the State, I will
15 review a Presentence Investigation Report; but in the end, your
16 sentence, no matter what it is, is solely up to me and no one
17 else.

18 Do you understand that?

19 THE DEFENDANT: Yes, sir, I understand.

20 THE COURT: And so if I think it's appropriate, I
21 could send you to prison for up to ten years for this offense.

22 THE DEFENDANT: Yes, sir, I understand.

23 THE COURT: With all the rights in mind that you're
24 waiving and all the consequences of your plea, is it still your

1 desire to plead guilty this morning?

2 THE DEFENDANT: Yeah. Yes, sir.

3 THE COURT: Have you had an adequate amount of time to
4 speak to your attorney about your case?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Are you satisfied with her representation
7 of you?

8 THE DEFENDANT: Yes, sir, very much so.

9 THE COURT: Has anyone promised you anything or
10 threatened you in any way in order to get you to plead guilty
11 this morning?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: Do you feel you are pleading guilty freely
14 and voluntarily?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have any questions for me,
17 Mr. Briones?

18 THE DEFENDANT: No, sir.

19 THE COURT: Then what is your plea to the charge of
20 burglary, a felony, as alleged in the Third Amended
21 Information?

22 THE DEFENDANT: Guilty.

23 THE COURT: The Court finds the defendant understands
24 the nature of the offense charged and the consequences of his

1 plea; he's made a knowing, voluntary and intelligent waiver of
2 his constitutional rights; and, therefore, the Court will
3 accept his guilty plea and we will set a date for sentencing.

4 THE CLERK: September 30th at 8:30.

5 THE COURT: Sir, on September 30th, I'm ordering that
6 you bring in \$25. That's an administrative assessment fee. I
7 will order that in addition to anything else I do on that date.

8 I am also ordering that you cooperate with the
9 Division of Parole and Probation in the preparation of a
10 Presentence Investigation Report. That's actually in your best
11 interests, because you want to put yourself and your attorney
12 in the best position possible to argue on your behalf that day.

13 Do you understand that?

14 THE DEFENDANT: Yes, Your Honor. I've got a question.

15 THE COURT: Go ahead.

16 THE DEFENDANT: On September 30th you want me to bring
17 in \$25 for what?

18 THE COURT: It's an administrative assessment fee. By
19 law -- there's a statute that says that I have to impose that
20 \$25 fee on every single case.

21 THE DEFENDANT: Okay.

22 THE COURT: And so if you have that on your books, we
23 can take care of it that way. If you don't --

24 THE DEFENDANT: I don't have it. I'm still -- I'm

1 still in jail.

2 THE COURT: We'll take care of it. Whether or not you
3 have the \$25 doesn't determine what the sentence is.

4 THE DEFENDANT: Okay.

5 THE COURT: So if you have access to it, you have to
6 bring it in on that day; if you don't, you don't.

7 THE DEFENDANT: Okay.

8 THE COURT: It will be part of your sentence. Do you
9 understand?

10 THE DEFENDANT: All right.

11 THE COURT: All right?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: I'll see you next month.

14 THE DEFENDANT: Okay. Thank you.

15 THE COURT: Thank you, Mr. Briones.

16 (Proceedings concluded.)

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1 STATE OF NEVADA)
2) ss.
3 COUNTY OF WASHOE)

4 I, MARIAN S. BROWN PAVA, Certified Court Reporter in
5 and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me at the
7 time and place therein set forth; that the proceedings were
8 recorded stenographically by me and thereafter transcribed via
9 computer under my supervision; that the foregoing is a full,
10 true and correct transcription of the proceedings to the best
11 of my knowledge, skill and ability.

12 I further certify that I am not a relative nor an
13 employee of any attorney or any of the parties, nor am I
14 financially or otherwise interested in this action.

15 I declare under penalty of perjury under the laws of
16 the State of Nevada that the foregoing statements are true and
17 correct.

18 Dated this 2nd day of September, 2014.

19 /s/ Marian S. Brown Pava

20 _____
21 Marian S. Brown Pava, CCR #169
22
23
24

1 CODE 2645
2 EVELYN GROSENICK SBN 12217
3 WASHOE COUNTY PUBLIC DEFENDER
4 P.O. BOX 11130
5 RENO, NV 89520-0027
6 (775) 337-4800
7 Attorney for Defendant:

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR THE COUNTY OF WASHOE
12

13 THE STATE OF NEVADA,

14 Plaintiff,

15 vs.

CASE NO. CR14-0440B

16 FERNANDO BRIONES,

DEPT. NO. 10

17 Defendant.
18 _____/

19 **OPPOSITION TO ATTORNEY GENERAL'S MOTION TO QUASH SUBPOENA**

20 **DUCES TECUM**

21 Defendant FERNANDO BRIONES, by and through his counsel of record, Washoe
22 County Public Defender Jeremey Bosler and Deputy Public Defender Evelyn Grosenick,
23 hereby opposes the Motion to Quash Subpoena Duces Tecum filed by the Attorney General on
24 September 23, 2014.

25 This opposition is made pursuant to federal and state statutes, constitutions, and case
26 law, the record in this case, the attached documentation, and any evidence or oral argument
presented at a hearing on this issue.

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1 **POINTS AND AUTHORITIES**

2 **I. PROCEDURAL HISTORY**

3 On August 7, 2014, Mr. Briones pled guilty to one count of burglary, a violation of
4 NRS 205.060(1), a felony. The possible penalties for this charge are one to ten years in the
5 Nevada Department of Corrections ("NDOC") and a fine of up to \$10,000. Mr. Briones is
6 eligible for probation. Pursuant to the negotiations, Mr. Briones and the State are free to argue
7 for an appropriate sentence.

8 On September 10, 2014, the Nevada Department of Parole and Probation ("P&P") filed
9 a Pre-Sentence Investigation Report ("PSI") in this case. The PSI was prepared by Leonard
10 Frisch and approved by Laura Pappas, P&P Supervisor, Northern Command, Reno. P&P
11 recommends that the Court sentence Mr. Briones to 48 to 120 months in the NDOC. P&P
12 further recommends that the Court deny probation to Mr. Briones.

13 On September 11, 2014, Mr. Briones' counsel requested from P&P three documents
14 that were used to prepare the PSI in this case: the Probation Success Probability worksheet
15 ("PSP worksheet"), Sentence Recommendation Selection Scale ("SRSS"), and the PSR
16 Questionnaire that Mr. Briones filled out. Mr. Briones did not request the attendance in court
17 of anyone from P&P. The request for the PSI scoring documents was made by an investigator
18 in the Public Defender's Office, Erin Griffin, who sent a letter to Melinda Ridgley via email.
19 See Ex. 1. Ms. Ridgley complied with the request in part and faxed the first two of the three
20 requested documents (the PSP worksheet and the Sentence Recommendation Selection Scale)
21 to the Public Defender's Office the very same day. Ex. 2. On September 17, 2014, P&P sent a
22 document via fax to the Public Defender's Office stating that P&P needed a subpoena for the
23 documents previously requested. Ex. 3. On the same date, Ms. Griffin faxed a subpoena to
24 P&P requesting these same documents. Ex. 4.

25 ///

26 ///

1 On September 23, 2014, the Attorney General filed a Motion to Quash Subpoena Duces
2 Tecum (“AG’s Motion”). On September 26, 2014, the Court vacated the sentencing date of
3 September 30, 2014 so that the parties could brief the issues raised in the AG’s Motion.

4 II. EXPLANATION OF PSI DOCUMENTS

5 A. Statutory Authority Regarding PSI’s

6 “The Division of Parole and Probation is mandated by statute to prepare a PSI to be
7 used at sentencing for any defendant who pleads guilty to or is found guilty of a felony.”
8 *Stockmeier v. State, Bd. of Parole Comm’rs*, 127 Nev. Adv. Op. 19, 255 P.3d 209, 212 (2011).
9 “A PSI contains information about the defendant’s prior criminal record, the circumstances
10 affecting the defendant’s behavior and the offense, and the impact of the offense on the
11 victim.” *Id.* at 212-13. “Because the sentencing court will rely on a defendant’s PSI, the PSI
12 must not include information based on ‘impalpable or highly suspect evidence.’” *Id.* at 213
13 (quoting *Goodson v. State*, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982)). “To that end, after
14 preparing a PSI, the Division must disclose the report’s factual content to the prosecuting
15 attorney, defense counsel, and the defendant, and give the parties the opportunity to object to
16 any of the PSI’s factual allegations.” *Id.*; see NRS 176.156(1) (“The Division shall afford an
17 opportunity to each party to object to factual errors in any such report and to comment on any
18 recommendations.”).

19 In addition, the Chief of P&P is required to adopt standards to assist in “formulating a
20 recommendation regarding the granting of probation or the revocation of parole or probation to
21 a convicted person who is otherwise eligible for or on probation or parole.” NRS
22 213.10988(1). These “standards must be based upon objective criteria for determining the
23 person’s probability of success on parole or probation.” *Id.* The PSI recommendation is more
24 than a suggestion or simple recommendation to the Court. The Court must consider these
25 standards and P&P’s recommendation in determining whether to grant probation. NRS
26 176A.100(3) (“The court shall consider the standards adopted pursuant to NRS 213.10988 and

1 the recommendation of the Chief Parole and Probation Officer, if any, in determining whether
2 to grant probation to a person.” Emphasis added).

3 **B. P&P Scoring**

4 Presumably consistent with its mandate in NRS 213.10988, P&P has developed the
5 documents attached in Exhibit 2 to assist in “formulating a recommendation regarding the
6 granting of probation or the revocation of parole or probation” based on “objective criteria.”
7 NRS 213.10988(1). The following documents are attached as Exhibit 2: PSP worksheet, SRSS,
8 Offense Score table, and Social Score table.

9 P&P uses the PSP worksheet to develop a numerical score (Probation Success
10 Probability Score, or “PSP Score”) for each defendant based on characteristics of the instant
11 offense, the defendant’s criminal history, and socio-economic factors. P&P develops the PSP
12 Score by assigning points in each of several categories. P&P relies on the Offense Score table
13 and the Social Score table to determine how many points to assign in each category.

14 For instance, the Offense Score table assigns points to various aspects of a defendant’s
15 prior criminal history and the circumstances of the instant charge. The top row contains broad
16 categories, such as “Felony Convictions,” “Jail Sentences,” and “Years Free of Conviction.”
17 Under each category, the defendant receives points based on where he falls among the three or
18 more possible subcategories. The points the defendant receives for a given subcategory appear
19 to the left of that subcategory. For instance, a defendant receives -1 point for two or more prior
20 felony convictions, 0 points for one prior felony conviction, and 1 point for no prior felony
21 convictions.

22 Similarly, the Social Score table assigns points in various categories relating to a
23 defendant’s social factors, such as “Age,” “Family Situation,” “Education,”
24 “Commitment/Ties,” and substance abuse history. The table operates in a similar fashion to the
25 Offense Score table, in that points are assigned based on the subcategory into which a
26 defendant falls.

1 The Raw Score listed on the PSP worksheet is the sum of all the points a defendant
2 receives in the Offense Score section. The significance of the Raw Score is discussed below.
3 The Offense Score Total is the Raw Score multiplied by 1.2. The Social Score is the sum of all
4 the points a defendant receives in the Social Score section. The PSP Total Score is the sum of
5 the Offense Score Total and the Social Score Total.

