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

Electronically Filed
May 08 2015 04:29 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CHARLES JOSEPH MAKI

Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.
_____/

Sup. Ct. Case No. 67717
Case No. CR94-0345
Dept. 8

RECORD ON APPEAL

VOLUME 7 OF 8

POST DOCUMENTS

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

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

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FILED

'96 MAY -9 A7:53

JUSI BAILEY CLERK

BY _____ DEPUTY

Case No. CR94-0345

Dept. No. VIII

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

FOR THE COUNTY OF WASHOE

CHALRES JOSEPH MAKI,

Petitioner,

-vs-

E.K. McDANIEL, WARDEN,

_____,

Respondent.

_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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

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

DATED this 3rd day of [redacted] MAY, 1996.

Respectfully submitted,

Charles J. Maki

CHARLES J. MAKI

V7.1

FILED

'96 MAY -9 A7:53

JUDI BAILEY CLERK

BY _____ DEPUTY

Case No. CR94-0345

Dept. No. VIII

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES JOSSEPH MAKI,

Petitioner,

-vs-

E.K. McDANIEL, WARDEN,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

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

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

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

1. Are you presently employed: Yes ___ No XXX

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

V7.2

N/A

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

N/A

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

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

Yes ____ No XXX

b. Rent payments, interest or dividends?

Yes ____ No XXX

c. Pensions, annuities or life insurance payments?

Yes ____ No XXX

d. Gifts or inheritances?

Yes ____ No XXX

e. Any other sources?

Yes XXX No ____

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

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

Yes ____ No XXX

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

V7.3

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No XXX

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

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute towards their support: NONE.

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

DATED this 3rd day of [redacted] MAY, 1996.

Charles J. Maki

Sign your name
CHARLES J. MAKI

CHARLES J. MAKI 42820

Print your name DOP#

V7.4

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'96 MAY -9 A7:54

JUDITH BAILEY, CLERK

BY _____ DEPUTY

CASE NO: CR94-0345

DEPT NO: VIII

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

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF

CHARLES J. MAKI #42820
NAME

ON MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS /

FINANCIAL CERTIFICATE

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

DATED this 12th day of APRIL, 1996.

BY: Sandra L Hinman
Nevada Department of Prisons
Inmate services Accountant
Authorized Officer of Institution

APR 0 9 1996

V7.5

Case No. CR94P0345

Dept. No. VIII

FILED

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JUDICIAL DISTRICT CLERK

BY _____ DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES JOSEPH MAKI,

Petitioner,

v.

E.K. McDANIEL, WARDEN,

Respondent.

/

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

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

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

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

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

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

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

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

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

PETITION

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

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

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

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

4. Case number: CR94-0345

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

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

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

V7.7

Yes_____ No XXX. If "yes," list crime, case number and sentence being served at this time: _____

_____

_____

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

8. What was your plea? (check one)

(a) Not guilty XXX

(b) Guilty _____

(c) Nolo contendere _____

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

_____

_____

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

(a) Jury XXX

(b) Judge without a jury: _____

11. Did you testify at the trial? Yes_____ No XXX

12. Did you appeal from the judgment of conviction?

Yes XXX No_____

13. If you did appeal, answer the following:

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

(b) Case number or citation: 26049

(c) Result: DISMISSED

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

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

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

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes_____ NoXXX.

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

(a) (1) Name of Court: _____

(2) Nature of proceeding: _____

_____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes_____ No_____

(5) Result: _____

(6) Date of Result: _____

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

_____

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

(1) Name of Court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes_____ No_____

(5) Result: _____

(6) Date of Result: _____

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

_____

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

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

(1) First petition, application or motion?

Yes_____ No_____

Citation or date of decision: _____

(2) Second petition, application or motion?

Yes_____ No_____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes_____ No_____

Citation or date of decision: _____

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

N/A

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

a. Which of the grounds is the same:

N/A

b. The proceedings in which these grounds were raised:

N/A

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

N/A

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

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

N/A

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

This petition is being timely filed by petitioner.

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

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

N/A

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

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

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

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

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

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

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

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

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

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

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

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

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

EXECUTED at ELY, NEVADA on the 3rd day of [redacted] MAY, 1996.

Charles J. Maki
Signature of Petitioner
CHARLES JOSEPH MAKI
P.O. BOX 1989
Address
ELY, NEVADA 89301

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

Attorney for Petitioner

Address

VERIFICATION

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

Charles J. Maki
Signature of Petitioner
CHARLES JOSEPH MAKI

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, CHARLES JOSEPH MAKI, hereby certify pursuant to N.R.C.P. 5(b), that on the 3rd day of [redacted] MAY, 1996, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

E.K. McDANIEL, Warden
Respondent prison or jail official
ELY STATE PRISON
P.O. BOX 1989
Address
ELY, NEVADA 89301

Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

DOROTHY NASH HOLMES
District Attorney of County of Conviction
WASHOE COUNTY DISTRICT ATTORNEY
P.O. BOX 11130
Address
RENO, NEVADA 89520

Charles J. Maki
Signature of Petitioner

CHARLES JOSEPH MAKI
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

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

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

(CONTINUED ON ATTACHED PAGE 8-B)

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

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

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

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

GROUND FOUR SUPPORTING FACTS:

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

CHARLES JOSEPH MAKI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 26049

ORDER DISMISSING APPEAL

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

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

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

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

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

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

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

ORDER this appeal dismissed.

_____, C.J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Shearing

_____, J.
Rose

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

AFFIDAVIT OF CHARLES JOSEPH MAKI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further affiant sayeth not.

Dated this 3rd day of ~~April~~ MAY, 1996.

Submitted by:

Charles J. Maki

CHARLES J. MAKI
PETITIONER IN PRO SE

VERIFICATION UNDER PENALTY OF PERJURY

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

Dated this 3rd day of ~~April~~ MAY, 1996.

SUBMITTED BY:

Charles J. Maki

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

Petitioner In Pro Se

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AFFIDAVIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and know the people and fact of this case.

DATED THIS 29th DAY OF September, 1995

State of Nevada
County of White Pine

Paul Grubbs
Signature

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

John Huth
NOTARY PUBLIC

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

STAMP

V7.29

AFFIDAVID OF CURTIS WOODS

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

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

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

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

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

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

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

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

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

Subscribed before me on
June 29, 1995 by
Kevin Anderson
John Huth

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

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

FILED

'96 MAY 29 P3:57

JUDI BAILEY, CLERK

BY _____ DEPUTY

CASE NO. CR94P0345

DEPT. NO. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER

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

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

DATED this 29 day of May, 1996.

DISTRICT JUDGE

V7.31

Certificate of Mailing

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

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

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

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

Kathryn Miller
ADMINISTRATIVE ASSISTANT

V7.32

0-8
S-9
Post

FILED

'96 AUG -5 P4:58

JUDY BAILEY, CLERK

BY _____ DEPUTY

CASE NO: CR94P0345

DEPT NO: 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

STIPULATION AND ORDER

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

DATED this 31 day of July, 1996.

Gary H. Hatlestad
Deputy District Attorney

David A. Hardy
Attorney for Petitioner

It is so ordered.

District Judge

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

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 AUG 20 P12:58

JUDI BAILEY, CLERK

BY _____ DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

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

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

DATED this 18th day of August, 1996.

David A. Hardy

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

DAVID A. HARDY
ATTORNEY AT LAW
321 SOUTH ARLINGTON AVE.
RENO, NV 89501-2001
(702) 324-1113
FAX (702) 786-5099

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of facts and procedural history[1]

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

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

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

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

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

II. **Argument**

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

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

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

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

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

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

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

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

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

Similarly, Maki's attorney should have sought an independent physical examination of the girls. As noted, Ms. Peele testified that Summer's hymen showed evidence of multiple abuse. However, Summer testified that Maki penetrated her vagina with his penis on one occasion. Although Desiree's hymen did not show any evidence of abuse, Ms. Peele testified her examination did not preclude the possibility that such abuse had occurred. This is an important point that Maki's attorney failed to challenge. As noted in

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Medical Examination for Sexual Abuse: Have We Been Misled?, attached hereto as Exhibit B, there are serious difficulties with diagnosing sexual abuse on the basis of ano/genital examinations. Indeed, the attached article states in relevant part:

> Likewise, it might seem obvious that a normal ano/genital examination is no help in establishing molest. Such normal examinations are, nonetheless, frequently termed "consistent with" sexual abuse. Rarely is this followed by a statement indicating that a normal examination is equally consistent with no abuse. Take, for example, the case in which the doctor wrote, "The normal size of her vagina is not an uncommon finding in girls who have been fondled although not deeply penetrated into the vagina. This finding is still consistent with someone attempting to stick their finger into the vagina."
>
> Given that with many victims of molestation the medical examination will be normal, it follows that every child's anatomy is "consistent with" molest because normal anatomy is also consistent with nontraumatic molest.

See Id. at 1-2.

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

2. Trial counsel failed to allow Maki to testify.

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

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constitutional right to testify on his own behalf.

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

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

In limited circumstances, a defendant is relieved of responsibility of establishing the prejudicial effect of his attorney's ineffective assistance. An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982). Every defendant has a constitutional right to the assistance of counsel unhindered by conflicting interests. Maki and his attorney were in conflict on a number of issues, which cumulatively resulted in unfair representation. Maki and his attorney disagreed about the development and presentation of evidence, whether Maki was guilty, and whether Maki's attorney could disregard her personal

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experiences and zealously represent Maki. More importantly, Maki had a personality conflict with his attorney that prevented almost all communications between attorney and client. At one point Maki's attorney informed Maki she had visited with the girls and their father and concluded they were telling the truth. She specifically told Maki, "I think you're guilty." Maki's attorney also told Maki she did not want to represent him at trial. Maki was concerned about his attorney's commitment to his defense and before the trial ever began he complained to this Court, the state bar, and Washoe Legal Services. In short, Maki's attorney felt no loyalty to Maki, and therefore, rendered ineffective assistance of counsel.

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

Maki has a large multi-colored tattoo in his pubic area. This tattoo is unmistakable. Maki had photographs taken of this tattoo immediately after his arrest because he knew the girls would be unable to identify it. When Maki's attorney cross-examined the girls she failed to elicit any testimony about this tattoo; indeed, she failed to even ask about Maki's tatoos. See trial transcript, pages 55-68; 87-93. This is important because the girls failed to specifically mention the tattoo at the preliminary hearing. After Maki's attorney called the investigator to testify about photographing the tatoo, the State called the girls as rebuttal witnesses. This time, however, Summer was able to describe the tattoo in question. Desiree still did not fully describe the tattoo, but she provided general testimony about a tattoo on Maki's stomach. There is some confusion regarding the location of the tattoo Summer described. Maki submits the tattoo Summer described is on his back near the right shoulderblade. In both cases, Maki's attorney failed to cross-examine the girls after their rebuttal testimony. Maki submits the girls were able to

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testify about the tatoo because they were coached in the hallway prior to taking the witness stand. Maki's attorney failed to exploit the girls' ignorance of the tattoo during their direct testimony. Accordingly, Maki lost his one good opportunity to show the girls were fabricating their stories.

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

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

In this case, Maki informed his attorney that Mike Fried, Bob Loyal, Kevin Anderson, and Mike Vendramin could be called to discredit Ms. Coombs' testimony. Maki's attorney apparently failed to investigate these men as possible witnesses. Maki's

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attorney could also have called a number of character witnesses. In particular, Maki submits that Ken Daniels, Linda Stalings, Paul Grubbs, Gale Thomas, and Carla Scarpa would have testified in his behalf. Unfortunately, Maki's attorney failed to investigate these people as possible witnesses. Representative affidavits are attached hereto as Exhibit C. Maki submits that had his attorney done a better job at the sentencing hearing he would have received a lesser sentence.