6 **C. Significance of the Raw Score**

7 The Raw Score determines the minimum and maximum prison sentence P&P will
8 recommend based on the Sentence Recommendation Selection Scale. For instance, a Raw
9 Score from the PSP Score worksheet of between 39 and 49 points puts a defendant in the low-
10 risk category on the SRSS. For a crime with a sentence range of 1 to 4 years, the SRSS
11 instructs P&P to recommend a sentence of 12 to 30 months for someone in the low-risk
12 category. For the same crime, a defendant in the high-risk category (i.e., a very low Raw
13 Score) would receive a recommendation of 12 to 48 months. Therefore, the Raw Score
14 determines what minimum and maximum prison terms P&P should recommend to the Court.

15 **D. Significance of the PSP Total Score**

16 The PSP Total Score determines whether P&P will recommend probation for a
17 probation-eligible defendant. On the SRSS, there is a place for the PSI-writer to fill in the PSP
18 Total Score approximately eight lines below the heading. Next to this line appears a key with
19 three categories: "Denial," "Borderline," and "Probation." This key tells P&P to recommend
20 denial of probation for a defendant with a PSP Total Score that falls between 0 and 54 and to
21 recommend probation for a defendant with a PSP Total Score that falls between 65 and 100. A
22 defendant with a PSP Total Score between 55 and 64 is considered "borderline."

23 **E. P&P's Scoring and Sentencing Recommendations for Mr. Briones**

24 P&P calculated a Raw Score of 21 for Mr. Briones. Ex. 2. P&P also calculated an
25 Offense Score Total of 25, a Social Score Total of 16, and a PSP Total Score of 41. *Id.*
26 According to the SSRS, a PSP Total Score of 41 puts Mr. Briones in the denial of probation

1 category. Therefore, on page 10 of the PSI, P&P recommends that the Court deny probation to
2 Mr. Briones. This recommendation is consistent with P&P's scoring criteria, assuming the
3 PSI-writer's scoring is correct.

4 Mr. Briones' Raw Score of 21 places him in the medium-risk category on the SSRS.
5 According to the SSRS, for a felony that carries a possible sentence of 12 to 120 months (or 1
6 to 10 years), P&P should recommend 16 to 72 months in NDOC for a medium-risk defendant
7 like Mr. Briones. However, P&P recommends the maximum, 48 to 120 months, for Mr.
8 Briones in the PSI. The sentence recommendation in this case is inconsistent with P&P's own
9 scoring criteria.

10 On September 26, 2014, counsel for Mr. Briones contacted the PSI-writer in this case,
11 Leonard Frisch, regarding his sentencing recommendation. *See* Affidavit of Evelyn Grosenick
12 ¶ 2, attached as Ex. 5. Counsel for Mr. Briones asked Mr. Frisch about the discrepancy
13 between the SRSS and the recommended sentence. *Id.* ¶ 3. Counsel pointed out that Mr.
14 Frisch should have recommended 16 to 72 months according Mr. Briones' scores on the SRSS,
15 but Mr. Frisch recommends 48 to 120 months in the PSI. *Id.* Mr. Frisch asked if counsel was
16 familiar with progressive sentencing, and explained that he recommends the maximum because
17 Mr. Briones has prior felony convictions, including a prior burglary conviction. *Id.*

18 Counsel for Mr. Briones pointed out that Mr. Briones' prior felony convictions are
19 already factored into the sentencing recommendation through the PSP Total Score, because one
20 of the categories under Offense Score is the total number of felony convictions. *Id.* ¶ 4. Mr.
21 Frisch stated that the scoring documents do not account for all of Mr. Briones' prior felonies,
22 including a prior burglary conviction. *Id.* Counsel for Mr. Briones inquired as to whether there
23 were any written documents or guidelines issued by P&P that instructed Mr. Frisch to deviate
24 from the SSRS in this situation. *Id.* ¶ 5. Mr. Frisch stated that there were not any written
25 directives or policies supporting his deviation. *Id.*

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III. LEGAL ARGUMENTS

A. Mr. Briones Has a Fourteenth Amendment Due Process Right to Inspect P&P's

Scoring Documents

"[T]he sentencing process . . . must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* In *Gardner*, the United States Supreme Court recognized that defendants have a due process right to object to and rebut the basis of a sentencing recommendation. *Id.*

A sentence based upon mistaken or highly suspect information also denies a defendant due process under the Fourteenth Amendment. *See Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690 (1948) (holding that sentence based on materially untrue assumptions violated defendant's due process rights); *State v. Eighth Judicial Dist. In & For Clark Cnty.*, 100 Nev. 90, 96, 677 P.2d 1044, 1048 (1984) (same). This is true even if a judge's reliance on mistaken or highly suspect information is the result of mere carelessness. *Townsend*, 334 U.S. at 741. Due process is implicated regardless of whether the judge correctly perceived inaccurate information or incorrectly perceived accurate information. *United States v. Myers*, 374 F.2d 707, 710-12 (3rd Cir. 1967) (a judge's misinterpretation of correct information can deny a defendant due process); *United States v. Malcolm*, 432 F.2d 809, 816 (2nd Cir. 1970) ("Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.").

The District Court's reliance on a purportedly objective sentencing recommendation from P&P that, in reality, is subjective and deviates from P&P's own scoring criteria violates Mr. Briones' Fourteenth Amendment due process right. The only way to protect Mr. Briones'

1 Fourteenth Amendment due process right is to allow the defense to have access to the PSI
2 scoring documents so that the defense has an opportunity to comment on and rebut that
3 recommendation.

4 **B. Denying a Defendant's Counsel Access to P&P's Scoring Documents Violates His**
5 **Sixth Amendment Right to Effective Assistance of Counsel at Sentencing**

6 The Sixth Amendment guarantees the right of a defendant to the assistance of counsel at
7 all critical stages of the criminal proceeding, including sentencing. *United States v. Cronin*,
8 466 U.S. 648, 654, 104 S. Ct. 2039, 2044, 80 L. Ed. 2d 657 (1984) (noting that the Sixth
9 Amendment guarantees the right of effective assistance of counsel); *Gardner*, 430 U.S. at 358
10 (noting that a defendant is entitled to effective assistance of counsel at sentencing, because
11 sentencing is a critical stage in the criminal proceeding). "Even though the defendant has no
12 substantive right to a particular sentence within the range authorized by statute, the sentencing
13 is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of
14 counsel." *Gardner*, 430 U.S. at 358; *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936,
15 938 (1978) (recognizing the rule from *Gardner* as "well[-]established"). "If no actual
16 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has
17 been violated." *Cronin*, 466 U.S. at 654 (citation omitted). The right to effective assistance of
18 counsel is premised on the adversarial nature of our criminal justice system, which "is meant to
19 assure fairness." *Id.* at 655-56.

20 The Court is required to afford a defendant's counsel the opportunity to speak on behalf
21 of the defendant before sentence is imposed. NRS 176.015(2). Furthermore, a defendant,
22 through his counsel, has the right to "object to factual errors" in the PSI and "comment on any
23 recommendations." NRS 176.156(1).

24 Counsel cannot effectively comment on the PSI's recommendation on behalf of the
25 defendant if she does not know what facts and criteria P&P used to reach its recommendation.
26 In this case, the PSI recommends that Mr. Briones serve 48 to 120 months in the Nevada

1 Department of Corrections. Had P&P not disclosed its scoring documents to Mr. Briones'
2 counsel, counsel for Mr. Briones never would have known how P&P reached that
3 recommendation and would not have been able to effectively comment on that recommendation
4 at sentencing. In this case, counsel for Mr. Briones has the PSI scoring documents and can
5 point out to the Court that P&P's recommendation deviates significantly from P&P's own
6 scoring guidelines. According to the scores Mr. Frisch calculated for Mr. Briones and the
7 SRSS, P&P should have recommend 16 to 72 months. That is a difference of four years for the
8 maximum sentence.

9 In addition, there are several scoring criteria on the PSP worksheet with which counsel
10 disagrees. For instance, in the "Present Offense" section, Mr. Frisch gave Mr. Briones zero
11 points under "CoOffender" for being the leader or coercing others. Ex. 2. There are no facts in
12 the police reports or the PSI to suggest that Mr. Briones was the leader relative to his co-
13 defendant. Counsel for Mr. Briones believes Mr. Briones should have received one point for
14 sharing equal responsibility. In the "Pre-Sentence Adjustment" section, Mr. Frisch gave Mr.
15 Briones one point for being indifferent towards the instant offense. *Id.* However, Mr. Briones
16 clearly expresses remorse in the written statement attached to the PSI. Therefore, counsel for
17 Mr. Briones believes he should have received four points for being contrite. *Id.* These are just
18 two of many factors for which Mr. Briones' counsel disagrees with P&P's scoring.

19 Counsel for Mr. Briones never would have been able to comment effectively on P&P's
20 deviation from its own scoring guidelines or the scoring in this case if P&P had not produced
21 the PSI scoring documents to the defense. If the scoring documents had not been provided, Mr.
22 Briones would have had ineffective assistance of counsel at sentencing. This case demonstrates
23 exactly why denying the defense the opportunity to review P&P's scoring documents may deny
24 a defendant his right to effective assistance of counsel at sentencing. Further, allowing P&P to
25 recommend a sentence under the guise that the recommendation is based on objective criteria,

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1 when in fact it is not, violates the fundamental principle of fairness in the adversarial
2 proceeding, on which the Sixth Amendment right to effective assistance of counsel is based.

3 **C. Mr. Briones Has Statutory Rights to Inspect P&P's Scoring Documents**

4 Although the Attorney General portrays the PSI recommendations as merely a
5 subjective decision, NRS 213.10988(1) requires P&P to “formulat[e] a recommendation
6 regarding the granting of probation or the revocation of parole or probation” based on
7 “objective criteria.” It is unclear if the Attorney General is conceding that the current
8 presentence investigation process is subjective and, therefore, does not comport with the
9 obligations imposed by NRS 213.10988(1). However, if the recommendation is as subjective
10 as the Attorney General suggests, the Court and litigants have an even greater responsibility to
11 review the information for accuracy.

12 The PSI is more than a mere recommendation and its significance in the criminal
13 process cannot be overemphasized. The Court is required to consider P&P's recommendation
14 at sentencing. NRS 176A.100(3). “Because a court cannot base its sentencing decision on
15 information or accusations that are founded on impalpable or highly suspect evidence, the PSI
16 must not include information based on impalpable or highly suspect evidence.” *Gomez v. State*,
17 324 P.3d 1226, 1228 (Nev. 2014) (citations and internal quotation marks omitted). The Court
18 is also required to resolve disputes regarding the accuracy of the PSI before sentencing. *See*
19 *Sasser v. State*, 324 P.3d 1221, 1223 (Nev. 2014) (noting that pursuant to *Stockmeier*, the Court
20 must resolve a defendant's objections to the PSI before sentencing) (“Initially, we note that a
21 defendant has a right to object to his PSI and the district court will make a determination on the
22 PSI information, so long as the defendant objects to it at the time of sentencing.”).

23 The PSI remains a significant document even after sentencing, because it follows a
24 criminal defendant post-sentencing and affects prison classification, programming, and parole
25 eligibility. As the Nevada Supreme Court stated in *Stockmeier*: “We emphasize that even if
26 disputed factual statements do not affect a defendant's sentence, any significant inaccuracy

1 could follow a defendant into the prison system and be used to determine his classification,
2 placement in certain programs, and eligibility for parole, and thus, the defendant must promptly
3 seek to correct any alleged inaccuracies to prevent the Department of Corrections from relying
4 on a PSI that could not later be changed.” 255 P.3d at 214. Further, the PSI cannot be changed
5 or amended after sentencing. *Id.* at 213 (“Nothing in Nevada law gives the district court
6 express, implied, or inherent authority to amend a prisoner’s PSI post-sentencing.”). Therefore,
7 the disadvantages a defendant suffers as the result of an inaccurate PSI are compounded
8 through the sentencing and the post-sentencing process. First, the judge may rely on a sentence
9 recommendation that is not based on objective criteria in imposing a maximum sentence.
10 Subsequently, the Nevada Department of Corrections will rely on both the PSI and the sentence
11 imposed in determining eligibility for programming and parole.

12 As the Attorney General concedes, “parties to a criminal action have the right to object
13 to factual errors in a report” and “a right to ‘comment’ on any recommendations contained in a
14 report” at sentencing. AG’s Mot. to Quash 3:15-17 (Sept. 23, 2014) (hereinafter, “AG’s
15 Mot.”); NRS 176.156(1) (“The Division shall afford an opportunity to each party to object to
16 factual errors in any such report and to comment on any recommendations.”). Necessary to
17 exercise the right to comment on P&P’s sentencing recommendation is the right to review the
18 documentation P&P used to generate its recommendation. *Cf. Stockmeier*, 255 P.3d at 213
19 (“[A]fter preparing a PSI, the Division must disclose the report’s factual content to the
20 prosecuting attorney, defense counsel, and the defendant, and give the parties the opportunity to
21 object to any of the PSI’s factual allegations.”).

22 Mr. Briones has a right to review the PSI scoring documents so that his attorney can
23 comment on P&P’s recommendation at sentencing. *See* NRS 176.156(1). The litigants also
24 have the right to review the PSI scoring documents to ensure that P&P is complying with its
25 statutory obligations. Mr. Briones’ case presents a perfect example of why it is necessary for
26 defendants to have access to P&P’s scoring documents. The recommendation in this case

1 deviates drastically from P&P's own scoring guidelines. Mr. Frisch stated that there are no
2 written P&P guidelines or directives that instruct him to deviate from the SRSS to account for
3 Mr. Briones' prior felony convictions. Therefore, the recommendation in this case is not based
4 on objective criteria as required by NRS 213.10988 and any sentencing decision that relies on
5 the recommendation is founded on "impalpable or highly suspect evidence." *Stockmeier*, 255
6 P.3d at 213.

7 If P&P had not provided the PSI scoring documents in this case, Mr. Briones and the
8 Court would never have known why P&P is recommending 48 to 120 months. Mr. Briones and
9 the Court would never have known that this recommendation is based on Mr. Frisch's
10 subjective decision to deviate from P&P's guidelines. Instead, the Court and the parties would
11 have mistakenly relied upon the belief that the recommendation in this case was based on
12 objective criteria pursuant to NRS 213.10988. That is P&P's obligation by statute, after all.

13 **D. NRS 176.156 and NRS 213.1075 Do Not Preclude the Disclosure of the PSI Scoring**

14 **Documents**

15 The AG argues that the subpoena must be quashed because it seeks confidential
16 information, the disclosure of which is prohibited by NRS 176.156(5) and NRS 213.1075.
17 AG's Mot. 2:2-3:9.

18 NRS 176.156(5) states: "*Except for the disclosures required by subsections 1 to 4,*
19 *inclusive, a report of a presentence investigation or general investigation and the sources of*
20 *information for such a report are confidential and must not be made a part of any public*
21 *record.*" (Emphasis added).

22 The plain language of this statute, on its face, does not prohibit P&P from disclosing the
23 scoring documents to the defense.¹ In addition, the subsection on which the Attorney General

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25 ¹ Defense counsel is willing to file these documents under seal if the Court allows. Counsel for
26 Mr. Briones attempted to file P&P Scoring documents under seal in another case. However,
the request was denied by the Court, because the documents do not contain the date of birth,
social security number, or address of the defendant. *See Grosenick Aff.* ¶ 6. P&P has not

1 relies explicitly carves out an exception to dissemination for “disclosures required by
2 subsections 1 to 4.” NRS 176.165(5). As explained above, it is necessary for defense counsel
3 to review the PSI scoring documents in order to exercise the defendant’s right to comment on
4 P&P’s recommendation at sentencing.

5 NRS 213.1075 provides: “Except as otherwise provided by specific statute, all
6 information obtained in the discharge of official duty by an employee of the Division or the
7 Board is privileged and may not be disclosed directly or indirectly to anyone other than the
8 Board, the judge, district attorney or others entitled to receive such information, unless
9 otherwise ordered by the Board or judge or necessary to perform the duties of the Division.”
10 This statute allows disclosure if permitted by other statutes. As explained above, disclosure to
11 the litigants of P&P scoring documents is necessary to a defendant’s right to comment on the
12 sentencing recommendation in the PSI pursuant to NRS 176.165. In addition, it is reasonable
13 to conclude that a defendant is an “other[] entitled to receive such information.” NRS
14 213.1075.

15 Even if the Court were to interpret NRS 176.156(5) and/or NRS 213.1075 as precluding
16 release of the PSI scoring documents, these statutes must yield to a defendant’s constitutional
17 due process and effective assistance of counsel rights.

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26 objected to the filing of these documents under seal in other cases. *See id.* ¶¶ 6-7.

1 E. P&P Has Waived Any Objection to Releasing the P&P Scoring Documents to the
2 Defense²

3 P&P has waived any argument that it cannot release the P&P scoring documents to the
4 defense. P&P has regularly provided these documents to attorneys in the Public Defender's
5 Office, upon request, for many months. In addition, P&P Captain David Sonner made a
6 presentation regarding PSI's to the Nevada Legislature's Advisory Commission on the
7 Administration of Justice on May 1, 2014, at which he represented that P&P was providing the
8 scoring documents to attorneys when requested.

9 During that presentation, members of the Commission expressed concern that the P&P
10 scoring documents should be made available to the defense. Justice Hardesty echoed the
11 arguments made herein when he stated: "There was a concern in 2010, and I think repeated
12 again in 2012, in front of this Commission that the importance of providing the scores was the
13 very simple risk that an addition error could create a different result. And the defendant and
14 State had the right to know what were the assessments on these individual items." Video of
15 Mtg. of Nev. Leg. Adv. Comm'n on Admin. of Justice, May 1, 2014, at 3:04:55-3:05:30.³

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18 ² The Court may be inclined to find the Attorney General's Motion moot in this case because
19 P&P already provided the PSI scoring documents to Mr. Briones' counsel. *See* Ex. 2; *Nat'l*
20 *Collegiate Athletic Ass'n v. Univ. of Nevada, Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) ("A
21 moot case is one which seeks to determine an abstract question which does not rest upon
22 existing facts or rights." (citation omitted)). However, an issue is not moot if "the activity
23 complained of . . . is 'capable of repetition, yet evading review.'" *State v. Washoe Cnty. Pub.*
24 *Defender*, 105 Nev. 299, 300, 775 P.2d 217, 217-18 (1989). Mr. Briones' case "presents a
25 prime example of the type of situation which is capable of repetition yet evades review,"
because the Attorney General has filed similar motions in other cases in which P&P has not
already provided the defense with the PSI scoring documents. *Id.*, 775 P.2d at 218. P&P's
deviation from its own scoring criteria in this case demonstrates exactly why the litigants need
access to the PSI scoring documents.

26 ³ A video of these proceedings and the minutes are available at:
http://nvleg.granicus.com/MediaPlayer.php?publish_id=f99d1f98-22dc-1032-bf3f-792d77cd9eae (last accessed Oct. 2, 2014).

1 Larry Digesti, a representative of the State Bar of Nevada, inquired of Ct. Sonner:
2 “Captain, I want to go back and ask you a question with respect to the two forms that you
3 presented here today the Sentence Recommendation Selection Scale and the Probation Success
4 Probability, and kind of following up on an earlier question by Justice Hardesty, you responded
5 by answering that this information would be made available—or is available—to defense
6 counsel, if requested. Is that a fair statement?” *Id.* at 3:12:12-3:14:30. Cpt. Sonner responded:
7 “Yes. . . . My experience has been that if defense counsel requests the information and how it
8 was scored, we do provide that, yes.” *Id.* Cpt. Sonner further stated that P&P provides the
9 scoring documents on request and does not require a court order. *Id.*

10 P&P’s pattern of producing the PSI scoring documents in the past and their affirmative
11 representations to the Advisory Commission constitute waiver of any argument that they are
12 not permitted to release these documents to defense counsel.

13 **F. Any Burden on P&P Imposed by Producing the PSI Scoring Documents Is Not**
14 **“Undue” and Must Yield to a Defendant’s Constitutional and Statutory Rights**

15 The Attorney General argues that being required “to produce the documentation
16 underlying sentencing recommendations or provide testimony related to those sentencing
17 recommendations” will place an “undue and unreasonable burden on the Division, and will
18 likely result in the Division being unable to meet its statutory obligations with respect to PSI
19 preparation.” AG’s Mot. 4:15-18.

20 Based on the scoring documents in this case, it appears that P&P may have already
21 failed to meet its statutory obligations, because its recommendation in this case is not based on
22 objective criteria as required by NRS 213.10988. The sentencing recommendation in this case
23 is based on Mr. Frisch’s subjective decision to deviate from P&P’s scoring instruments. It
24 bears repeating that this practice would not have been discovered if the defense were denied the
25 opportunity to review the PSI scoring documents.

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1 In addition, the Attorney General's argument that providing the PSI scoring documents
2 to the litigants is overly burdensome is undermined by P&P's quick response to the informal
3 request made in this case. Ms. Griffin of the Washoe County Public Defender's Office emailed
4 an informal request for the PSI scoring documents to Melinda Ridgley of P&P on September
5 11, 2014 at 7:50 a.m. *See* Ex. 1. Ms. Ridgley faxed the requested documents to the Public
6 Defender's Office less than five hours later, at 12:36 p.m. *See* Ex. 2.

7 The only burden on P&P is to fax to the litigants a copy of PSI scoring documents that
8 have already been completed by the PSI writer. No new document needs to be generated by the
9 PSI writer. P&P's past record of being able to produce the documents within a few days, or on
10 the same day as requested, as in this case, undermines the Attorney General's argument that
11 producing these documents creates an unreasonable burden.

12 In addition, the Attorney General's assertion that P&P will be burdened by subpoenas
13 requiring P&P representatives to testify in court is speculative. *See* Natalie Wood Decl. ¶ 12,
14 attached as Ex. 2 to AG's Mot. Neither the informal request for the PSI scoring documents or
15 the subpoena in this case requested anyone from P&P to personally appear in Court. *See* Exs. 1
16 & 4. If the Court is concerned about how often a party subpoenas a P&P representative to
17 appear personally in court, the Court may wish to hold an evidentiary hearing to inquire into
18 that allegation.