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

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

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

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

Maki's appellate counsel failed to challenge this Court's decision denying his request for a new attorney. Based upon the apparent conflict between Maki and his

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attorney, which destroyed even their ability to communicate, this decision was erroneous. Maki's appellate attorney also failed to challenge this Court's decision denying Maki's request for a continuance so Maki could retain a defense expert. As noted, the State withheld critical evidence until three days before trial. This severely prejudiced Maki's defense because the girls' testimony was inconsistent with Ms. Peele's explanation of the photographs. WCDCR 13 provides that continuances may be granted for "good cause." Maki submits he had good cause for a continuance, and this Court's decision was an abuse of its discretion. Maki also alleges his appellate attorney should have raised the violation of NRS 171.178. Maki submits the Supreme Court would have ruled in his favor had these issues been presented on direct appeal.

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

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

DATED this 16th day of August, 1996.

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CERTIFICATE OF SERVICE

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

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

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

DATED this 20th day of August, 1996.

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EXHIBIT A

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,) No. 26049
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)

FILED

OCT 04 1995

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

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

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

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

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

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

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

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

ORDER this appeal dismissed.

_____, C.J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Shearing

_____, J.
Rose

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

O-4892

EXHIBIT B

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FOR POST CONVICTION
TO DAVID HARDY - ATTORNEY
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Medical Examination for Sexual Abuse: Have We Been Misled?

Lee Coleman

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

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

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

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

Not for the first time and undoubtedly for the last, we have turned to doctors to relieve us of the uncertainty. And so great has been our desire for resolution, for "science" to come to the rescue, that we have been only too happy to accept whatever the doctors have offered. With few exceptions (Nathan, 1989; Paul, 1977; Paul, 1986; Woodling & Heger, 1986; Zeitlin, 1987) little thought has been given to whether the doctors' offerings are legitimate medical evidence, or mere speculation.

Some Clarifications

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

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

If a doctor hears an allegation and writes it down as "history," he or she has not made a "finding" but merely repeated the allegation. This might seem obvious, yet it is common for doctors to make a "diagnosis" of sexual abuse, relying heavily on what they call the "history," as given by an accusing adult or by an investigator.

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

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

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

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

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

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

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

History of Sexual Abuse Examinations

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

An early but influential article was that of Woodling and Kossoris (1981). A collaboration of a family practitioner and a district attorney, this article listed findings which the authors claimed were indicative of abuse. These included a number of findings which are either extremely nonspecific or open to subjective interpretation by the examining physician, such as perihymenal erythema (redness), tightness (too much or too little) of pubic or anal muscles, anal fissures, and hymenal irregularities interpreted as either "transections" or evidence of scarring.

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

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

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

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

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

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

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

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

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

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

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

What emerges from these meetings is the fact that these "specialists" have seen a lot of children, and opined on which ones were molest victims, but *they have no way of checking the accuracy of their conclusions*. Even if they agree on how to interpret a particular finding, this doesn't mean they are correct. Only controlled research will allow them to decide whether a particular finding is indicative of molest.

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

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

In Search of Research

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

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

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

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

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

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

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

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

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

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

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

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

McCann and his colleagues are the only ones so far to take on the very necessary task of trying to establish the range of ano/genital anatomy in normal children. Without such data, the "findings" so regularly attributed to molest are essentially meaningless. That there are as yet no published data on this is itself highly significant.

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

- Vaginal opening size varies widely in the same child, depending on how much traction is applied and the position of the child while being examined. Knee-chest position (Emans, 1980) leads to different results from frog position.
- Fifty percent of the girls had what McCann calls bands around the urethra. He has heard these described as scars indicative of molest.
- Fifty percent of the girls had small (less than 2 mm) labial adhesions when examined with magnification (colposcope). Twenty-five percent had larger adhesions visible with the naked eye.
- Only 25 percent of hymens are smooth in contour. Half are redundant, and a high percentage are irregular.
- What are often called clefts in the hymen, and attributed to molest, were present in 50 percent of the girls. Commenting on his team's mistaken assumptions at the outset of their study, McCann said, *"We were struck with the fact that we couldn't find a normal (hymen). It took us three years before we found a normal of what we had in our minds as a preconceived normal . . . you see a lot of variation in this area just like any other part of the body... We need a lot more information about kids . . . we found a wide variety . . ."* (my emphasis).
- "...in the literature, they talk about...intravaginal synechiae and it turns out that . . . we saw them everywhere . . . We couldn't find one that we couldn't find those ridges."
- "When does normal (hymenal) asymmetry become a cleft? I don't know."

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

- Thirty-five percent of children had perianal pigmentation.
- Forty percent had perianal redness. The younger the age group, the more likely this finding.
- One third of the children showed anal dilation less than 30 seconds after being positioned for the examination.
- Intermittent dilation, said by Hobbs and Wynne (1986) to be clear evidence of molest, was found in two-thirds of the children.

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

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

The Debacle in England

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

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

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

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

Higgs and a colleague (Wyatt) soon were diagnosing children right and left as victims of sodomy. So sure were they of their conclusions that when the finding disappeared and then returned, and the alleged perpetrator had no contact prior to the reappearance, they presumed a *second* sodomy by a different person! In one case, by the time of the fourth reappearance of the anal relaxation, the grandfather, father and finally the foster parents had all been accused of sodomizing the child.

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

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

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

A Review of 158 Examinations

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

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

Table 1
Age Distribution of Boys

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

Table 2
Age Distribution of Girls

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

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

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

Table 3
Frequency of Alleged Indicators of Molest in 109 Girls

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

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

Even the few findings Emans claims distinguish molested from nonmolested but otherwise symptomatic girls, such as hymenal tears and intravaginal synechiae, have been found to be unreliable. McCann et al. found, as already mentioned, that is was impossible to tell the difference between "normal asymmetry" of the hymen and hymenal "tear," and that he saw intravaginal synechiae "everywhere" when the normal children were examined.

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

Table 4
Anal Findings in 158 Boys and Girls

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

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

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

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

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

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

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

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

Confusion in the Laboratory

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

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

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

Suggested Reforms

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

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

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

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

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

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

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

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

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Woodling, B. A. & Heger, A. (1985, April). Comments to seminar on sexual abuse of children sponsored by Annenberg Health Center, Rancho Mirage, CA.

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Zeitlin, H. (1987, October 11). Investigation of the sexually abused child. *Lancet*, p. 842.

EXHIBIT C

DAVID A. HARDY
ATTORNEY AT LAW
321 SOUTH ARLINGTON AVE.
RENO, NV 89501-2001
(702) 324-1113
FAX (702) 788-5099

AFFIDAVIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and know the people and fact of this case.

DATED THIS 29th DAY OF September, 1995

State of Nevada
County of White Pine

Paul Grubb
Signature

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

John Huth
NOTARY PUBLIC

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

STAMP

V7.62

AFFIDAVIT OF CURTIS WOODS

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

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

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

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

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

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

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

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

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

Subscribed before me on June 28, 1995 by Kevin Henderson
JOHN HUTH

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

CURTIS S. WOODS
(AKA) KEVIN C. ANDERSON

V7.63

FILED

'96 AUG 23 A9:35

BY

No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

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

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

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

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

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

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

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

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

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

DATED: August 22, 1996.

RICHARD A. GAMMICK
District Attorney

By _____
TERRENCE P. McCARTHY
Deputy District Attorney

CERTIFICATE OF MAILING

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

David A. Hardy, Esq.
Attorney at Law
321 South Arlington Avenue
Reno, Nevada 89501

DATED: August 23, 1996.

Linda Jackling

0-8-9
5-9
Post

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 NOV 25 P4:06

JUDI BAILEY, CLERK

BY DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

MOTION TO WITHDRAW AS COUNSEL

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

DATED this 19th day of November, 1996.

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

DAVID A. HARDY
ATTORNEY AT LAW
321 SOUTH ARLINGTON AVE.
RENO, NV 89501-2001
(702) 324-1113
FAX (702) 786-5099

AFFIDAVIT OF DAVID A. HARDY

STATE OF NEVADA)
).ss
COUNTY OF WASHOE)

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

1. Affiant is an attorney in good standing licensed to practice in the State of Nevada.

2. Affiant is counsel of record for Petitioner in the above-captioned action.

3. That Affiant has accepted a position at the Nevada Supreme Court and will be leaving the private practice of law.

4. That Defendant's address is P.O. Box 1989, Ely, Nevada, 89501.

DATED this 19th day of November, 1996.

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

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

Notary Public

THOMAS L. STOCKARD
NOTARY PUBLIC-STATE OF NEVADA
WASHOE COUNTY
My Appt. Expires Sept. 12, 1998

DAVID A. HARDY
ATTORNEY AT LAW
321 SOUTH ARLINGTON AVE.
RENO, NV 89501-2001
(702) 324-1113
FAX (702) 786-5099

CERTIFICATE OF MAILING

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

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

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

DATED this 25th day of November, 1996.

David A. Hardy

DAVID A. HARDY
ATTORNEY AT LAW
121 SOUTH ARLINGTON AVE.
RENO, NV 89501-2001
(702) 324-1113
FAX (702) 786-5099

Case No. CR94P-0345

Dept. No. VIII

FILED

'96 DEC -4 A01:35

JUDI BAILEY, CLERK

BY [signature] DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

CHARLES J. MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent. /

MOTION FOR THE APPOINTMENT OF COUNSEL

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

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

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

Dated this 30 day of November, 1996.

Respectfully submitted by:

Charles J. Maki

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

Petitioner In Pro Se

CERTIFICATE OF SERVICE

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

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

Attorney for Respondent

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

Attorney for Petitioner

Charles J. Maki

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

Petitioner In Pro Se

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 DEC -5 A9:39

JUDI HARVEY, CLERK

BY DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

REQUEST FOR SUBMISSION

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

DATED this 5th day of December, 1996.

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

0-8

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 DEC 11 A8:24

JUDI BAILEY CLERK

BY U. Stewart DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

REQUEST FOR SUBMISSION

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

DATED this 5th day of December, 1996.

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

V7.73

Case No. CR94P0345

Dept. No. 8

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

CHARLES MAKI,

Petitioner,

vs. **ORDER**

THE STATE OF NEVADA,

Respondent.

_____/

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

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

ordered to set the hearing.

IT IS SO ORDERED.

DATED this 15 day of January, 1997.

DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 16 day of January, 1997, she mailed copies of the foregoing ORDER in Case No. CR94P0345 to the following:

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

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

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

Kathryn Miller
Administrative Assistant

FILED

'97 JAN 29 P4:10

JUDI BAILEY, CLERK

BY DEPUTY

Case No. CR94P0345

Dept. No. 8

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

CHARLES MAKI,

Petitioner,

vs.

ORDER

THE STATE OF NEVADA,

Respondent.

_____/

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

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

IT IS SO ORDERED.

DATED this 29 day of January, 1997.

DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 29 day of January, 1997, she mailed copies of the foregoing ORDER in Case No. CR94P0345 to the following:

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

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

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

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

Kathryn Miller
Administrative Assistant

No. CR94P0345

Dept. No. 8

FILED

'97 MAY 20 A10:14

JUDI BAILEY, CLERK

BY W. Stewart
DEPUTY

Second Judicial District Court

State of Nevada, Washoe County

CHARLES MAKI,

~~Plaintiff~~
Petitioner,

vs.