19 The Attorney General's assertion that it is already overburdened by having to interview
20 all defendants facing sentencing for felony and gross misdemeanor charges is also
21 questionable. Counsel for Mr. Briones spoke with another PSI writer, Jennifer Iveson,
22 regarding a different case on September 25, 2014. *Grosenick Aff.* ¶ 8. Ms. Iveson stated that
23 PSI writers do not interview defendants who are only facing gross misdemeanor charges. *Id.*

24 The Attorney General also complains that P&P lacks the budget and the resources to
25 provide copies of the PSI scoring documents to the litigants. AG's Mot. 5:3-13. Budgeting
26 and resources are issues for the Legislature to address. While the Public Defender's Office

1 appreciates resource constraints, what should not be lost is that defense counsel have also taken
2 on the additional burden of reviewing PSI scoring documentation and commenting as
3 appropriate. If P&P is already unable to satisfy its statutory obligation to make sentencing
4 recommendations based on objective criteria, and subjecting its inherently flawed process to
5 inspection in order to expose this problem presents an even greater burden, then perhaps it is
6 time to rethink the PSI entirely.

7 In the interim, even if subjecting P&P's scoring process to transparency imposes a
8 burden on P&P, that burden is not "undue" or "unreasonable" in light of a defendant's statutory
9 rights and constitutional due process and effective assistance of counsel rights.

10 IV. CONCLUSION

11 Mr. Briones has constitutional due process and effective assistance of counsel rights, as
12 well as statutory rights, to inspect the PSI scoring documents used to generate P&P's sentence
13 recommendation. NRS 176.156(5) and NRS 213.1075 do not prohibit P&P from allowing
14 litigants to inspect these documents, and P&P has already waived any such argument through
15 its past conduct and representations to the Legislative Advisory Committee. Further, Mr.
16 Briones' constitutional rights trump any statute or any burden imposed on P&P in disclosing
17 the PSI scoring documents. The PSI writer's deviation from the scoring criteria in this case
18 demonstrates exactly why defendants need to be permitted access to the PSI scoring
19 documents.

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1 For the stated reasons, Mr. Briones respectfully requests that the Court deny the
2 Attorney General's motion and permit Mr. Briones to rely on the PSI scoring documents, which
3 have already been produced in this case, during argument at sentencing.

4 **AFFIRMATION PURSUANT TO NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document does not contain the
6 social security number of any person.

7 DATED this 3rd day of October, 2014.

8 JEREMY T. BOSLER
9 Washoe County Public Defender

10 /s/ EVELYN GROSENICK
11 EVELYN GROSENICK
12 Deputy Public Defender
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Deputy District Attorney
Nevada Division of Parole and Probation
Attorney General
Via ECF System

/s/ LINDA GRAY
LINDA GRAY

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Acting Clerk of the Court
Transaction # 4636892 : shambrig

EXHIBIT 1

EXHIBIT 1

Griffin, Erin M.

From: Griffin, Erin M.
Sent: Thursday, September 11, 2014 7:50 AM
To: npprecords@dps.state.nv.us
Subject: Scoring Document request from Washoe County Public Defender
Attachments: Briones P&P request.pdf

Hi Melinda,

Attached is a request for Scoring Documents.

If you have any problems or questions let me know.

Thanks.
Erin

*Erin Griffin
Criminal Investigator
Washoe County Public Defender
PO Box 11130
Reno, NV 89520-0027
Phone 775-337-4836
Fax 775-337-4856
egriffin@washoecounty.us*



Washoe County Public Defender

Jeremy T. Bosler / Public Defender

Standard of Excellence Since 1969

Attorneys at Law

September 11, 2014

Melinda Ridgely
DPS Parole and Probation
Custodian of Records

Melinda,

The Washoe County Public Defender's Office currently represents FERNANDO BRIONES,
DOB 06/20/1977 last 4 of SS# 7353.

We are requesting a copy of the Scoring Documents, including the Probation Success
Probability, Sentence Recommendation Selection Scale documents and the PSR Questionnaire
on Fernando Briones.

Documents can be returned via fax or email, if appropriate. If not please call me, Erin Griffin, at
775-337-4836 when the records are ready to be picked up.

Thank you,

Erin Griffin
Washoe County Public Defender Investigator
PO BOX 11130
Reno, NV 89520-0027
p. 775-337-4836
f. 775-337-4856

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EXHIBIT 2

EXHIBIT 2

Brian Sandoval
Governor



James M. Wright
Director

Natalie Wood
Chief

DIVISION OF PAROLE AND PROBATION

September 11, 2014

PROBATION SUCCESS PROBABILITY (PSP) SCORE

Offender:	BRIONES, FERNANDO	Offense Score Total:	25
PSI #:	447992	Social Score Total:	16
BIN #:	1003721189	Raw Score Total:	21
Case #:	CR14-0440B	Total PSP Score:	41

Prior Criminal History:

Felony Convictions:	-1 = 2 or More	Jail Sentences:	1 = 2 or less
Misdemeanor Convictions:	0 = 4 or more	Juvenile Commitments:	2 = None/or over 24
Pending, unrelated cases:	0 = Felony	Years free of Conv:	2 = 3 - 5
Subsequent Crim Hist:	2 = None	Prior Formal Suprv:	0 = More than 1
Prior Incarcerations:	0 = 2 or more	Criminal Pattern:	-2 = History of Violence

Present Offense:

Circumstances of Arrest:	2 = Non-prob.	Sophistication/Premeditation:	1 = Moderate
Type of Offense:	2 = Property	Plea Bargain Benefits:	1 = Somewhat
Psych or Medical Impact:	3 = N/A	Financial Impact:	2 = Minimal or no loss
Weapon:	3 = N/A	CoOffender:	0 = Leader/Coerced Others or NONE
Controlled Substances:	3 = N/A	Motive:	0 = Deliberate

Raw Score x 1.2 = Offense Score Total: 25

Social History:

Age:	2 = 25 - 39	Family Situation:	2 = Moderately Supportive
Employment/Program:	2 = Sporadic	Education:	2 = High School/GED/Vo-Tech Cert
Financial:	1 = Inadequate	Military:	1 = Hon Discharge/No Mil Service
Employability:	1 = Could be developed		

Pre Sentence Adjustment:

Commitment/Ties:	1 = Home State	Resource Availability:	2 = Available
Program Participation:	3 = N/A	Substance Drug:	-2 = Serious Abuser/Addict
Honesty/Cooperation:	0 = Deceptive	Substance Alcohol:	0 = Excessive
Attitude/Supervision:	0 = Negative	Attitude/Offense:	1 = Indifferent

Social Score Total: 16

Offense Score + Social Score = PSP TOTAL SCORE: 41

DEPARTMENT OF PUBLIC SAFETY
DIVISION OF PAROLE AND PROBATION

SENTENCE RECOMMENDATION SELECTION SCALE

OFFENDER'S NAME: FERNANDO BERNES CC# CR14-044B
 CT: OFFENSE: BURGLARY NRS: 205.060 CATEGORY: B
 REC: Prison PROB ONLY NON-PROBATION
 CT: OFFENSE: NRS: CATEGORY:
 REC: PROB ONLY NON-PROBATION
 CT: OFFENSE: NRS: CATEGORY:
 REC: PROB ONLY NON-PROBATION

PSP TOTAL SCORE: 41 X 0-54 = DENIAL 55-64 = BORDERLINE 65-100 = PROBATION

DEVIATION JUSTIFICATION: In to Prison OR Out to Probation

<input type="checkbox"/>	In/Prison	<input type="checkbox"/>	Out/Prob
<input type="checkbox"/>	In/Prison	<input type="checkbox"/>	Out/Prob
<input type="checkbox"/>	In/Prison	<input type="checkbox"/>	Out/Prob

CRIMINAL HISTORY/OFFENSE RAW SCORE: 21

REFERENCE & GUIDE TO MAX SENTENCE AND MINIMUM PAROLE ELIGIBILITY

(NOTE: CIRCLE CORRESPONDING RANGE OF MONTHS (RANGE) BELOW)

SENTENCE IN YEARS	SENTENCE RANGE	LOW (39-49 MOS)	MODERATE (28-38 MOS)	MEDIUM (17-27 MOS)	MED-HIGH (8-16 MOS)	HIGH (-3-8 MOS)
1-4	MAXIMUM (SUGGESTED MAX) MINIMUM	30-48 (39) 12 MOS	30-48 (32) 12 MOS	30-48 (24) 12 MOS	30-48 (16) 12 MOS	30-48 (8) 12 MOS
1-5	MAXIMUM (SUGGESTED MAX) MINIMUM	30-60 (39) 12 MOS	30-60 (32) 12 MOS	30-60 (24) 12 MOS	30-60 (16) 12 MOS	33-60 (8) 12 MOS
1-6	MAXIMUM (SUGGESTED MAX) MINIMUM	30-72 (39) 12 MOS	30-72 (32) 12 MOS	30-72 (24) 12 MOS	33-72 (16) 13 MOS	40-72 (8) 16 MOS
1-10	MAXIMUM (SUGGESTED MAX) MINIMUM	30-120 (39) 12 MOS	30-120 (32) 12 MOS	40-120 (24) 16 MOS	55-120 (16) 22 MOS	65-120 (8) 28 MOS
2-10	MAXIMUM (SUGGESTED MAX) MINIMUM	60-120 (39) 24 MOS	60-120 (32) 24 MOS	60-120 (24) 24 MOS	60-120 (16) 24 MOS	65-120 (8) 26 MOS
2-15	MAXIMUM (SUGGESTED MAX) MINIMUM	60-180 (39) 24 MOS	60-180 (32) 24 MOS	65-180 (24) 26 MOS	88-180 (16) 35 MOS	100-180 (8) 40 MOS
3-15	MAXIMUM (SUGGESTED MAX) MINIMUM	90-180 (39) 36 MOS	90-180 (32) 36 MOS	90-180 (24) 36 MOS	90-180 (16) 36 MOS	100-180 (8) 40 MOS
5-15	MAXIMUM (SUGGESTED MAX) MINIMUM	150-180 (39) 60 MOS	150-180 (32) 60 MOS	150-180 (24) 60 MOS	150-180 (16) 60 MOS	150-180 (8) 60 MOS
1-20	MAXIMUM (SUGGESTED MAX) MINIMUM	30-240 (39) 12 MOS	55-240 (32) 22 MOS	80-240 (24) 32 MOS	108-240 (16) 48 MOS	133-240 (8) 53 MOS
2-20	MAXIMUM (SUGGESTED MAX) MINIMUM	60-240 (39) 24 MOS	60-240 (32) 24 MOS	80-240 (24) 32 MOS	108-240 (16) 43 MOS	133-240 (8) 53 MOS
5-20	MAXIMUM (SUGGESTED MAX) MINIMUM	150-240 (39) 60 MOS	150-240 (32) 60 MOS	150-240 (24) 60 MOS	150-240 (16) 60 MOS	150-240 (8) 60 MOS

(ALL RECOMMENDATIONS THAT DO NOT CORRESPOND WITH "SUGGESTED MAX" & "MINIMUM" MUST INCLUDE RANGE DEVIATION JUSTIFICATION)

CT: ALL Felonies are vehicle or property T or F
 CT: offenses %
 CT: %

OFFICER'S NAME/CID#

DATE

SUPERVISOR'S APPROVAL

DATE

SOCIAL SCORE

Social History									
Age	Family Situation	Education	Employment/Program	Military	Employability	Racial			
0 Certified Adult	Disruptive	Unknown	0 Almost Non-existent	0 Other	0 Unemployable	Unknown			
1 Under 25	Non-Supportive/Non-Existent	Incomplete	2 Sporadic	1 Hon Discharge/No Military Service	1 Could be developed	Inadequate			
2 25-39	Moderately Supportive	High School/ GED/ Voc Tech Cert	4 Continuous/ Housewife		2 Ready/ Not Needed	Could be Developed			
3 40 or More	Constructive Support	College or Tech Program Completed			4 Adequate				