STATE OF NEVADA,

Respondent.
~~Defendant~~

APPLICATION FOR SETTING

TYPE OF ACTION: Post Conviction

MATTER TO BE HEARD: Evidentiary Hearing

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

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

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

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

☐ Jury Demanded By (Name): _____

Estimated No. of Jurors: _____

☐ No Jury Demanded By (Name): _____

Estimated Duration of Trial: 1 day

Attorney(s) for Plaintiff

Attorney(s) for Defendant

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

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

JUD 500 (Rev. 10/91)

V7.80

FILED

'97 JUN -3 P2:52

JUDITH A. [illegible] CLERK

BY A. Stewart
DEPUTY

No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE.

* * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

APPLICATION FOR ORDER TO PRODUCE PRISONER

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

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

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

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

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

DATED: May 20, 1997.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By _____
TERRENCE P. McCARTHY
Deputy District Attorney

V7.82

CERTIFICATE OF MAILING

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

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

DATED: June 3, 1997.

Linda Jackling

V7.83

FILED

'97 JUN -3 P2:53

JUDICIAL CLERK
BY C. Stewart
DEPUTY

No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE.

* * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

ORDER TO PRODUCE PRISONER

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

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

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

DATED: May 30, 1997.

DISTRICT JUDGE

V7.85

CERTIFICATE OF MAILING

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

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

DATED: June 3, 1997.

Linda Jackling

FILED

'97 JUL 15 P4:47

JUDICIAL CLERK
BY S. Davis
DEPUTY

Case No. CR94P0345

Dept. No. 8

SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

* * * * * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Defendant.

_____/

APPLICATION FOR ORDER TO PRODUCE PRISONER

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

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

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

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

//////

//////

//////

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

DATED this 15th day of July, 1997.

Joseph R. Plater by John N. Schroeder

JOSEPH R. PLATER, Esquire
313 Flint Street
Reno, Nevada 89501
(702) 348-2070

ATTORNEY FOR PETITIONER

JOHN NICHOLAS SCHROEDER
301 Flint Street
Reno, Nevada 89501
(702) 329-3000
Bar Number: 396

CERTIFICATE OF SERVICE

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

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

_____ personal delivery

_____ facsimile (fax)

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

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

FILED

'97 JUL 16 P3:33

JUDI BAILEY, CLERK

BY _____ DEPUTY

Case No. CR94P0345

Dept. No. 8

SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

* * * * * *

CHARLES MAKI,

Petitioner,

v.

ORDER TO PRODUCE PRISONER

THE STATE OF NEVADA,

Defendant.

_____/

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

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

DATED this 16 day of July 1997.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

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

\ _____ personal delivery

_____ facsimile (fax)

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

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

Clara Schmidt

V7.91

FILED

'97 JUL 24 P4:53

JUDI BAILEY CLERK

BY _____ DEPUTY

No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

CHARLES JOSEPH MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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

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

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

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

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

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

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

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

Maki claimed that counsel prohibited him from

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

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

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

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

best she could with what she had to work with.

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

DATED this 24 day of July, 1997.

DISTRICT JUDGE

V7.95

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24 day of July, 1997, she mailed copies of the foregoing ORDER in Case No. CR94P0345 to the following:

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

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

Kathryn Miller
Administrative Assistant

V7.96

FILED

'97 JUL 28 A8:29

JUDI BAILEY, CLERK
BY DEPUTY

Case No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES JOSEPH MAKI

Petitioner,

NOTICE OF ENTRY OF DECISION OR ORDER

VS.

STATE OF NEVADA

Respondent,

_____/

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

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

JUDI BAILEY
CLERK OF THE COURT

By _____
Deputy

V7.97

FILED

'97 JUL 24 P4:53

JUDI BAILEY CLERK

BY _____ DEPUTY

No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

CHARLES JOSEPH MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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

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

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

V7.98

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

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

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

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

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

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

best she could with what she had to work with.

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

DATED this 24 day of July, 1997.

DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 24 day of July, 1997, she mailed copies of the foregoing ORDER in Case No. CR94P0345 to the following:

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

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

Kathryn Mullen
Administrative Assistant

CERTIFICATE OF MAILING

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

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

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

JOE PLATER, ESQ
313 FLINT ST
RENO, NV 89501

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

PAT MEACHAM
CRIMINAL DOCKET CLERK

Case No. CR94-0345

Dept. No. 8

FILED

'97 AUG 18 P4:28

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHEO

JUDI BAILEY, CLERK
BY L Duncan
DEPUTY

* * * * *

HUCK J. MAKI,

Petitioner,

vs.

E.K. McDANIEL, Warden,

Respondent.

NOTICE OF APPEAL

TO: ALL CONCERNED PARTIES:

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

Dated this 11 day of August, 1997.

Respectfully submitted,

Chuck J. Maki

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

Petitioner In Pro Se

CERTIFICATE OF SERVICE

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

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

Attorney for Respondent

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

Attorney for Respondent

Chuck J. Maki

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

Petitioner In Pro Se

A 30904

FILED

'97 AUG 18 P5:30

JUDI BAILEY CLERK

BY K. Duncan DEPUTY

CASE NO. CR-94-0345

DEPT. NO. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

* * *

MAKI CHARLES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NOTICE OF APPEAL

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

DATED this 6th day of AUGUST, 1997.

CHARLES J. MAKI

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

(APPELLANT IN PROPER PERSON)

///

///

///

///

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CASE NO. CR94-0345

DEPT. NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

E.K. MCDANIEL,

RESPONDENT.

_____/

FILED
'97 AUG 19 A9:17
JUDI BAILEY, CLERK
BY DEPUTY

CERTIFICATE OF CLERK

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

DATED, AUGUST 19, 1997.

JUDI BAILEY, COUNTY CLERK

BY, _____
RUTH MORGAN
APPELLATE DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CASE NO. CR94-0345

DEPT.NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

E.K. MCDANIEL,

DEFENDANT.

_____/

CERTIFICATE OF TRANSMITTAL

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

JUDI BAILEY, COUNTY CLERK

BY _____
RUTH MORGAN
APPELLATE DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CASE NO. CR94-0345

DEPT. NO. 8

THE STATE OF NEVADA,

PLAINTIFF,

VS.

CHARLES J. MAKI,

DEFENDANT.

_____/

CASE APPEAL STATEMENT

1. THE APPELLANT IS CHARLES J. MAKI.

2. THE APPEAL IS FROM THE ORDER FILED JULY 24, 1997, BY HON. STEVEN KOSACH, DISTRICT JUDGE

3. THE PARTIES BELOW CONSIST OF; THE STATE OF NEVADA IS PLAINTIFF, CHARLES JOSEPH MAKI IS DEFENDANT.

4. THE PARTIES HEREIN CONSIST OF; CHARLES JOSEPH MAKI IS APPELLANT, THE STATE OF NEVADA IS RESPONDENT.

5. COUNSEL ON APPEAL IS; GARY HADLESTAD, CHIEF APPELLATE DEPUTY, P.O. BOX 11130, RENO, NEVADA 89520

6. THE APPELLANT WAS REPRESENTED BY THE PUBLIC DEFENDER IN THE DISTRICT COURT.

7. THE APPELLANT HAS FILED A PROPER PERSON NOTICE OF APPEAL AND HAS NOT REQUESTED COUNSEL FOR APPEAL AT THIS TIME.

8. FEES ARE NOT APPLICABLE

9. AN INFORMATION WAS FILED FEB. 10, 1994.

DATED, AUGUST 19, 1997.

JUDI BAILEY, COUNTY CLERK

BY, _____
RUTH MORGAN, DEPUTY

Case No. CR94-P0345

Dept. No. 8

FILED

'97 AUG 26 P3:50

JUDITH A. LEY, CLERK

BY _____ DEPUTY

SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

* * * * * *

CHARLES MAKI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_____/

NOTICE OF APPEAL

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

DATED this 26 day of August, 1997.

JOSEPH R. PLATER, ESQ.
313 Flint Street
Reno, Nevada 89501
(702) 348-2070

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

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

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

X personal delivery

____ facsimile (fax)

____ Federal Express or other overnight delivery

____ Reno/Carson Messenger Service

addressed as follows:
WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
PO BOX 11130
RENO NEVADA 89520

DATED this 26 day of August, 1997.

Paige Pattinoski

Case No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE STEVEN KOSACH, DISTRICT JUDGE

--oOo--

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

APPEARANCES:

For the Petitioner: JOSEPH PLATER, ESQ.
Attorney at Law
Reno, Nevada

For the Defendant: TERRENCE McCARTHY
Deputy District Attorney
Washoe County Courthouse
Reno, Nevada

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

ORIGINAL

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

--oOo--

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

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

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

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

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

(The witness was sworn at this time.)

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

THE WITNESS: Your Honor, I have hearing aids.

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

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

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

///

C H A R L E S M A K I

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

DIRECT EXAMINATION

BY MR. PLATER:

Q. Would you state your name, please?

A. Charles Joseph Maki.

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

A. Kind of.

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

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

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

A. Ely State Prison, yes.

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

A. In 1994.

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

A. Yes.

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

A. What are all the grounds?

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

A. Oh, yeah.

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

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

MR. PLATER: Whatever is comfortable.

THE COURT: Exactly. Wherever is comfortable.

BY MR. PLATER:

Q. Is this better, Mr. Maki?

A. Yes.

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

A. Yes.

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

A. Right.

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

A. That's fine.

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

A. That's fine.

Q. You want to bring those out?

A. Exactly. Exactly.

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

A. Janet Cobb Schmuck, public defender.

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

A. Yes, I do.

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

A. Correct.

Q. All with a minor under 14, correct?

A. Correct.

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

A. Absolutely.

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

A. Uh-huh.

Q. Was it your desire at trial to testify?

A. Was it mine?

Q. Was it your desire to testify at trial?

A. Positively. I absolutely wanted to testify.

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

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

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

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

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

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

Q. When did she tell you that?

A. What day?

Q. Was it during trial, before trial?

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

Q. And what was your response to that?

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

Q. Where she was visiting you?

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

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

A. Yes, she did.

Q. What did she tell you?

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

Q. Did she talk about prior convictions?

A. No.

Q. You had prior convictions, right?

A. Yes, I do, prior convictions.

Q. Felony prior convictions?

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

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

A. Oh, sure.

Q. You were willing to do that?

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

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

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

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

A. Absolutely not.

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

A. I don't recall.

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

transcripts.

A. No. I don't recall.

Q. That you ever objected to the Court?

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

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

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

Q. And you followed her advice?

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

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

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

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

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

A. No, I never did that.

Q. How come?

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

Q. Okay.

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

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

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

Q. Such as?

A. I get witnesses.

Q. What types of witnesses?

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

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

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

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

BY MR. PLATER:

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

A. Was I concerned?

Q. Right.

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

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

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

witnesses are going to say.

THE WITNESS: Oh.

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

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

THE COURT: Objection is sustained.

BY MR. PLATER:

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

A. Yes.

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

A. Oh, absolutely.

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

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

Q. Did you tell her to do anything else?

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

Q. Anything else besides that?

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

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

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

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

A. A who?

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

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

MR. McCARTHY: Objection, your Honor.

THE COURT: Sustained.

BY MR. PLATER:

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

A. You betcha.

Q. Was that ever done to your knowledge?

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

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

A. No. She never mentioned anything at all.

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

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

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

A. Very much so.

Q. Why is that?

A. Can I put it bluntly?

THE COURT: Go ahead.

THE WITNESS: Miss Schmuck is two-faced.

BY MR. PLATER:

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

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

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

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

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

A. Absolutely not.

Q. Because what she said regarding her own past?

A. Absolutely not.

Q. And because she said you were guilty?

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

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

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

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

Q. Do you remember the sentencing in this case?

A. Yes.

Q. Do you remember before sentencing a Jocelyn Coombs?

A. Coombs.

Q. Coombs?

A. Yeah.

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

A. Yes, I did.

Q. And did you have a discussion regarding that with

Miss Schmuck?

A. Yes, I did.

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

A. Any proposed defense?

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

A. Oh, definitely.

Q. What did you tell her?

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

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

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

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

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

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

Q. Okay.

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

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

THE COURT: Thank you. Mr. McCarthy?

BY MR. McCARTHY:

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

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

Q. Right.

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

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

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

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

A. No. No.

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

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

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

A. Pretty much, yeah.

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

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

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

A. Yes.

Q. That has some names in it?

A. Yes.

Q. People that could help you?

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. Right.

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

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

A. Exactly.

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

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

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

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

Q. Okay.

A. We're speaking during trial?

Q. Yeah.

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

Q. Okay.

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

THE CLERK: State's Exhibit A marked.

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

THE COURT: Is that a copy of the transcript?

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

BY MR. McCARTHY:

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

A. You want me to read the whole thing?

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

A. Not really.

Q. You've never received that letter?

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

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

A. As far as I can remember, no.

Q. Okay.

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

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

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

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

A. Oh, yeah.

Q. You recall that in some detail?

A. Pretty much so, you bet.

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

A. Define "this."

Q. Skip it.

THE COURT: May I see it, please?

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

later. Unless there's an offer to stipulate.

MR. PLATER: Probably. Did she write it?

MR. McCARTHY: Yeah.

MR. PLATER: Sure.

BY MR. McCARTHY:

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

A. Exactly what she told me.

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

A. I couldn't give you her reason.

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

A. She didn't tell me that.

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

A. No, you're changing it around.

Q. Tell me.

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

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

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

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

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

Q. I don't quite understand.

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

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

A. No, she did not say that.

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

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

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

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

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

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

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

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

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

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

Q. In the trial?

A. During the trial.

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

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

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

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

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

A. That would be after Michael O'Brien.

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

A. Yes.

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

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

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

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

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

THE COURT: I'll strike it.

BY MR. McCARTHY:

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

A. I thought I was.

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

A. Say again, now?

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

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

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

A. Pretty close. Pretty close.

Q. Can you make it closer?

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

THE COURT: Yes.

MR. PLATER: You want the other package?

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

THE COURT: That's fine with me.

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

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

(Whereupon the reporter read the record.)

BY MR. McCARTHY:

Q. Did you hear that?

A. Excuse me. It sounded like mumbles.

(Whereupon the reporter read the record.)

BY MR. McCARTHY:

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

A. Right.

Q. When was it that you made that fuss?

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

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

A. That I can't answer, really.

Q. Was it something you said?

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

pictures brought out so that the identity could be shown.

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

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

Q. Did the judge get it?

A. Janet Schmuck had them.

Q. Did the jury get to see the pictures?

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

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

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

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

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

Q. Can you give us some names, please?

A. Give you all of them.

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

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

this is during trial only.

Q. Yeah.

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

Q. I'm sorry. What are you reading from, sir?

A. My notes. You can look at them.

Q. That's all right. Those are the notes you took at trial?

A. These are the notes I took from the day I was arrested to the day I went to prison. It's like a diary. You might say of everything, every conversation, phone call, person who visited me, everything that took place, I wrote it all down so I wouldn't forget.

Q. Great. Perhaps you can tell us, then, if you gave these names to Janet Schmuck.

A. Okay. April 2nd to April 4th, 1994 was the one that I got down here also. It was April 1st and March 26th and that's basically it.

Q. When did you prepare this diary that you have?

A. From -- if you'd look to see it. I have no objection to you looking at it.

Q. Thank you. May I approach?

A. These are other notes right there of when I was in prison. Now, the dates might be a day or two off, but because

I didn't have no calendar.

Q. So you wrote this diary that you're reading from like each day. You would sit down and say today Janet Schmuck came to visit me?

A. It wasn't just Janet Schmuck. It was other attorneys that came to seen me. Janet Schmuck, my sister, anybody that visited me in jail. The conversation I had with the police after I was arrested, when I didn't have an attorney present, everything and anything, what happened between myself and the judge, what happened in the courtrooms, everything.

Q. Okay. So, for instance, conversation you had with the police, later that day, you sat down with the paper and pencil and you wrote down, today I had a conversation with the police, something along those lines?

A. Something along those lines.

Q. It wasn't later, right?

A. No. It was within the reasonable time that I had. I mean, if I was here, of course, I couldn't do it, so I had to wait until I got back to my little cell back there and took out pencil and paper and start scratching notes.

Q. Can I see that once again, please? When did you write down the part at the top, page one, side one?

A. Oh, probably about a year after I've had this.

Q. Okay. So that wasn't written there in the beginning?

A. Oh, no. I sent a copy of this to my sister and I sent a copy of this to my attorney and my appeal attorney, David Hardy. I sent a copy of this also to Robin Wright, but in case this got lost in transit. My sister on the street had a copy and so did Daniel Johnson.

Q. Now, did you give us the whole list of names that you'd asked Janet Schmuck to acquire, people you'd asked her to bring in for you?

A. Well, you want the whole list? I got pretty much all of them, I think. Ken Daniels, Linda Stallings, Carla Scarpa, Daniel Johnson, Gail Thomas. Those are the people I wanted at trial initially, plus I wanted -- I knew that Paul Grubbs wouldn't be able to come.

Q. Why not?

A. Because he moved.

Q. Okay. I'm sorry. Go ahead. Was there more?

A. There was a guy named Jay, I don't know his last name. Miss Schmuck told me that he wouldn't come unless he was, what do you call it, subpoenaed. Yeah, I would say that's basically about it, yeah.

Q. How about your sister Jackie? Did you suggest to Janet Schmuck that your sister Jackie should come to the trial?

A. Yeah. I wanted her to come, but Janet told me that the district attorney had a tape in his possession of Jackie,

my sister you're speaking of, threatening Jocelyn that if Jackie came, as you call her, her real name is Ester, but if she came, that the district attorney would probably arrest her.

Q. Now, that supposed tape of Ester threatening Jocelyn?

A. Right.

Q. That was after the trial and before sentencing, was it not?

A. I assume.

Q. Okay. For trial purposes, did you suggest to Janet Schmuck that she have your sister Ester come to the hearing?

A. Yes. Yes, I did.

Q. Okay.

A. Yes, I did.

Q. Did Janet Schmuck tell you that she would not do that?

A. Well, I know she did, but I'm trying to see the reason why.

Q. So she told you that she refused?

A. You wanted me, to put it bluntly, Janet Schmuck told me that my family was fucked up if the ladies will excuse my words.

Q. All right.

A. Yeah.

Q. Now, tell me also, this conversation where Janet

Schmuck told you that you were guilty?

A. Uh-huh.

Q. Do you recall if the word "credibility" entered into that conversation at all?

A. Did -- and which part now?

Q. The word "credibility," did that arise in that conversation?

A. On whose part?

Q. I'll rephrase it. When Janet Schmuck told you that she was guilty, that you were guilty, excuse me, did she do that by telling you she had met with the girls and she found them to be credible?

A. Yes.

Q. Okay. Did she tell you that she thought a jury would believe them?

A. Yes.

Q. Did she tell you that because of that, she would not defend you to the best of her abilities?

A. In part.

Q. Explain if you would "in part?"

A. She told me she went and talked to the two girls and their dad. When I asked her to go talk to other people in the apartment complex, she stated that she talked to them, that she felt that they were telling the truth, that I was lying and a

jury would not find me, as you put it, credible, and that I was guilty. Period.

Q. But did she go on to say, because you were guilty she would not put forth her best efforts?

A. No. She would find a way, yeah, she told me she was assaulted prior to sometime in her lifetime, she didn't get into the details, and the girls had to be telling the truth and that's all basically how it goes.

Q. Okay.

A. That I had to be the guilty party.

Q. Okay. And speaking of Desiree Summer, the girls, as we call them, can you recall, sir, if it was ever a time when they could have seen the tattoos on your abdomen?

A. My stomach?

Q. Yes.

A. Hundreds of times. Everybody sees them. I've got them on my back, my stomach and my arms. I take out my garbage, I'm sitting in my house, I work on my truck, I go next door, I'm sitting on the front porch, you know, enjoying a cool drink of cool aid or something or a cold beer on a summer night. Hundreds of times, thousands of people could see it. I play baseball.

Q. Now, are there some tattoos they never would have seen on you?

A. Absolutely.

Q. And what tattoo is that?

A. At that time to down below my penis area, from my belly button down to my scrotum.

MR. McCARTHY: May I have just a moment, your Honor?

May I have these marked, your Honor?

THE CLERK: State's Exhibit B1 and B2 marked for identification.

BY MR. McCARTHY:

Q. Mr. Maki, I'll show you what's been marked as Exhibits B1 and about B2, are these photographs of you, sir?

A. Yes. Kind of rough looking, aren't I? Yeah, that's me.

MR. McCARTHY: I'll offer B1 and B2.

THE COURT: Any objection?

MR. PLATER: No.

THE COURT: B1 and B2 will be admitted.

BY MR. McCARTHY:

Q. Now, those photographs show two photographs, two tattoos, is that right?

A. Yes.

Q. And it's your belief that thousands of people might have seen the upper tattoo, but very few people were ever going to see that lower tattoo, is that right?

A. You can see the head of the upper tattoo, but, basically, you're correct.

MR. McCARTHY: Be just a moment, your Honor. I think I'm done. I have nothing further.

THE COURT: Any redirect?

BY MR. PLATER:

Q. Mr. Maki, when you said -- when there was this testimony that -- you testified that Miss Schmuck told you that the girls in her opinion were credible?

A. Yes.

Q. Okay. Did she tell you that you were -- did she actually use the word that you were guilty or simply that the State's case with its witnesses was more credible than your defense?

A. No. She told me point blank I was guilty.

MR. PLATER: That's all I have.

THE COURT: Anything else, Mr. McCarthy.

MR. McCARTHY: No, thank you.

THE COURT: You can resume your seat at the counsel table, Mr. Maki.

MR. PLATER: I'm sorry. I had one other question.

THE COURT: One other question. Go ahead and set down.

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REDIRECT EXAMINATION

BY MR. PLATER:

Q. Mr. Maki, Mr. McCarthy went through a list of witnesses you gave to Miss Schmuck?

A. Uh-huh.

Q. And what was the purpose of giving those witnesses to Miss Schmuck for?

A. I wanted them to testify. Most of those people have kids have known me, I've dated them, I've known them for years and all of them have kids and I wanted the jury to see that I not this animal that the State has made me out to be, that I've been around kids all my life. I've got kids of my own. They're grown up a little bit now. I still have kids of my own. I wanted them to be able to see through someone else's eyes besides the State's eyes of who I was.

Q. You wanted to present witnesses to show the jury that you had been around children and you never molested them or assaulted them?

A. All my life I've been around them.

Q. You presented one witness at trial to testify to that?

A. Excuse me?

Q. You presented of a witness at trial to testify to that?

A. Yes, Daniel Johnson.

Q. And that was not sufficient in your mind?

A. Absolutely not.

Q. Why not?

A. Daniel Johnson, I haven't seen for six years and she lived 400 miles away and when she found out that I was in trouble up here, she came to my rescue, so to speak, because she knew what type of person I was and who I was. She traveled 400 miles out of her way to come up here and testify for my behalf.