Presentence Adjustment									
Commitment/ Ties	Resource Availability	Substance Alcohol	Substance Drug	Program Participation	Honesty/ Cooperation	Attitude/ Supervision	Attitude-Offense		
0 None	Unavailable	0 Excessive	-2 Serious Abuser/ Addict	0 Refused	0 Deceptive	0 Negative	0 Denies		
1 Home State	Available	2 Problematic	0 Regular Use	0 Failure	1 Reluctant	1 Indifferent	1 Indifferent		
2 Local/ In State	Pre-Determined/Not needed	1 Non-Problematic	1 Occasional	1 Planned/Current	2 Chival	2 Positive	4 Continue		
			3 No Use	2 Completed					

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EXHIBIT 3

EXHIBIT 3

**Division of Parole & Probation**

1445 Old Hot Springs Rd, Suite 104

Carson City, NV 89706

Telephone: 775-684-2611

Fax: 775-684-2693

From: Melinda Ridgely AAI**Custodian of Records****Command: Headquarters ~ General Services~
Records****FAX COVER SHEET****TO: Erin Griffin****DATE: 9/17/2014****FAX#: 337-4856****PAGES: 2 including this cover sheet****SUBJECT: Fernando Briones****ATTENTION:**☐ *Urgent*☐ *As Requested*☐ *For Review*☐ *As We Discussed*☐ *Please Comment/Recommend*☒ *For Your Information*☐ *Please Handle/Reply*☐ *Other***COMMENTS:**

I have been instructed that all score sheets and PSR questionnaire will require a Subpoena once received we will send on to the Attorney Generals for direction

******CONFIDENTIAL******

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE AND ANY AND ALL ACCOMPANYING DOCUMENTS ARE THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF PAROLE AND PROBATION, AND ARE PRIVILEGED AND CONFIDENTIAL. THE INFORMATION CONTAINED HEREIN IS INTENDED ONLY FOR THE USE OF THE DESIGNATED RECIPIENT NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION, OR THE TAKING OF ANY ACTION IN RELIANCE ON THIS INFORMATION IS STRICTLY PROHIBITED.

IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS SHOWN ABOVE VIA THE U. S. POSTAL SERVICE. THANK YOU.

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EXHIBIT 4

EXHIBIT 4

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EXHIBIT 5

EXHIBIT 5

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AFFIDAVIT OF EVELYN GROSENICK

STATE OF NEVADA)

 : ss.

COUNTY OF WASHOE)

I, EVELYN GROSENICK, having been duly sworn, and testifying under penalty of perjury hereby depose and state:

1. Your affiant is a licensed Nevada attorney, in good standing, and counsel of record for Defendant Fernando Briones in CR14-0440B.
2. On September 26, 2014 at 10:30 a.m., I spoke with Nevada Division of Parole and Probation PSI Writer Leonard Frisch via telephone.
3. I asked Mr. Frisch about the discrepancy between the Sentencing Recommendation Selection Score, pursuant to which Mr. Frisch should have recommended 16 to 72 months, and his recommendation of 48 to 120 months. Mr. Frisch asked if counsel was familiar with progressive sentencing and explained that he recommends the maximum because Mr. Briones has prior felony convictions, including a prior burglary conviction.
4. I pointed out that Mr. Briones' prior felony convictions are already factored into the sentencing recommendation through the PSP Score Total, because prior felony convictions is one of the subcategories in the Offense Score section. Mr. Frisch stated that the scoring documents do not account for all of Mr. Briones' prior felonies, including a prior burglary conviction.
5. I inquired as to whether there were any written P&P documents or guidelines that instructed Mr. Frisch to deviate from the Sentence Recommendation Selection Scale in this situation. Mr. Frisch responded that there were not.

1 6. In *State v. Diaz-Diaz*, CR14-0626 and CR14-0627, I used the PSI scoring documents
2 to challenge P&P's sentencing recommendations in those two cases. I attempted to have the
3 documents filed under seal. The Second Judicial District Court denied this request, because the
4 documents did not contain social security numbers, dates of birth, or addresses. P&P never
5 objected to the filing of the PSI scoring documents in that case.
6

7 7. I used the PSI scoring documents to challenge P&P's sentencing recommendation in
8 *State v. Anacleto*, CR14-0793. P&P never objected to the filing of the PSI scoring documents
9 in that case.

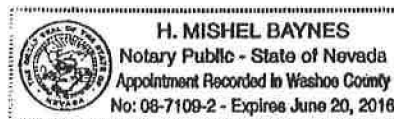
10 8. On September 25, 2014, I spoke with PSI writer Jennifer Iveson in regard to another
11 case, *State v. Morris*, CR14-1200. I asked whether she had attempted to interview Mr. Morris
12 in connection with the PSI she wrote in that case. Ms. Iveson told me that as a matter of policy
13 they do not interview defendants charged only with gross misdemeanors.
14

15 DATED this 3rd Day of October, 2014.
16

17
18 
19 EVELYN GROSENICK

20 Subscribed and sworn to before me this 3rd day of October, 2014
21

22
23 
24 NOTARY PUBLIC
25
26



4301
CATHERINE CORTEZ MASTO
Attorney General
NATHAN L. HASTINGS
Deputy Attorney General
Nevada Bar Number: 11593
555 Wright Way
Carson City, Nevada 89711
(775) 684-4605

Attorneys for Nevada Parole and Probation

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

STATE OF NEVADA,

Case No: CR14-0440B

Plaintiff,

Dept. No: 10

v.

FERNANDO BRIONES,

Defendant.

NOTICE OF WITHDRAWAL OF MOTION TO QUASH SUBPOENA DUCES TECUM

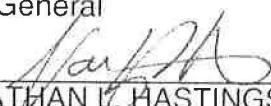
The State of Nevada, Department of Public Safety, Division of Parole and Probation (Division), by and through its attorneys, CATHERINE CORTEZ MASTO, Attorney General, and NATHAN L. HASTINGS, Deputy Attorney General, hereby gives notice of its withdrawal of its Motion to Quash Subpoena Duces Tecum, which was filed on September 23, 2014.

Upon the filing of the Division's Motion to Quash, the Court issued an Order vacating the September 30, 2014, sentencing to allow for full briefing of the Motion to Quash prior to sentencing in this case. (See Order dated September 26, 2014). The Division's withdrawal of its Motion to Quash removes the need for further briefing; the previously scheduled sentencing is ripe to be rescheduled consistent with the Court's September 26, 2014, Order.

DATED this 15 day of October, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By:


NATHAN L. HASTINGS
Deputy Attorney General

Attorneys for Nevada Parole & Probation

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of Plaintiff's NOTICE OF WITHDRAWAL OF MOTION TO QUASH, addressed to:

EVELYN GROSENICK
WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
P.O. BOX 11130
RENO, NEVADA 89520

ADAM D. CATE
WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
P.O. BOX 11130
RENO, NEVADA 89520

DATED this 15th day of October, 2013.


JANICE M. RIHERD
An Employee of the State of Nevada


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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF WITHDRAWAL OF MOTION TO QUASH SUBPOENA DUCES TECUM filed in District Court Case No. CR14-0440B does not contain the social security number of any person.

Date: 10/15/14

CATHERINE CORTEZ MASTO
Attorney General

By: 
NATHAN L. HASTINGS
Deputy Attorney General

Attorneys for Nevada Parole and Probation

1 CODE: 4185
2 DAWN B. GUSTIN, CCR #253
3 Peggy Hoogs & Associates
4 435 Marsh Avenue
5 Reno, Nevada 89509
6 (775) 327-4460
7 COURT REPORTER

8 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF WASHOE
10 THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

11 --ooOoo--

12 THE STATE OF NEVADA,) Case No. CR14-0440B
13 Plaintiff,) Dept. No. 10
14 vs.)
15 FERNANDO BRIONES,)
16 Defendant.)
17 =====

18 -*- ROUGH DRAFT -*-

19 TRANSCRIPT OF PROCEEDINGS

20 SENTENCING

21 THURSDAY, OCTOBER 30, 2014

22
23
24 Reported by: DAWN BRATCHER GUSTIN, CCR 253, RPR, CRR
California CSR 7124

1 APPEARANCES:

2 FOR THE PLAINTIFF: ROY L. STRALLA, ESQ.
3 Deputy District Attorney
4 1 S. Sierra St., 4th Floor
Reno, Nevada 89501

5 FOR THE DEFENDANT: EVELYN A. GROSENICK, ESQ.
6 Deputy Public Defender
7 350 S. Center St., 5th Floor
Reno, Nevada 89501

8 FOR THE DIVISION OF JENNIFER IVESON
9 PAROLE AND PROBATION:

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1 --oOo--

2 RENO, NEVADA, THURSDAY, OCTOBER 30, 2014, 10:11 A.M.

3 --oOo--

4
5 THE COURT: The next matter is The State of
6 Nevada vs. Fernando Briones, CR14-0440B. Mr. Briones
7 appears in court in custody with his attorney,
8 Ms. Grosenick. Mr. Stralla is here on behalf of the
9 State of Nevada. Ms. Iveson is here on behalf of the
10 Division of Parole and Probation. This is a sentencing.

11 Ms. Iveson, are there any additions,
12 corrections or deletions to make to the September 10th,
13 2014 file-stamped Presentence Investigation Report?

14 MS. IVESON: No, your Honor.

15 THE COURT: The Court has received and
16 reviewed that document. Further, the Court has received
17 and reviewed the September 26th, 2014 file-stamped
18 documents submitted by defense for consideration at
19 sentencing. The Court has also received and reviewed the
20 October 15th, 2014 Notice of Withdrawal of Motion to Quash
21 Subpoena Duces Tecum. That was filed by the Attorney
22 General's office in response to a subpoena issued for
23 sentencing documents filed by the defendant.

24 This matter had previously been scheduled for

1 sentencing on September 30th of 2014. The defendant had
2 subpoenaed documentation from the Division of Parole and
3 Probation and the State had not had an opportunity to
4 respond and, therefore, the Court continued the
5 sentencing by way of order file-stamped September 26th of
6 2014. But it would appear that the defense now has the
7 documents that they were seeking from the Division of
8 Parole and Probation so we are ready to go forward this
9 morning.

10 The Court has also received and reviewed the
11 July 9th, 2014 file-stamped Substance Abuse Evaluation
12 filed under seal. The Substance Abuse Evaluation in this
13 case was prepared by Janice Fung and I have reviewed that
14 document as well.

15 Well, one additional thing, I did go back and
16 review the June 6th, 2014 file-stamped court ordered
17 evaluations in this case because I always think those are
18 important at sentencing as well.

19 Ms. Grosenick, are we ready to go forward
20 this morning?

21 MS. GROSENICK: We are, your Honor.

22 THE COURT: Do you have a copy of the
23 Presentence Investigation Report and do you have any
24 additions, corrections or deletions that you would like

1 to make?

2 MS. GROSENICK: We do have a copy, your
3 Honor, and I would ask to have the credit time served
4 corrected. It looks like the credit time served was
5 calculated through September 30th in this PSI and I
6 believe it should be through today which is October 30th,
7 so I would add an additional 30 days for a total of 276
8 days.