Q. She had not seen you for six years?

A. She had not seen me for six years.

Q. At the time of the trial?

A. At the time of the trial.

Q. So these other witnesses would have presented more recent testimony about your relationship with their children?

A. Absolutely.

Q. So these were going to be used as character witnesses?

A. I guess that's what you call them, yes.

Q. And what were their names?

A. It was Linda Stalling, I dated her. She has two young boys. There's a -- I've known Linda when I was in the hospital. I met her there. I knew her for approximately a

year and a half, two years. Up to date at the time of the trial, as a matter of fact, I just seen her a few weeks prior to my arrest.

Carla, I've known Carla for approximately up to the date of the trial, about 18 years. Ken, I knew him, God, years. Ken Daniels, I've known him 15 years up to the date of the trial. He's got two young girls.

Linda Stallings, I've known her for two years, plus dated her five months. She's got two young boys. Carla Scarpa, I've known 15 years plus dated a couple of months. She's got one boy I've known since two years old. Daniel Johnson, I lived with her for nine months. I helped her baby sit a couple of kids off and on.

Gail Thomas, I knew her for two years, dated her off and on. She has two kids and three grand kids and those are my character witnesses that I wanted to come to testify about me, about what I was like, who I am, who I really am, not what the State thinks I am.

Q. And you also mentioned that there was a person or that you knew of some prior sexual activity of the little girls in this case?

A. Yes.

Q. You gave that to Miss Schmuck?

A. I told Miss Schmuck, positively, I told Miss Schmuck,

more than once, my sister told her also.

Q. Did you ever personally observe any sexual activity of the young children?

A. Truthfully, no. I can't say that I did. No. I wish I could say that, but I can't.

Q. Did you ever see the young children in inappropriate circumstances or behavior yourself?

A. Yes.

Q. What was that?

A. I caught the young girl and the older girl both in compromising positions with young boys

Q. Let's take Desiree first. What did you see?

A. The first time was with Summer, the younger girl, and that was with little John downstairs. That was approximately November of 1993. They were in her bedroom with the older girl. John was what they call playing doctors, both, you know, all kids do it, you know, when they're that age, I guess. They were playing doctors, as I they called it. I told the dad that night when he got home from work and he said it was no big deal.

Q. What did you see?

A. John had his pants to the ankles, Summer had no pants on and he was on top of her trying to have sex with her.

Q. And you saw that?

A. Positively.

Q. And what did you do about it?

A. I pulled John up by his arm, kind of out of my way, scolded him to a degree, took him down stairs to his -- it wasn't really his stepfather. It was to be stepfather. And I told him about it and I told the mother about it and he was restricted from seeing the girls at that point, to my knowledge, anyway. And I waited until later that night and told Gary, the father, Gary Mineese of what was going on with Summer and John and he told me, it was no big deal, this happened before, you know, they're just kids.

Q. Regarding Desiree, you saw something else also?

A. Desiree, it was a few weeks later, I think it was school time when they had, what do you call it, school vacation.

Q. Thanksgiving break or Christmas?

A. Summer or Christmas break or whatever it is. Anyway, it was a big kid up there, he's wearing what I believe to have -- I always heard as these gang clothes, those were Oakland Raiders things. I assumed he was one of these gang member things. I've never really seen one so I don't know.

He was up there. Anyway, he was a big kid. He was almost my size. He looked like 17 years old. He was in there with Desiree on the bed. He had her pretty well depants and he was

trying to do things with her.

I grabbed that boy by his hair, threw him down the stairs and that's when I told Jay, the guy downstairs, of what I've done, because he seen the guy tumbling down the stairs and I told Jay what happened. And asked Jay his opinion if I should tell the father about this, because apparently the dad just don't give a hoot.

And he said, yeah, he thought it would probably be better if I told him and he would back me up on it. And I said fine. And I went up there and told Desiree. I'm going to have to tell your dad about what I saw. And Desiree got upset, called me names, told me it was none of my business. It was her boy friend and got upset about everything and I just-- that's how it has to be.

So Gary come home that night fairly intoxicated about 9:30. I pulled him up. I told him: This time I caught Desiree in there with a young boy. She says it's her boyfriend. And Gary acknowledged the fact that he knew this kid, that he was from the neighborhood somewhere and he's been up there before. And, again, it was no big deal.

Q. And what was your purpose in telling Miss Schmuck about these incidents?

A. Well, Gary told me when I first met Gary approximately three months after I met Gary Mineese, he told me

when we were drinking, we were having a couple of beers on the porch that night one night. He told me he was pulled up by the Reno Police Department and the welfare department for taking showers and running around the house nude with his daughters.

MR. McCARTHY: Your Honor, if this is offered for the truth of the matter asserted, then I object.

BY MR. PLATER:

Q. I'm asking why did you want -- why did you bring these incidents to Miss Schmuck's attention?

A. Oh, you mean about the kids?

Q. Right.

A. Because I wanted her to know what kind of girls these were. I wanted her to know. I mean, everybody is painting them as these two angels. These are no angels by no means. When the DA had them sitting up here in white dresses with little teddy bears and stuff, you know, I asked Miss Schmuck what's going on. She said: It's a DA's trick to make them look innocent. They're not innocent by no means. Let's get to the heart of the matter. Let's show what they really are.

Q. Okay. That's all I have.

THE COURT: Anything else?

MR. McCARTHY: If I may.

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RECROSS EXAMINATION

BY MR. McCARTHY:

Q. Want to show what they really are?

A. Yes.

Q. What are they?

A. They're not little angels. I won't say that they're -- they're -- I don't know what a typical eight and eleven year old girl is. I mean, it's been a while since I raised mine. Mine weren't like that that I know of.

Q. Is it your belief that these two girls, that the eight-year-old and the eleven-year-old were both sexually active?

A. In my belief, I know, I seen it with my own two eyes. I told the father, I told Miss Schmuck, I told her to even go down and have the welfare department, somebody, medical anybody to check them out to see. Have a psychological evaluation of the girls, find out what's ticking in their brain. But nobody wanted to listen to me.

I seen it with my own two eyes. The dad told me: It's no big deal, they're young. Okay. Maybe that's true. It's not my place. You know, I put my nose in where it didn't belong. I called the welfare department on him, because I put my nose in where it didn't belong. Because he comes home drunk every night and don't take care to his eyes and takes them over to an

adult pizza joint where the college kids hang out. The kids are coming up to the house when he's not home. His buddy Frances takes them out when he didn't know where they are.

I catch boys in the room having sexual activities with the girls, and they tell me it don't matter. I'm the one that called the welfare. I told them. Again, I put my nose where it didn't belong. I think they were sexually active. You're doggone right. I seen they're sexually active. To what degree, I couldn't tell you for sure. But they were definitely, what do you call it, exploring. I'll put it that way.

Q. Do you think they were seductive?

A. Do I think they were seductive?

Q. Yeah.

A. Hell if I know.

Q. Did you have an opinion about who is the initiator in this sexual activity?

A. I couldn't tell you.

Q. What you saw, did it appear to be voluntary?

A. It appeared to be.

Q. Ever try to seduce you?

A. No.

Q. They never did?

A. Never.

Q. Never wanted to have sex with you?

A. Who.

Q. They never wanted to have sex with you?

A. No, absolutely not.

Q. Those girls ever see you naked?

A. Absolutely not.

Q. Never saw you in the shower?

A. One of them did, yes. I can't lie about that. She seen my back of my butt.

Q. She -- could she have seen your genitals?

A. Absolutely not.

Q. Could any of them ever see you getting in or out of the shower?

A. No.

Q. Any of those girls ever see you getting dressed?

A. Absolutely not.

Q. Were you ever wearing a bathrobe in the presence of Summer and Desiree?

A. Oh, probably. Yeah. But I would have something underneath it. It wasn't like I would go out there and just, you know, wear a bathrobe. I would have short pants or my drawers on or something. I'm lounging around in my house, sure. Is there something wrong with laying around with having bathrobe on closed.

Q. When you say "drawers" on, you mean briefs?

A. Boxers, I usually wear.

MR. McCARTHY: That's all I have.

MR. PLATER: Nothing else.

THE COURT: You can step down, Mr. Maki.

THE COURT: Take a short break.

(A short break was taken at this time.)

THE COURT: Okay. Mr. Maki is present with counsel, Mr. Plater. Mr. McCarthy is present. You can call your next witness.

MR. PLATER: Call Mr. Fried, your Honor.

THE CLERK: Raise your right hand to be sworn.

THE CLERK: Thank you. Be seated.

M I C H A E L R. F R I E D

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

DIRECT EXAMINATION

BY MR. PLATER:

Q. Would you state your name, please?

A. Michael Ray Fried.

Q. Mr. Fried, you're an inmate at NNCC in Carson City?

A. Correct.

Q. Do you know Mr. Maki?

A. Yes, I do.

Q. And do you know a Jocelyn Coombs?

A. Yes, I do, but the name wasn't Coombs when I knew her.

Q. Okay. Was it Maki at that time?

A. Yes.

Q. And you went out with her?

A. Yes, I did.

Q. Okay. And that was some time ago?

A. Yes.

Q. When was that?

A. I believe it to be 1979 or 1980.

Q. Okay. And at that time, did you have problems regarding her credibility?

A. As far as problems, I don't know. I've heard some tails that I don't say I could believe, but I've had no proof to back them up either.

Q. Were you aware of her reputation regarding credibility?

A. Yes, I was.

Q. What was that?

A. She was very, how would you say, I don't know if I want to say insecure -- let's see if I can explain. How about her word wasn't to be trusted, because she liked to manipulate

male people for favors or whatever she could get out of somebody.

Q. And that was during a time that you went out with her?

A. Yes.

Q. That you knew of her reputation?

A. Right.

Q. Did you ever see her under the influence of controlled substances?

A. Yes, I have.

Q. How often?

A. Well, every time I seen her, which probably would be once or twice weekly for the span we were together.

Q. What type of substances did she take?

A. Usually marijuana and speed.

Q. Speed being methamphetamine?

A. Right.

Q. And what was she like under the influence?

A. Happy-go-lucky, want to go party some more, carefully.

Q. Did it affect her memory or --

A. It's really hard for me to say on that one, because it's a short span that I was with her.

MR. PLATER: That's all I have, your Honor.

THE COURT: Mr. McCarthy, questions?

CROSS EXAMINATION

BY MR. McCARTHY:

Q. Do you recall where you were living, sir, in the Summer of '94?

A. Pardon me?

Q. Do you recall where you were living in the Summer of 1994?

A. Virginia Motor, I believe.

Q. Did you spend any time in the county jail that year?

A. Yes, four months.

Q. Were you in the county jail at the time Charles Maki was sentenced?

A. Yes.

MR. McCARTHY: That's all I have.

MR. PLATER: That's all.

THE COURT: Thank you, Mr. Fried. You can step down.

MR. PLATER: Your Honor, I will call -- what is your calendar like today?

THE COURT: I'll go until about noon, then I have a 1:30. Then we can resume this after approximately half an hour of that 1:30. We can start up at about 2:00. But we've got roughly half an hour to go this morning.

MR. PLATER: It might be quicker if I called Miss Schmuck

right now and we can go right through that.

THE CLERK: Thank you, please be seated.