9 THE COURT: Do you agree with that,
10 Ms. Iveson?

11 MS. IVESON: Yes, your Honor, I do.

12 THE COURT: 276 days.

13 I've made that correction on page 10 of the
14 Presentence Investigation Report and initialed and dated
15 it. So let's go forward.

16 MS. GROSENICK: Thank you, your Honor.

17 First, I'd like the talk briefly about how
18 Mr. Briones got to Reno. He grew up in an extremely
19 rough neighborhood in Los Angeles. He was fortunate to
20 have a good family, good mother and father, and he was
21 able to stay out of the gangs which is unlike many of the
22 people he went to school with. Mr. Briones dropped out
23 of high school before he graduated so that he could start
24 working. He did eventually earn his GED during his last

1 incarceration which was at the High Desert State Prison
2 in Susanville.

3 Mr. Briones developed some substance abuse
4 issues fairly early on as reported by Ms. Fung. He began
5 drinking alcohol in high school and when he was 20 he
6 started using methamphetamine. His disease has
7 progressed to the point at which prior to his arrest he
8 was smoking methamphetamine and drinking alcohol almost
9 daily.

10 His substance abuse issue is directly related
11 to this case. The police reports indicate that
12 Mr. Briones had been using both methamphetamine and
13 alcohol on the day of his arrest in this case so he was
14 not making rationale decisions at that time. And I think
15 it's important to note that he hasn't received treatment
16 for these issues.

17 More specifically I don't know if the Court
18 is aware of this practice, but when parolees are released
19 from the California State Prison in Susanville, they are
20 put on a van and dropped off in downtown Reno with the
21 hope that they will go to the Greyhound station. So
22 Mr. Briones was dropped off in early January 2014 with
23 \$200. He was dropped off in downtown Reno and that's
24 basically how he got there. He was incarcerated in

1 Susanville from 2009 to early January 2014 and the intent
2 was to send him to Reno so that he could get back to
3 California to start parole in Los Angeles.

4 When Mr. Briones arrived here all he had was
5 the \$200 that the California prison system gave him and a
6 bag that had the only things in his possession which was,
7 primarily consisted of letters that he had received from
8 family while incarcerated.

9 The same day that he arrived here in Reno, he
10 slipped on ice and cut his forehead open. You can
11 actually see he still has a scar above his eyebrow from
12 that. While he was on the ground, the individual that he
13 got off the bus with took his entire bag of things and so
14 Mr. Briones basically lost everything and had no way to
15 reach his family except for knowing his mother's address
16 by heart fortunately. And since his head injury he has
17 had some trouble with memory.

18 So it was in this state that Mr. Briones
19 found himself in downtown Reno. He did stay at the
20 shelter, the homeless shelter and resumed his drug and
21 alcohol addiction here in Reno.

22 So for that reason, your Honor, because of
23 his -- Oh, I'm sorry. Before I get into what we're
24 asking for, I also want to talk about what he did.

1 Mr. Briones broke the window of an unoccupied parked car
2 with a rock.

3 THE COURT: It was two. Were there two cars?

4 MS. GROSENICK: Yes, he --

5 THE COURT: Well, he and his codefendant
6 broke into two cars.

7 MS. GROSENICK: Correct.

8 THE COURT: One window was broken.

9 MS. GROSENICK: Correct.

10 THE COURT: All right.

11 MS. GROSENICK: He admits to breaking the
12 window and he's taking responsibility for that and I'm
13 not saying that's not a crime, it absolutely is, that's
14 why he's willing to plead guilty to an offense that
15 carries prison time for that. However, what he did was
16 not a violent crime. The car was parked, it was
17 unoccupied. No law-abiding citizens were put in any
18 danger and on the scale of what fits a burglary, I
19 believe this is at the less severe end. It's not a
20 situation where he's creeping around in somebody's house
21 taking things.

22 The owner of the car reported a loss of \$2 in
23 change and I believe possibly the cost of the window, but
24 we haven't received any documentation regarding that.

1 But now Mr. Briones faces one to ten years in prison.

2 So he's got a documented addiction to drugs
3 and alcohol which he was under the influence of when he
4 committed the crimes in this case, he has a head injury,
5 he's lost all his worldly possessions and he's homeless,
6 and it's in that context in which he committed the crimes
7 in this case.

8 He's been accepted to the Salvation Army
9 program. I do have an e-mail from Steve Andrea. I don't
10 believe I filed it with the Court. So we are asking for
11 him to be given a chance at probation and receive
12 treatment. I'm sure the State will object to that, but
13 he does desperately need treatment through the Salvation
14 Army or Drug Court or counseling.

15 If you're not inclined to grant him that
16 opportunity, then we would request that you impose a
17 sentence of about 12 to 30 months so that after his
18 prison sentence is completed here, he can get back to
19 California and resume his life there.

20 Now I would like to comment on P & P's
21 sentencing recommendations. I filed some documents to be
22 considered at time of sentencing, which I believe your
23 Honor has read.

24 THE COURT: I have.

1 MS. GROSENICK: These are the PSI scoring
2 documents that P & P used to come up with the
3 recommendation for Mr. Briones and they are recommending
4 the maximum of 48 to 120 months which is four to ten
5 years.

6 I assume that your Honor has not read the
7 AG's motion and our opposition thereto because the AG
8 withdrew that motion very shortly after we filed the
9 opposition.

10 THE COURT: That's true, I didn't review
11 either because they weren't submitted to the court for
12 consideration so I didn't --

13 MS. GROSENICK: Correct.

14 THE COURT: -- review them.

15 MS. GROSENICK: Okay. So I will provide some
16 background information if it's helpful to the Court
17 regarding the documents that I filed to be considered for
18 sentencing.

19 THE COURT: I'm very familiar with the
20 documents, I'm familiar with the grids that are contained
21 on the documents. I know exactly what they mean. Just
22 so the record is totally clear, at the request of Chief
23 Judge Hardy I participated in and actually led a -- I
24 don't want to use the term task force because I think

1 that makes it sound much more involved than it was, but I
2 led a group to try and analyze the procedure by which
3 criminal defense attorneys were seeking the types of
4 documents that you have provided from the Division of
5 Parole and Probation, so I know probably more than most
6 judges about what those documents are and what the
7 meaning of them are. So you don't need to try and
8 educate me, though I don't want you to take that as an
9 indication that I'm upset or offended, I just, I know
10 what they are. So go ahead.

11 MS. GROSENICK: Okay. Thank you very much,
12 your Honor. And I'm actually very happy to hear that.
13 This is an ongoing issue, although the AG did withdraw
14 its motion in this case, it has filed a new motion to
15 quash in another case so that will be coming up before
16 your Honor not too long from now. And I think this case
17 is actually a significant one to be considered in the
18 ongoing debate in light of information I'm about to
19 present to you.

20 THE COURT: Okay.

21 MS. GROSENICK: So since you have not had a
22 chance to represent -- or to review our opposition, the
23 only exhibit that I would reference from that is Exhibit
24 5 which is my own personal affidavit regarding my

1 conversation with Mr. Frisch who is the P & P officer who
2 prepared this PSI.

3 So your Honor's aware of the significance of
4 the raw, the raw score and the PSP total score, I
5 believe. These scores just briefly are used. P & P
6 basically tries to use facts concerning the criminal
7 charge in this case, the defendant's criminal history and
8 socioeconomic factors to come up with numerical scores
9 which they plug into a formula and then they use a chart
10 to determine what they'll recommend to the Court.

11 So the two scores that are the most
12 significant are the raw score total and the PSP total
13 score. The raw score is what determined whether or not
14 P & P should recommend probation or not and the PSP total
15 score is used to determine what sort of risk a defendant
16 presents as far as being successful on parole and
17 probation or reoffending, I suppose.

18 In this case Mr. Briones' raw score is 21, so
19 if you turn to the second page in the documents the
20 defense submitted --

21 THE COURT: I think his raw score actually is
22 25, isn't it?

23 MS. GROSENICK: I believe that's the offense
24 score total.

1 THE COURT: Oh, that's correct, I apologize.

2 MS. GROSENICK: Um-hum.

3 THE COURT: The raw score is found right
4 above -- Go ahead.

5 MS. GROSENICK: Correct. So the raw score
6 is --

7 THE COURT: 21.

8 MS. GROSENICK: 21, correct, and the PSP
9 total score is 41. And I'm sorry, I had that backwards.
10 The PSP total score is the one that determines whether or
11 not P & P will recommend probation. So on the second
12 page in the document we filed, that's the sentence
13 recommendation selection scale. Mr. Briones' PSP total
14 score as calculated by P & P was 41. That puts him in
15 the category for a denial of probation in this case so
16 that's why P & P is recommending denial.

17 I did, I did go through and I scored
18 Mr. Briones on what I believed his score would be and it
19 still came in under 64, so I'm not challenging that
20 recommendation.

21 His raw score is 21 as reported by -- below.
22 In that table, as your Honor is aware, the left-hand, the
23 leftmost column lists various penalty ranges, statutory
24 sentence ranges and then the top row lists whether the

1 person's low, moderate, medium, medium high or high risk
2 and so what you do is you go over -- he's rated a 21 raw
3 score, that puts him in the medium category which is the
4 fifth column over from the left and then you go down four
5 to the fifth row across which is a sentencing range of
6 one to ten. So according to P & P's own documents,
7 that's recommending 16 to 72 months. That's what I
8 believe that based on how P & P scored this they should
9 have recommended to the Court. So that's 16 to 72 months
10 in prison; however, they're recommending 48 to 120. So
11 that's a difference of one and a half to six years to
12 four to ten. It's a significant difference.

13 And the other thing I'd like to point out
14 about that recommendation, I did contact the PSI writer.
15 As your Honor previously indicated that might be helpful
16 to try to work it out before we get in front of your
17 Honor. I contacted Mr. Frisch regarding this PSI, asked
18 him why the discrepancy between his recommendation and
19 what the table said and he indicated that it was due to
20 the concept of progressive sentencing, but that there
21 were no specific guidelines for P & P as to when to
22 deviate from the table for something like progressive
23 sentencing. So his deviation was not according to Parole
24 and Probation's own guidelines. He's recommending a

1 maximum sentence of four to ten years.

2 And the other thing I'd like to note is that
3 even if Mr. Briones would have been found a high risk to
4 offend, this table tells P & P to recommend 26 to 120.
5 So that's a lower minimum than this table -- or this
6 table recommends a lower minimum than P & P is
7 recommending so they're going even off their own chart.

8 THE COURT: But based on that argument,
9 Ms. Grosenick, the Court would -- or the Division of
10 Parole and Probation would never recommend the maximum
11 sentence. I mean, because when you look at --

12 MS. GROSENICK: Well, this --

13 THE COURT: -- just to use Mr. Briones's case
14 as an example, when you look at the high-end sentence
15 recommendation for one to ten, felony, it comes in at 28
16 months on the bottom. I think that's an eight. I can't
17 tell if it's a six or an eight, the print is a little
18 smudged. Maybe it's a six.

19 Ms. Iveson, is that a six or an eight?

20 MS. IVESON: The maximum is 26, your Honor.

21 THE COURT: Okay. So 26 months -- or the
22 minimum is 26, the maximum is between 65 and 120 months.
23 And so based on your analysis the Division of Parole and
24 Probation would never be justified in recommending a

1 maximum statutory sentence of 48 to 120 months, right?