J A N E T C O B B S C H M U C K

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

DIRECT EXAMINATION

BY MR. PLATER:

Q. Would you state your name, please?

A. Janet Cobb Schmuck.

Q. Miss Schmuck, you're a licensed attorney, is that correct?

A. That's correct.

Q. You have a license to practice law in the State of Nevada?

A. Yes.

Q. Are you licensed in the Federal Court District of Nevada also?

A. Yes.

Q. You're a lawyer in the Washoe County Public Defender's Office?

A. That's correct.

Q. You've been a lawyer there for how many years?

A. It will be seven years in October.

Q. Okay. When did you pass the bar?
A. 1990.
Q. And you went straight to work for the Public Defender's Office?
A. That's right.
Q. You know Charles Maki?
A. Yes, I do.
Q. And you represented him at trial?
A. That's correct.
Q. And that was in 1994?
A. Yes.
Q. When did you start doing trial work for the Public Defender's Office?
A. I think I went into the trial division in November of 1993.
Q. Okay.
A. I know it was just when Mr. Specchio had started as the public defender.
Q. Okay. Prior to that time, what were you doing?
A. I was in the appellate division.
Q. Okay.
A. And prior to that, I had been in the municipal court doing trial work.
Q. Okay. With the Public Defender's Office?

A. That's correct.

Q. Okay. So in November of '93, you started doing felony trial work?

A. That's right.

Q. Okay. So do you remember when you first received this case regarding Charles Maki?

A. I believe it would have been in February, probably around the first of February or late January, since I think that's when the preliminary hearing was conducted.

Q. Of 1994?

A. That's right.

Q. Okay. Now, I take it you had numerous conversations and meetings with Mr. Maki?

A. That's correct.

Q. Okay. And during the process of representing him, it -- you eventually had going to trial, right?

A. That's right.

Q. And in the beginning, you conducted a preliminary hearing, right?

A. That's right.

Q. And he was arraigned in district court after that?

A. That's right.

Q. And you then you began to file pretrial motions, right?

A. That's right.

Q. And one of the pretrial motions you filed was a motion to suppress statements that he had made to RPD officers, right?

A. That's right.

Q. Do you remember that motion that you filed?

A. Yes, I do.

Q. Do you remember the grounds that you raised in the motion?

A. I believe the grounds for the motion was his indication of his rights not to continue the questioning that he wanted to speak with an attorney.

Q. Right. And I'll represent to you, I've reviewed the motion and maybe you can look at it if you want to.

MR. PLATER: May I approach, your Honor?

BY MR. PLATER:

Q. You recognize that document?

A. Yes.

Q. Okay. That's the motion you filed on behalf of Mr. Maki?

A. That's right.

Q. To suppress statements that he made to officers?

A. That's correct.

Q. Is it accurate to say that you raised, I believe, two

grounds in that motion to suppress his statement? One was that he was entitled to a Miranda warning, because at the very beginning of the interview with the officers, he was -- it was in your argument a custodial interrogation. And, secondly, you wanted to suppress all statements he made after he told officers he didn't want to talk to them anymore?

A. That's correct.

Q. Okay. So you raised two grounds?

A. That's right.

Q. Okay. Now, you did that because you were a lawyer who was appointed to represent Mr. Maki and you were doing that in your best professional judgment, right?

A. That's correct.

Q. What did you see your -- what was your role as Mr. Maki's counsel?

A. My role as his counsel was to represent him in all court proceedings, to zealously advocate his position, to protect his constitutional rights, to make sure that he had a fair and sound representation and that he was defended properly.

THE COURT: I'm sorry? What?

THE WITNESS: That he was defended properly.

BY MR. PLATER:

Q. That's why you filed the motion, right?

A. I filed that motion for those reasons and because I thought there was a rule issue as far as the tapes that he had made and there was an issue presented to the Court in terms of those statements being suppressed.

Q. And you filed other motions on behalf of Mr. Maki also, right?

A. That's right.

Q. You did that because you understand your duty as his attorney to protect his constitutional rights and zealously advocate all issues that might favor the outcome, or that might be favorable to his particular case, right?

A. Yes.

Q. And you also filed those motions because, is it fair to say, you sensed this case might be going to trial?

A. That's very true, yes.

Q. In other words, you don't -- as a trial lawyer, even though you have a potentially meritorious motion, you don't file every motion, even if it's potentially meritorious, if you don't see the case going to trial. Is that a fair statement?

A. That's a fair statement.

Q. Because sometimes during plea negotiations, the State will recognize it has a weak issue and as a defense you have a strong issue and you agree to waive filing of a certain motion and the State will give you something in return for your not

pursuing the defense by motion or otherwise and so you don't file all of the motions that are possible in every case?

A. That's true.

Q. But in this case, is it fair to say that based on your relationship with Mr. Maki, you saw that this case was probably going to trial?

A. Yes.

Q. That's one of the reasons you filed the motion to suppress statements that he made?

A. Yes.

Q. And you raised two issues in the motion to suppress that were basically based both on the Miranda decision, correct?

A. Correct.

Q. And can you quickly tell us what Miranda provides?

MR. McCARTHY: Your Honor, I'm going to object. Not to the question, but to the line of questioning. The motion to suppress was litigated in this court and in the Supreme Court. There's been a judgment on the merits. It's a res judicata, your Honor. So the admissibility alone of the statements has been decided by the Court of final -- the final court in this state.

THE COURT: I don't think that's where he's going with it. It's more tactics, I think.

MR. PLATER: Well, Mr. McCarthy is right in that the habeas provisions provide that if something has been litigated to the Court, especially of highest appeal, that issue is barred from post conviction relief, and it's true that Miranda and/or it's true that the voluntariness of his statements as they were presented by his trial counsel were litigated and decided against him, but I'm going to a different area that was not used by his trial counsel.

THE COURT: I'll let you go into the different area. That's what I meant. So overruled.

BY MR. PLATER:

Q. Okay. Could you tell us what you understand Miranda to be real briefly. We don't need an expert, full, broad definition?

A. Particularly with respect to this, my understanding is that someone who is the subject of an investigation should be warned that the subject of an investigation and told you -- everything you say can be used against you. If you want a lawyer, you should let us know, and if you can't afford a lawyer, one will be appointed to represent you.

Q. And Miranda does not apply to every scenario of investigations, does it?

A. No.

Q. Under what circumstances of investigation does it

talk about generally speaking?

A. Usually, we're talking about a custodial -- custodial interrogation when someone is not free to leave.

Q. Okay. And you raised the fact that in your mind, based on what you saw in the transcript of the interview between officers and Mr. Maki, you thought that there was an issue that that was a custodial interrogation from the very beginning, right?

A. Yes.

Q. And you raised that despite the fact that the officers told Mr. Maki he was free to leave, he was voluntarily coming with them, and that he didn't have to do anything with them, right?

A. Yes.

Q. And why did you think it was custodial at that time, at that very outset when Mr. Maki was down at the police station answering their questions?

MR. McCARTHY: Your Honor, that is the precise question that has a res judicata effect. He is not custodial as a matter of law.

MR. PLATER: I agree with that. It's been litigated. I'm leading into something.

THE COURT: I'll give you some leeway.

MR. PLATER: Maybe I'm taking too long.

THE WITNESS: Could I hear the question again?

BY MR. PLATER:

Q. Let me try it a different way. Okay. You thought that -- you thought that Mr. Maki's answering questions from the very beginning with the police officers at the police station was a custodial interrogation, right?

A. Yes.

Q. And you lost the issue?

A. That's right.

Q. Filed a motion, had a hearing, Judge Kosach ruled against you, right?

A. Right.

Q. And the Supreme Court agreed with Judge Kosach on that issue, do you know that?

A. I do.

Q. It's a matter of record. Okay. The order dismissing appeal rules that way. Okay. I guess I'll get straight to the issue. Did you ever consider when you were filing your suppression motion to add a third ground and say in the alternative if Mr. Maki was not in custody while he's being interrogated at the beginning of the interview, he certainly was in a custodial interrogation at some point later during the interview, but before the officers themselves decided it was custodial and gave Miranda warnings?

MR. McCARTHY: Your Honor, I think now that we have what the issues all about, I repeat, the Supreme Court has decided this individual is not subject to custodial interrogation. As the law of the case is a res judicata effect, as a matter of law, he could not have prevailed on that prong.

THE COURT: Yes, but the question was alternatively, so I'll overrule it as far as for the purposes of this question.

THE WITNESS: Let me make sure. Did I consider raising in the alternative that he was in custody before the police officers knew he was in custody?

BY MR. PLATER:

Q. Okay. I'll try to phrase it better.

A. Okay.

Q. Do you remember during the interrogation, at one point the officers advised Mr. Maki of his Miranda rights?

A. Yes.

Q. And do you remember the officers testifying they did that because they thought they had probable cause to arrest him at that point?

A. Yes.

Q. And you based part of your motion -- well, strike that. Did you think that or did it ever cross your mind that if this was not a custodial interrogation at the very beginning, it may have become a custodial interrogation at some

other point during the interview especially before the officers read Miranda rights to Mr. Maki?

A. I can't say that I recall thinking of it that way.

Q. Do you remember during the interview in the beginning Mr. Maki denied allegations of any wrongdoing with the girls?

A. Yes.

Q. Okay. And this was before officers read Miranda to him, is that right?

A. That's right.

Q. Before they read Miranda to him at a later point, but at the beginning of the interview, he did admit to bathing with Summer, do you remember that?

A. Yes.

Q. He admitted she washed his back and maybe she touched his genitalia?

A. Uh-huh.

Q. Do you remember that he admitted that he was guilty with Summer, that he had a buzz and I did something wrong?

A. Yes, I do remember that.

Q. Okay. At that point, had Mr. Maki committed -- admitted that he had committed a crime?

A. I think so.

Q. And that would have been at least lewdness?

A. Yes.

Q. Okay. Did the officers have probable cause to arrest him at that point, after he had made those admissions about Summer and the lewdness?

A. Based upon the comments that he made, at that point I would think that the officers had probable cause to Mirandize him at that point, at least.

Q. Okay. When he was Mirandized, he invoked his right to remain silent, right?

A. My -- I can't remember exactly. I know he invoked in such a way. I don't remember exactly if he said, I don't want to talk anymore, or if he actually said, I want a lawyer. It may have been that I don't want to talk to him.

Q. That's what he said. He said I don't want to talk. Okay. So after he made those statements that we referred to, you believe there was probable cause to arrest him for lewdness, right?

A. Well, I didn't say probable cause to arrest. I said that I think there was a -- at that point, there would have been a reason for the officers to Mirandize him.

Q. Because it would have been -- because he would have been in custody at that point?

A. I'm hesitating because I'm trying to remember from reading the police reports. It was at the time when I was going through all this and developing the motion to suppress,

it was my opinion that Mr. Maki was the subject of the investigation when the police officers went over to the apartment house and asked him to accompany them down to the police station. And that basically he was in custody at that point.

Q. You believed that the officers had probable cause to arrest him for sexual assault and lewdness, even before the interview began, right?

A. Yes.

Q. Now, assuming that -- I guess my question is: Why did you not argue that assuming Miranda did not have to be followed at the beginning of the interrogation, why did you not argue that it should have been followed by officers earlier than they actually gave the warning such as when Mr. Maki admitted to being guilty with Summer, having committed lewdness with her and the officers had probable cause to arrest him for sexual assault?

MR. McCARTHY: Your Honor, I have a different objection at this point. I was just looking, I can't find where this issue was pleaded, either in the petition or in the supplement. If it's appropriate at all, it ought to be in the successive petition.

MR. PLATER: I think there is a Fifth Amendment right filed in there.

MR. McCARTHY: It's very lengthy and wordy and it's hard to say, but I looked and I can't find it in there.

THE COURT: I'm going to overrule the objection. We can proceed with that.