2 MS. GROSENICK: Based on their own table,
3 yes.

4 THE COURT: But this all circles back to the
5 same thing, Ms. Grosenick. The recommendation of the
6 Division of Parole and Probation is just that, it's a
7 recommendation. It's nothing more. I'm not bound to
8 follow it. So they make the recommendation, I can choose
9 to follow it or not.

10 MS. GROSENICK: That's correct, your Honor,
11 and I'm glad --

12 THE COURT: The State's not bound in this
13 case to recommend any particular sentence based on the
14 Division of Parole and Probation's recommendation. I
15 think that the argument about the recommendation that is
16 made might be more persuasive under circumstances where
17 the State is bound to do something with that
18 recommendation; by that I mean they are bound to concur
19 with the recommendation or have no objection to probation
20 if recommended, otherwise concur, or recommend some other
21 fixed sentence. But we know that none of that is the
22 case in this -- in these -- or in Mr. Briones's case,
23 they're free to argue. So this is simply nothing more to
24 me than a recommendation of Division of Parole and

1 Probation that I can do with what I want and Mr. Stralla,
2 or any other representative of the State, is not bound by
3 it in any way.

4 MS. GROSENICK: That's correct, your Honor,
5 but the disturbing thing to me is that the PSI is
6 presented as a, as a recommendation based on objective
7 criteria. In this case it's not based on objective
8 criteria, it's based on the discretion of Mr. Frisch.
9 It's basically having a third party weighing in on what
10 Mr. Briones's -- on what his sentence should be and I
11 don't think that's the appropriate role of P & P under
12 the current statutory reading.

13 If the legislature wants to amend the statute
14 in some way, I think that's appropriate. I just -- the
15 part that bothers me is that when you look at the PSI it
16 says 48 to 120. There's no explanation for that and when
17 you peel back the curtain you see that it's not even
18 according to their own recommendations and there's no
19 explanation for that in the PSI.

20 THE COURT: Well, maybe when you peel back
21 the curtains, you see Mr. Briones's prior criminal
22 history, and certainly he -- it's not unreasonable to
23 assume that the Division of Parole and Probation might
24 feel that somebody with this type of criminal history

1 deserves maybe a little bit more than a sentence that is
2 recommended by the table which is almost the minimum
3 sentence allowed by law.

4 MS. GROSENICK: And, your Honor, I would also
5 note that on the probation success probability score his
6 prior felony convictions, how many prior felony
7 convictions, how many misdemeanor convictions, how many
8 pending unrelated cases, subsequent criminal history,
9 prior incarcerations, jail sentences, prison sentences,
10 years free of conviction, all of that already goes into
11 the score. So I -- you know, if Parole and Probation's
12 going to do that, if they want the freedom to deviate,
13 then we should have that statutory language changed to
14 give them the freedom to make a recommendation. I
15 would offer -- I'm not going to get into all the details
16 of what I would argue, it's just the problem that I see
17 is they're coming and saying it's an objective
18 recommendation and it's not, it's subjective, it's up to
19 the individual P & P writer to determine whether or not
20 they're going to deviate and why and that's never
21 presented to the Court.

22 THE COURT: What's the statutory authority
23 for the concept that the Division of Parole and Probation
24 needs to objectively evaluate and there's no subjective

1 consideration whatsoever put into the recommendation of
2 the Division?

3 MS. GROSENICK: Well, I would cite, your
4 Honor, to NRS 213.10988.

5 THE COURT: Which says there's no subjective
6 consideration at all that goes into this evaluation.

7 MS. GROSENICK: It says that Parole and
8 Probation is required to develop objective criteria to
9 formulate a recommendation regarding probation or
10 revocation of parole and probation.

11 THE COURT: What's the -- 213 what?

12 MS. GROSENICK: 213.10988.

13 THE COURT: Okay.

14 MS. GROSENICK: And I haven't had a chance to
15 read Judge Hardy's order that was recently, that was
16 recently issued in the Ellis case, but I know that he
17 cited additional statutes in that case, so I'm not sure
18 if any of those would be relevant, but I haven't had a
19 chance to fully review that as I didn't think we would be
20 arguing specific statutes today.

21 THE COURT: Well, you raised the issue, then
22 you need to be able to justify the citation by either
23 case law or statute.

24 The Court would note that NRS 213.10988

1 doesn't require the chief of the Division of Parole and
2 Probation to adopt all subjective analysis, it only
3 requires that they adopt objective standards, but it
4 doesn't say that they -- there can't be some subjective
5 determination by the individual writer. If that were the
6 case, then we wouldn't really need writers at all, all we
7 would need are computers, we just plug the information
8 in, it spits out a number and then I'm free to either
9 adopt it or disregard it as I see it appropriate. So I
10 don't think Chapter 213 is as dispositive of the issue as
11 you may believe, Ms. Grosenick.

12 Go ahead.

13 MS. GROSENICK: I don't believe that P & P is
14 authorized to make willy-nilly recommendations without
15 explanation.

16 THE COURT: And -- Well, what willy-- what's
17 willy-nilly about a recommendation for a maximum sentence
18 for a person who has basically been in and out of the
19 criminal justice system since 1997, apparently has
20 failed, as I calculate it, almost every period of
21 community supervision that he's ever been given, is
22 just -- literally has just been in and out of prisons in
23 the state of California and in the state of Nevada since
24 he was -- How old were you in 1997, Mr. Briones?

1 THE DEFENDANT: '97?

2 THE COURT: So you were 20, give or take.

3 THE DEFENDANT: Yeah, about 20.

4 THE COURT: Yeah, so he's been in and out of
5 prison, he has multiple holds out of the State of
6 California on him as we speak right now. He was released
7 from the Nev-- or the California Department of
8 Corrections on January 2nd of 2014, and as you represent,
9 lucky us, he was driven to the state of Nevada and
10 dropped off in Reno and within 26 days he has committed
11 yet another felony offense, his seventh felony offense.
12 What's willy-nilly about recommending something more than
13 his, than is suggested by the, the table that is prepared
14 pursuant to NRS 213.10988? How is it willy-nilly?

15 MS. GROSENICK: Your Honor, that's your role
16 as the judge.

17 THE COURT: You're right, but you suggested
18 that maybe this is something that's willy-nilly, so what
19 is it?

20 MS. GROSENICK: I do, they're, they're making
21 a recommendation that's not according to any of their
22 documentation. Mr. Frisch confirmed to me that there is
23 no guideline to tell them to deviate.

24 THE COURT: Ms. Grosenick, is it willy-nilly

1 if the Division of Parole and Probation looks at it, they
2 look at let's say Mr. Briones and then they decided to
3 deviate downward? Mr. Frisch talked to Mr. Briones and
4 felt maybe that he's a good candidate for probation so he
5 deviates downward; is that willy-nilly?

6 MS. GROSENICK: I think the State could
7 validly challenge that and I think that --

8 THE COURT: But it's not willy-nilly. It's a
9 simple acknowledgement that there are both objective and
10 subjective criteria that go into the recommendation from
11 the Division of Parole and Probation, and so every time a
12 recommendation is not what one or the other party likes
13 doesn't mean that it's just willy-nilly, it means that
14 there is another analysis that goes into play, that is,
15 the experience of the person that writes the presentence
16 investigation report. And I would be just as unimpressed
17 with Mr. Stralla if you were to stand up before me and
18 say, well, the Division went down, they had a downward
19 departure after speaking to the defendant and that's just
20 willy-nilly. It's not. It's not willy-nilly. It is an
21 analysis by a trained professional who may feel that
22 there are some considerations beyond what are contained
23 in the table. And again I would point out to you that
24 the Nevada Revised Statutes don't require the Division of

1 Parole and Probation to rely solely on a table analysis.
2 They have to do that pursuant to that statute, but,
3 again, you haven't cited me to anything that says they
4 can't consider things beyond that statute.

5 MS. GROSENICK: And, your Honor, I would just
6 like to make a record here.

7 THE COURT: I'm not saying you can't make a
8 record, Ms. Grosenick. I'm not limiting that in any way.
9 I'm just asking you to make a legitimate -- or to support
10 the comments that you make on the record with something
11 more than just your opinion. Is there something beyond
12 that?

13 MS. GROSENICK: Yes, your Honor.

14 THE COURT: Go ahead.

15 MS. GROSENICK: P & P's statutory -- P & P's
16 authority comes from statute. It's a creature of the
17 legislature created by statute. There is no statute of
18 which I am aware that allows them to make subjective
19 determinations regarding sentencing recommendations. So
20 I'll just put that out there.

21 THE COURT: Okay.

22 MS. GROSENICK: I don't think they have that
23 authority. That's my argument.

24 I think it's significant to recognize where

1 the recommendation is coming from. As your Honor has
2 already pointed out, you don't have to consider their
3 recommendation, but for something like the maximum, let's
4 consider why. I think that's up to your Honor. You have
5 great discretion. You can impose anything in between the
6 one and the ten and I think that's why you're the judge.
7 You're the one who sees these cases every day, who has
8 the experience and you've been placed in a position to
9 exercise your judgment. That's not P & P's role as
10 defined by statute.

11 I think -- I don't want to presume anything,
12 but I'll say for me the biggest benefit of the PSI is
13 learning the criminal history. It's a lot more thorough
14 than the NCIC reports that we get. It lists dispositions
15 and at that point the defendant has had an opportunity to
16 comment on the criminal history and perhaps provide
17 additional detail. The P & P has had the opportunity to
18 try to verify some of that information, and as your Honor
19 pointed out, that's a significant aggravating factor in
20 this case and I don't dispute that at all. I just don't
21 think P & P gets to come in and say we're recommending 48
22 to 120, we use objective criteria and theoretically this
23 48 to 120 is based on objective criteria. I just -- I
24 think that's incorrect and that's why I appreciate the

1 opportunity to argue that point to the Court.

2 THE COURT: Okay. Is there anything else you
3 want to add? Either regarding the documents submitted,
4 regarding the sentence itself or regarding Mr. Briones?

5 MS. GROSENICK: Yeah, I'll just summarize.

6 THE COURT: Okay.

7 MS. GROSENICK: Mr. Briones' prior criminal
8 history is an aggravating factor in this case and I don't
9 dispute that. As I already said, I went through and I
10 tried to calculate what I would come up with as his
11 score. I -- It frankly wouldn't have changed much,
12 although I did disagree with some of the points, but it
13 really wouldn't have changed what P -- what I think P & P
14 should have recommended under that.

15 And as far as the criminal history goes, that
16 is accounted for already in their scoring documents, in
17 their scoring table and their scoring methodology. If
18 that's not how -- if they feel that that's -- if they
19 feel or you feel or anyone feels that's not an accurate
20 way of calculating a recommended sentence, then I think
21 that's up to the legislature and P & P to change their
22 procedures on that.

23 On the mitigating side, Mr. Briones has taken
24 responsibility for his crime. He's got documented

1 substance abuse issues that are directly related to his
2 crime. He was in a real unfortunate situation when
3 California dropped him off here and he put a rock through
4 the window of an unoccupied car.