BY MR. PLATER:

Q. Do you remember my question?

A. Is your question that I should have -- did I consider arguing that he should have been Mirandized immediately.

Q. No. You argued that, right?

A. That's what I --

Q. Okay. And did you consider that if that argument were not successful, that Miranda -- he should have been Mirandized, even if it were later, at an earlier time than the officers actually did it, for example, after he confessed to lewdness with Summer, and he said he was guilty, he said he knew he did something wrong, and the officers have probable cause to arrest him right there. In your mind, shouldn't they have -- isn't that -- everything after that a custodial interrogation?

A. I don't remember -- I don't remember considering that when I was writing this.

Q. Would that have been a reasonable consideration?

A. I would say that at this point, listening to the questioning this morning, it doesn't sound like an unreasonable

thing to do, but I'm also trying to recall a time what I was considering as reasonable and I -- I just don't remember thinking that as a reasonable argument to bring up.

Q. You don't remember whether it was a reasonable argument?

A. I don't remember thinking of it as a reasonable argument.

Q. Okay. You're not saying that you thought it was an unreasonable argument?

A. No.

Q. You probably don't remember the specific counts in the information in this case, but do you remember the first five counts were counts of Sexual Assault against Mr. Maki?

A. Yes.

Q. The next five were Lewdness counts against him with a person under 14 years old?

A. Yes.

Q. I'll represent to you that Count Four in the information charged Mr. Maki with sexual assault against a minor under 14 years of age and that was Desiree, and it alleged that he sexually assaulted her with his finger. There was testimony at the preliminary hearing that Desiree said this occurred during another sexual assault when he was sexually assaulting her with his penis. In essence, she said she

assaulted me with his finger and his penis during the same time. Do you remember that testimony at all?

A. I remember at the preliminary hearing?

Q. Right.

A. I can't say right now that I actually remember the testimony. I mean, I've reviewed the preliminary hearing transcript to say I actually remember the testimony, no.

Q. And if Desiree had said during the preliminary hearing testimony that she was sexually assaulted by Mr. Maki's finger, during the time that she was sexually assaulting her with his penis, do you think it would have been a reasonable argument that that constituted one offense as opposed to two?

A. No. Because what you've described to me is if there was a sexual assault using the penis and there was a sexual assault using the finger, I would see it as two separate or two different incidents.

Q. Okay. And what if they occurred simultaneously?

A. I don't remember anything about that being said.

Q. Okay. If it were simultaneous, would that be considered in your opinion one criminal act as opposed to two?

A. That's possible. But, I mean, I possibly would have considered that and done some research on it.

Q. Well, let's talk about Count V. That was a Sexual Assault count against Mr. Maki where he alleged -- where it was

alleged that he assaulted Summer?

A. Yes.

Q. She was the youngest of the two girls. And she testified to that at trial in front of a jury. Do you remember that she was sexually assaulted by him?

A. Yes.

Q. Do you remember during the preliminary hearing where Summer said that she was never sexually assaulted by Mr. Maki?

A. No.

Q. Maybe it would refresh your recollection if I gave you a transcript?

A. Sure.

MR. McCARTHY: Your Honor, as far as I can tell, this is the third area we're getting into that hasn't been pleaded. I don't know how I respond if I'm not put on notice.

MR. PLATER: Well, it's relevant because it shows inconsistencies in the victim's statements that should have put counsel on notice to file a request that the Court order a mental health and a physical and psychological examination of the victim.

MR. McCARTHY: That's pleaded.

MR. PLATER: That's pleaded.

THE COURT: Well, yeah. We can pursue that.

MR. McCARTHY: Okay. I didn't understand that.

THE COURT: You didn't know where we were going.

MR. McCARTHY: What is your direct is a question of, for instance, ineffective assistance or failure to pursue a pretrial writ. I would object to any argument concerning any such assertion.

THE COURT: I understand. Let's take the lunch break. I'd say be back here at 2:00. I have a 1:30. So let's go ahead and be back at 2:00 o'clock.

(A lunch break was taken at this time.)

THE COURT: Okay. We're on the record. Mr. Maki is present with counsel. State's represented. Miss Schmuck is on the stand. We can proceed.

BY MR. PLATER:

Q. Miss Schmuck, before Mr. Maki went to trial, were you aware that you could file a motion to the Court seeking the Court to order an independent physical and/or psychological evaluation of the victims in this case?

A. Yes.

Q. And did you make a decision one way or the other to file such a motion?

A. Yes, I did.

Q. What was the -- what decision was that?

A. I decided not to.

Q. And why is that?

A. Specifically, for the psychological exam, I had been informed by the State that they were not calling witnesses who would or experts who would testify as far as psychiatric testimony was concerned.

Also, in this particular case, there was no indication or any information that I had the children had received any sort of counseling. If memory serves me correctly, the incidents were alleged to have occurred in December of that year and the reports were made very soon thereafter to the police and there was no indication at all that the children had been seen by any psychiatrist.

As far as a physical exam is concerned, I believe I received the Saints exam later in the discovery process. I think there was a hearing at which that was addressed that I had not received, the Saints exam, and I did not see the need at that point when I did receive the Saints exam to ask for a physical exam independently.

Q. Okay. So there were two reasons you didn't ask for a psychological examination. One was there was no psychological evidence that you saw that was forthcoming from the State?

A. The State had not endorsed an psychiatric expert. I believe Mr. Greco informed me that he was not calling a psychiatric expert.

Q. The second reason in terms of the psychological a

motion for the psychological evaluation that the children had had no counseling?

A. That primarily. The -- what I was looking for was if there was a possibility that the children had been questioned by an expert, if there was any possibility of coaching or suggesting that had been made to them. And because of the amount of time that had elapsed and the information that I have that there was -- that they had not been counseled, I did not see the reason for that. I also did not have any or did not gain any information during the course of the investigation of this case that led me to believe that the children had any prior sexual activity going on in their lives, prior to their allegations that Mr. Maki had sexually molested them.

Q. Okay. Is it your understanding that you couldn't ask the Court for a psychological evaluation merely because you didn't expect the Court -- merely because you didn't expect the State to offer psychological testimony?

A. No. That's not my testimony. I think I still could have asked for one. I made a decision not to ask for one.

Q. Based on the fact that the State wasn't going to produce such evidence and because the kids had no counseling?

A. The information that I had received, yes.

Q. Okay.

A. And because I could not -- I could not establish that

there had been sort of any prior incidents of sexual molestation of the children by anyone else. There was no -- I couldn't establish that there had been any sexual activity by them.

Q. In your mind, was that required? Did you have to make such a showing in a motion before the Court?

A. No, I didn't think I had to make such a showing. I also knew that Mr. Maki was very concerned about that and had informed me of his very strong beliefs that the children had engaged in sexual activity. And because he had informed me of that, I tried to find out about that, I asked people, we did investigations of that.

Q. Okay. Would it be fair to say that a psychiatric evaluation that's proposed by the defense can be used to gain evidence or determine the credibility of the victim who is going to testify at trial?

A. I suppose it would be fair to say, yes.

Q. And the same thing with the physical examination, right?

A. Yes.

Q. Okay. So did you make -- based on that, did you make a determination that there were no credibility issues regarding the children who are going to testify against Mr. Maki?

A. Yes. I found in my own, because I was there at the

preliminary hearing, and the follow-up investigations that we did, no -- I found the children to be credible and also viewing the video tapes that were done by the police.

Q. Okay. So in terms of the credibility, you didn't make a motion for psychiatric evaluation, because the children seemed credible to you?

A. Yes.

Q. And that assessment that you made was based on doing a preliminary examination of the children, is that correct?

A. That's right.

Q. Reviewing discovery in the case?

A. Yes.

Q. Which would have included reviewing the taped interviews of the children?

A. Yes.

Q. Police reports?

A. Yes.

Q. Speaking with the district attorney about his case?

A. Yeah.

Q. Reviewing everything that you had in terms of investigation and discovery?

A. Yes.

Q. Okay. And would that reasoning also apply to why you elected not to make a motion for an independent physical

examination of the children?

A. Yes.

Q. Basically -- okay. Because you thought they were credible witnesses? Okay. Now, you mentioned that the Saints exam also was a factor in your decision not to ask the Court for such an evaluation, the physical part?

A. Yes.

Q. Okay. And what was it about the Saints exam that led you -- that you didn't need to make or petition the Court for an independent physical examination of the children?

A. Because my belief at that point was that there had been an exam done, the exam results were not especially -- I believe it was the older child, Desiree, that there was no -- the Saints exam wasn't real clear that there had been trauma to her, that there had actually been sexual assault.

Q. In fact, the Saints exam regarding Desiree said that the hymen was normal and they could find no signs of sexual abuse, right?

A. Yes.

Q. Did you find that report consistent with Desiree's allegations that she had been sexual assaulted four times by Mr. Maki?

A. Of course, it's not consistent. I mean, but in the sense that they were finding that they -- there was no trauma.

But I'd also heard the child testify at preliminary hearing. She had been pretty consistent throughout all the statements she made at the preliminary hearing and to the police and I realize that one of the things that we would be able to do with the Saints exam was argue that in front of the jury.

Q. And would it have been consistent with your reasoning not to get a psychological evaluation of the children that although the Saints exam showed no sexual abuse, nevertheless, Desiree was claiming that Mr. Maki had sexually abused her four times?

A. I'm not quite following that. Could you ask that again?

Q. When you decided not to pursue a psychological evaluation of Desiree, did you factor in your decision the fact that although the Saints exam said she had not been abused, that she'd nevertheless herself claimed she had been abused sexually four times by Mr. Maki?

A. Yes.

Q. So is it fair to say from your testimony, then, that you didn't seek either a psychological or physical examination from the Court based on your assessment of the credibility of the children?

A. That was part of it, yes.

Q. Okay. Not entirely, though?

A. No.

Q. Okay. Let me ask you, then, regarding your assessment of credibility, did your assessment take into account the fact that Summer testified at the preliminary hearing at one point that no sexual assault had ever occurred on her in December?

A. I can't -- right now, I don't remember that particular testimony at the preliminary hearing. Just --

Q. Would it help if I provided a transcript?

A. Sure.

MR. PLATER: Okay. For counsel's benefit, I'm referring to preliminary hearing transcript, page 42.

BY MR. PLATER:

Q. Miss Schmuck, on page 42 of this transcript, I refer you to lines 12 through 17. You're done?

A. Yes.

Q. Do you remember that testimony?

A. I remember. I can't say that I remember specifically the child giving the testimony. I remember now the preliminary hearing transcript.

Q. Okay.

A. And, yes, I did take that into account.

Q. On line 15 it says: Summer, did his private ever go inside your private in December? Answer: No. Did you take it

to mean from Summer that she is saying Mr. Maki never sexually assault her in December?

A. I -- in taking that in isolation, yes, I think that's what you would have to, but I also was aware and what I took into my consideration that my opinion of this were the video tapes as well.

Q. Okay. So in any event, you're saying you took that into consideration when you made the decision that they were credible witnesses?

A. Yes.

Q. Do you have any background in psychiatry?

A. I think I took a class when I was college.

Q. Or psychology?

A. Psychology 101.

Q. In your experience as an attorney, do you think this type of information could have been a reasonable -- could have been part of a reasonable -- could have been a reasonable basis for a motion to the Court that the Court should have ordered an independent examination of Summer based on the fact that under oath, at one point she said she had never been sexually assaulted, even though at another time under oath she said she had?

A. I made a decision in this case not to seek the psychological examination based upon the information that I had

and my training and in my evaluation of the situation. I certainly think that there are cases where it could be very reasonable to do that.