5 THE COURT: Thank you, Ms. Grosenick.

6 Mr. Stralla, on behalf of the State.

7 MR. STRALLA: Your Honor, I don't care about
8 scales, grades, graphs, scores. All I care about as a
9 representative of the State of Nevada and as a prosecutor
10 is doing justice and doing the right thing. I don't want
11 to talk about that stuff. I want to talk about
12 Mr. Briones and that's why we're here. I don't care what
13 Ms. Grosenick brings up about moderate or light or high
14 risk to reoffend. I know based upon his criminal history
15 he's about as high a risk to reoffend as a criminal as I
16 see routinely in my job as a prosecutor.

17 The fact that he was paroled on January 2nd,
18 2014 and 26 days later, as the Court noted, he's breaking
19 into cars in Reno, I think that says it all right there.
20 He is a high risk to reoffend because that's all he
21 knows. He has chosen a lifetime of thievery just as
22 we've chosen a life of following the law or some people
23 being a plumber or being a construction worker or a
24 nurse. Mr. Briones has chosen to steal. That's what he

1 does.

2 They ask for treatment. Well, I know one
3 thing for certain. He certainly knows that it's wrong to
4 steal. He's been sent to prison time and time again for
5 stealing. Treatment's not going to change that. He
6 knows that's wrong, but he keeps doing it, your Honor.
7 And, in fact, I think it aggravates it that he was a
8 victim of thievery himself. They tried to use that as a
9 shield for him today. He's a victim of thievery himself.
10 So how does he react to that? He steals from other
11 people, your Honor. He is a habitual criminal. Make no
12 mistake about it.

13 What he brought with him to Reno wasn't just
14 his meager belongings, your Honor. He brought with him
15 the intent to steal because that's what he brings with
16 him wherever he goes because he's a thief. And the fact
17 that he had a large amount of loose change in his pocket,
18 I don't think you have to be a rocket scientist to figure
19 out where he got that stuff from.

20 He deserves the maximum sentence, your Honor.
21 He's lucky he's not facing a habitual criminal today. We
22 ask that you follow the Division's recommendation. I
23 don't know how he fell on the scale or not, but on my
24 scale he deserves the maximum sentence based on my years

1 of experience.

2 It was enlightening to hear all of that
3 today. I don't understand why on a case where I'm free
4 to argue, but, hey, I was a young attorney at one time,
5 too. I'm not anymore, but I can tell you this, this
6 man's a thief and deserves the maximum sentence.

7 THE COURT: Thank you, Mr. Stralla.

8 Mr. Briones, the law affords you the
9 opportunity to address the Court prior to imposition of
10 sentence and tell me anything you think I need to know
11 about yourself or about your case and so I'll hear from
12 you now.

13 THE DEFENDANT: Okay. To begin with, I'm
14 apologetic and I'm really sorry for what I'm in here for.
15 I'm holding myself responsible for what I did. I did
16 have an alcohol and a drug problem and I seen the drug
17 counselor and she told me that I was meant for a alcohol
18 and a drug program. I did ask for a alcohol and drug
19 program and I was accepted to Salvation Army.

20 What else can I say? I know that I'm wrong,
21 you know, I'm wrong for what I did and I'm very, very
22 sorry. But like I said, I did have an alcohol and a drug
23 problem which contributed to what I did and that's why I
24 did what I did. And I'm going to leave it up to you for

1 you to decide what you think should happen. It's up to
2 you. That's all I got to say.

3 THE COURT: Thank you, Mr. Briones.

4 THE DEFENDANT: Thank you.

5 THE COURT: Ms. Grosenick, is there any legal
6 reason why judgement should not enter at this point?

7 MS. GROSENICK: No, your Honor.

8 THE COURT: There being none, it will be the
9 order and judgment of the Court that the defendant,
10 Fernando Briones, is guilty of the felony offense of
11 burglary pursuant to his plea entered on August 7th 2014.

12 Mr. Briones, I don't know if you understood
13 much of the argument, or discussion I think is a better
14 term, that Ms. Grosenick and I were involved in during
15 your sentencing, but I'll tell you this, you have very
16 able and a very competent attorney standing by your side.
17 I don't think it matters one, one iota what her age is or
18 how long she's been practicing law. She's one of the
19 finest attorneys that I've seen appear in this courtroom
20 in quite some time because she thinks hard about her
21 cases, she works hard for her clients and she makes
22 arguments that she thinks are supported by both statutory
23 and case law. But the reason I'm telling you she's a
24 good attorney is all of those things and it's one

1 additional thing. I have no idea how she was able to
2 negotiate your case the way that she did. You have at
3 least one, if not multiple, prior burglary convictions
4 and so based on NRS 205.060, the State could have charged
5 you with burglary and prior burglary convictions as an
6 enhancement and you would not have been eligible for
7 probation at all. And so had the State chosen to do so
8 they could have filed two separate burglary counts as I
9 read the State's synopsis in your case and you would have
10 been looking at one to ten years on Count No. I and one
11 to ten years on Count No. II and then you could have been
12 looking at consecutive sentences and you would not even
13 have been eligible for probation, so she did a great job
14 in convincing the State not to do that.

15 The next thing that she did that I find
16 amazing is, is that she was able to convince the State
17 not to have you adjudicated an habitual criminal because,
18 as Mr. Stralla stated, that's exactly what you are.
19 Since you were 20 years old you have made it a living
20 doing drugs and stealing from other people, taking other
21 people's property.

22 As I reviewed your criminal history, it
23 doesn't appear to me, at least as I recall it, that there
24 are any crimes of violence or significant crimes of

1 violence in your past, but as Mr. Stralla stated you're
2 just a thief. And you use, you use drugs and steal from
3 people. That's basically what you were --

4 THE DEFENDANT: Well, your Honor --

5 THE COURT: -- doing forever. What?

6 THE DEFENDANT: I need, I need a chance to
7 recover from the alcohol and the drug addiction.

8 THE COURT: Mr. Briones, you have been
9 given --

10 THE DEFENDANT: Honestly if you grant me a
11 chance --

12 THE COURT: Mr. Briones --

13 THE DEFENDANT: -- I'd appreciate it.

14 THE COURT: -- stop. You have been given
15 chance after chance after chance. If anything you are a
16 clear demonstration of the failure of the criminal
17 justice system of the State of California because it
18 would appear to me that they do nothing more than to try
19 and get you in and out of their prisons as quickly as
20 possible.

21 On numerous felony offenses that you have had
22 since you were convicted in 1998 you have been given
23 periods of probation or parole and almost immediately you
24 revoke them or you get revoked from them, and the reason

1 you get revoked from them I'm guessing is you continue to
2 commit additional crimes while you're on community
3 supervision.

4 So certainly back to the point that I was
5 making, Ms. Grosenick has done an excellent job for you
6 because Mr. Stralla is not in a position today to ask me
7 to adjudicate you an habitual criminal. There is no
8 question in my mind that that is exactly what you are.
9 And if I had the opportunity today that is what I would
10 have done.

11 I would also note that the Division of Parole
12 and Probation wouldn't have made a recommendation about
13 that because that's not part of their responsibility.

14 It will be the order and judgment of the
15 Court that the defendant is guilty as I've stated
16 previously of a felony offense of burglary pursuant to
17 his guilty plea. Sir, I'm going to order that you be
18 sentenced as follows.

19 You will pay a \$25 administrative assessment
20 fee, you will pay a \$150 genetic marker testing fee and
21 you will submit to DNA genetic marker analysis. You will
22 pay a \$3 DNA collection fee and \$500 in attorney's fees.
23 It is the order of the Court that the defendant be
24 sentenced to the Nevada Department of Corrections for an

1 indeterminate period not to exceed 120 months with the
2 minimum parole eligibility of 48 months. The Court
3 believes that the maximum sentence is appropriate in this
4 case based on the defendant's prior criminal history
5 based on his repeated refusal to accommodate himself to a
6 law-abiding lifestyle based on the fact that he was
7 released from the California Department of Corrections
8 and less than one month later he is in the city of Reno
9 victimizing numerous people in this community. So it's
10 not based on what the Division of Parole and Probation
11 does or doesn't recommend, it is based on my independent
12 determination that that is the appropriate sentence in
13 Mr. Briones's case.

14 He will be given credit for 276 days time
15 served in the Washoe County Jail. Court's in recess for
16 15 minutes.

17 (Proceedings concluded.)
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24

1 **CODE 1850**

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

9 **STATE OF NEVADA,**

10 **Plaintiff,**

Case No. CR14-0440B

11 **vs.**

Dept. No. 10

12 **FERNANDO BRIONES,**

13 **Defendant.**
14

15 **JUDGMENT**

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

18 That Fernando Briones is guilty of the crime of Burglary, a violation of NRS
19 205.060 (1), a felony, as charged in the Third Amended Information, and that he be punished by
20 imprisonment in the Nevada Department of Corrections for the maximum term of one hundred
21 twenty (120) months with the minimum parole eligibility of forty-eight (48) months, with credit for
22 two hundred seventy-six (276) days time served.

23 It is further ordered that the Defendant shall pay the statutory Twenty-Five Dollar
24 (\$25.00) administrative assessment fee; that he shall submit to a DNA analysis test for the purpose
25 of determining genetic markers and pay a testing fee in the amount of One Hundred Fifty Dollars
26 (\$150.00), if not previously ordered; that he shall pay the Three Dollar (\$3.00) administrative
27 assessment fee for obtaining a biological specimen and conducting a genetic marker analysis; and
28

1 that he shall reimburse Washoe County in the amount of Five Hundred Dollars (\$500.00) for legal
2 services rendered.

3 It is further ordered that the fees are subject to removal from the Defendant's books
4 at the Washoe County Jail and/or Nevada Department of Corrections.

5 Dated this 30 day of OCT., 2014.
6 NUNC PRO TUNC to October 30, 2014.

7
8 
9 DISTRICT JUDGE

CR14-04408
STATE VS. FERNANDO BRIONES (4 Pages
District Court 11/20/2014 09:43 AM
Washoe County
2515

2515

Case No: RCR2014-075883B

Dept No: 10

FILED

ORIGINAL

2014 NOV 20 AM 9:41

CLERK OF THE COURT
Yuliana
CLERK

IN THE 2nd JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

The State of Nevada

Plaintiff

-VS-

Fernando Briones

Defendant

CR14-04408
DIO

NOTICE OF APPEAL

CASE# RCR2014-075883B

NOTICE IS HEREBY GIVEN that Fernando Briones, hereby appeals
the judgement of conviction entered in this Honorable court on or about the 30th day of
October, 2014.

Dated this 12th day of November, 2014.

Fernando Briones
Defendant Signature

Fernando Briones
(Print Name) In Proper Persona

CERTIFICATE OF SERVICE BY MAIL

Pursuant to N.R.C.P. Rule 5 (b), I hereby certify that I am the petitioner/Defendant named herein and that on this 12TH day of NOVEMBER 2014 deposited in the United States Mails in Carson City, Nevada a true a correct copy of the foregoing addressed to:

WASHOE COUNTY NV.

PO BOX 11130

Reno NV.

89520

Fernando Briones

PURSUANT TO N.R.S. 208.165, I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF NEVADA THAT THE FOREGOING IS TRUE AND CORRECT. See N.R.S. 208.165.

Signed at nvcc
(Location)

11-12-14
(Date)

Fernando Briones
(Signature)

1129231
(Inmate number)

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, Notice
of Appeal

(Title of Document)

filed in case number: RCR 2014 075883B

☒ 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: 11-12-14

Fernando Briones
(Signature)

Fernando Briones
(Print Name)

(Attorney for)

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Fernando Briones (#1129231)
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office