Q. In this particular situation, given these facts, would it have been reasonable for counsel for Mr. Maki to make such a motion based on the testimony of Summer?

A. I think if that were the only thing that we had, this be it would become more reasonable.

Q. So as I understand your testimony, you took it upon yourself to make the decision whether the children were credible?

A. I did make a decision, yes.

Q. Did you ever seek an independent professional in the field of psychiatrist, psychology or medicine to help you with your assessment whether the children were credible?

A. No.

Q. In your decision regarding the credibility of the children -- strike that.

I'll represent to you that also during this preliminary hearing, Summer at one point testified that she was never rubbed or touched so as to constitute lewdness by Mr. Maki. Do you remember that testimony?

A. Not right off the top of my head, no.

Q. The reference is page 46 of the preliminary hearing.

Miss Schmuck, if you could read lines three through six? Just a short paragraph.

A. Okay.

Q. On line three, the question was asked by the prosecutor at the preliminary hearing: Oh, Summer, besides the time when Chuck put his penis inside your private, did he ever touch his private to the outside of your private? Answer: No. Do you remember that testimony?

A. Yes, now, that I read the transcript.

Q. Now, there was a charge of lewdness against Mr. Maki. In fact, two charges that he touched or rubbed Summer's vagina and that he rubbed his penis on her vagina. Do you remember those two counts of lewdness?

A. In the information?

Q. Right.

A. Yes.

Q. So given Summer's testimony at the preliminary hearing that Mr. Maki never did touch his private to the outside of her private, did you use that in your decision regarding the credibility of Summer regarding the two lewdness counts?

A. Yes.

Q. That she was alleging against him?

A. Yes.

Q. What did you decide that she was not telling the truth at the preliminary hearing when she made the statement or she was inaccurate?

A. What I decided was that I knew there was going to be an argument about the video tape as far as her testimony that was made that would be child hearsay and that we were -- that I knew I was going to have to deal with that as far as a motion was concerned, because I -- at that point, I'm not sure I had seen the video tape at the preliminary hearing or when she testified at the preliminary hearing. But I knew there was going to be a question as to the video tape being introduced and the testimony as well. And ultimately took all of those into consideration in making the decision.

Q. Do you remember during the preliminary hearing where Summer said she was not sure if Mr. Maki had rubbed or touched her?

A. No. Not -- I don't remember that -- the preliminary hearing specifically her saying that.

Q. I'd like to refer you to page 41 and 42 of the preliminary hear. Could you read lines 23 through 25 on 41 and then one through 11 on 42?

A. Okay.

Q. Does that sound familiar?

A. Yes. It sounds familiar in the sense that I recall

reading transcript.

Q. Okay. On the top of 42, Mr. Greco said: Now, when you say he moved his private on yours, did he start with rubbing it around your private? Answer: I forget. Question: All right. When you say he moved your private around, what do you mean? Answer: He moved around, I think, on the outside. Okay. He touched his private to the outside of your private? Answer: I think. And in your mind, was Summer somewhat unsure of what happened, according to her testimony at the preliminary hearing?

A. To the passage that you just read, yes, she seemed somewhat uncertain.

Q. Did you factor that into your decision regarding the fact that there was no problem regarding the credibility of the children?

A. Yes.

Q. And is that the reason why you didn't bring out these inconsistencies at trial? In other words, when Summer took the stand, you didn't take a preliminary hearing transcript and say: Summer, you know, at the preliminary hearing, you were kind of unsure, isn't this true? And present the jury with her testimony?

A. Well, at the trial, and I can't answer that because -- I mean, I don't remember exactly in terms of

questioning the child at the trial. But at the trial, the focus of the defense was that Mr. Maki did not do this. No matter what the children claimed at all, Mr. Maki did not do this. And the evidence that we had were the tattoos and I don't remember exactly when you asked me if that was why I didn't ask the child at the trial, I don't know. But I know that we were really concentrating on the fact that there were the tattoos and Mr. Maki was not saying to anyone on that jury this didn't happen. That was not the defense in this case. The defense was Mr. Maki did not do this.

Q. And so if I understand your testimony, you're saying and the defense was based on the fact that they were mistaken about the tattoos, about the tattoos on his body?

A. Well, the children didn't talk about the tattoos at the preliminary hearing, if I understand your question correctly.

Q. The defense at trial was that Mr. Maki didn't do this?

A. Yes.

Q. As part of your defense strategy, then, based on your idea of what the defense was, was it your decision not to use inconsistent statements of the victims?

A. I -- as well as I can remember, my feeling about this was that the children were going to testify however they chose

to testify. And I was -- I don't remember making a conscious decision not to come in and say: Okay, this is what you said at the preliminary hearing. This is what you're saying now. What I was concerned about and wanted to make clear to the jury was that no matter what they were saying, this could not have been Mr. Maki, because they never talked about some very visible tattoos he had on him.

Q. And would it be inconsistent with that defense to also show or to question the credibility of the children themselves?

A. No, not necessarily.

Q. The children could have been credible and Mr. Maki could still not have done this?

A. Well, I think that's possible. I think the children could have been credible and I think -- and he still couldn't have done it. I guess, looking at the total picture, we were not able to establish and what we looked for very intensely was whether or not these children had had any sort of prior sexual exposure to anyone, because in that sense, that might make their testimony quite credible. And I had been assured by Mr. Maki that he had not done this, so we looked and spoke to everyone that we possibly could to try to establish what I had been told from him that the children had been sexually active with someone else, not him.

Q. So was it your belief if you pursued this defense, it was possible that the children actually thought this had occurred to them by Mr. Maki, but it hadn't?

A. No. I think the defense was that the children were telling the truth that someone had done it to them, but that it wasn't him. Mr. Maki believed that they were saying this, that they had been sexually molested by someone else and they were saying this about him, specifically because of problems that he had had with the shoulder.

Q. So in that regard, the children would not have been telling the truth regarding who did it to them?

A. Yes.

Q. That's an issue of credibility regarding their own stories and their own testimony, right?

A. Sure.

Q. As a practicing lawyer, inconsistent statements are often used to attack the credibility of somebody who is saying something under oath, isn't that true?

A. Yes.

Q. So as I understand it -- is it because Mr. Maki denied this and that the children did not have testimony about the tattoos and that possibly they had been molested by other people, that is the reason you didn't bring out these inconsistencies in testimony?

A. I couldn't establish that they had been molested by someone else or I couldn't -- I could never get any information on that, but, yes.

Q. Okay. At the preliminary hearing, I'll represent to you that on page 12, talking about Desiree, Desiree testified that in relation to where she was when she was being babysat, she said I guess in our house, I'm not sure, given the fact that she testified under oath that she was not sure where she was when she was being babysat by Mr. Maki, do you also factor that into your decision regarding their credibility?

A. You'll have to help me out with that one. I remember the testimony at the preliminary hearing about sexual assaults taking place in two different places, at Mr. Maki's apartment and at the children's apartment.

Q. Okay. On page 12 of the preliminary hearing, have you read lines four through eight?

A. Okay.

Q. Do you remember that testimony?

A. Yes, now that I've looked at it.

Q. Okay. It says: All right. Was Chuck baby sitting you that day in December? Answer: Yes. Question: And where was he baby sitting you at? Answer: I guess at our house. I'm not sure. Given the fact that she was not sure where she and Mr. Maki were at the time he was baby sitting her, did you

factor that in in determining her credibility?

A. Yes.

Q. Or, in fact, regarding her recollection?

A. I think I factored that in as well as the fact that in other places of the testimony she seemed to be pretty clear about what happened at his apartment and then what happened at her family's apartment.

Q. Do you remember during the preliminary hearing that Desiree testified in response to Mr. Greco that during the first sexual assault Mr. Maki's penis was going down?

A. Yes, I do remember that.

Q. Later on, she testified she wasn't sure if she ever saw the penis up a little bit. Did you use that in your decision?

A. Yes.

MR. PLATER: Your Honor, I'm wondering how much time did you want to take on this?

THE COURT: I want to finish.

MR. PLATER: Keep going.

THE COURT: I hope you can go quickly. But you've got to pursue your issues.

MR. PLATER: Okay.

BY MR. PLATER:

Q. Miss Schmuck, do you remember any other

inconsistencies in the testimony by either girl and their trial testimony?

A. No, not right now.

Q. Or statements they gave to other people?

A. Not at this moment, no.

Q. Do you remember in your investigation observing or concluding that there were inconsistencies by either girl insofar -- while comparing their statements from a court hearing or from a statement with police officers or other people?

A. No, I don't.

Q. So you have no recollection that there was -- are saying that you did not feel there were inconsistencies?

A. I'm saying I didn't have any recollection of that.

MR. PLATER: Maybe, your Honor, for the purposes of time, I have a number of what I perceive to be inconsistencies where the child said one thing one time or another during a prelim as opposed to trial as opposed to somebody else.

To save time, I think Miss Schmuck would testify that she remembers each of them if she were presented with each instance, that she considered it and she was -- she made her decision, based on what she said not to go forward to have the court order independent physical or mental evaluation. So I could perhaps just then save some of this examination for

argument, either in written form or orally.

THE COURT: Okay. I see what you're saying.

MR. PLATER: I could keep going on. I have a lot of it.

THE COURT: You've asked the generic question. That's fine with me.

MR. McCARTHY: The only thing I'd suggest is ask the witness if this offer of proof sounds reasonable to her.

THE COURT: That's what I meant by the generic question.

THE WITNESS: It's fine. Yes.

MR. McCARTHY: I have no objection to it.

MR. PLATER: Or I really do have it outlined.

THE COURT: No.

MR. PLATER: This is tedious.

THE COURT: Just shorten it up. Ask the generic question and we can move on to other issues and we'll do the same with other issues.

MR. PLATER: And then I'll be able to show the Court later on what the inconsistencies that I would have brought out and Mr. Maki would have used in application of the Court for a motion for independent psychological and physical or physical examination. Is that okay.

THE COURT: Okay.

MR. McCARTHY: I'd ask that he exclude everything that was raised at trial, because by that point it was far too late to

seek examination.

MR. PLATER: That's fine. Okay. I think that's all I have, then, at this point.

THE COURT: Any questions, Mr. McCarthy?

MR. McCARTHY: Yes, your Honor.

CROSS EXAMINATION

BY MR. McCARTHY:

Q. Miss Schmuck, have you tried other cases involving child victims?

A. Yes, I have.

Q. Is it your experience that child victims or other witnesses are always 100 percent consistent in their relation of the events?

A. No.

Q. As a trial lawyer, do you sometimes become aware of minor inconsistencies and elect not to bring it out?

A. Yes.

Q. Why?

A. Well, there's several reasons. I think primarily because if they're minor inconsistencies, especially with children, I think it's better to let it go than have the jury look like you're beating up on kids.

Q. You perceive a risk that the jury will perceive you as being overly picky?

A. Yes.

Q. In your experience, do juries expect some inconsistencies with child witnesses?

A. Yes.

Q. You were asked to read a couple of lines of page 12 a couple of minutes ago. It was read into the record the question where was he baby sitting at. The answer: I guess at our house. I'm not sure. Can you read the rest of that page, read the rest of that -- the rest of that page. Taking the testimony as a whole, do you find that those two lines that were read into the record to be clearing any inconsistencies?

A. No.

Q. Let's do the same at page -- I think we're at 42, 43 before and there were a couple of things of those pages were read into the record.

A. Okay. I've got page 42.

Q. Okay. Take a look at page 42 and 43, and if you can recall which lines we read into the record before. I don't.

A. Okay.

Q. So on those pages, do you find that the testimony as a whole has glaring inconsistencies?

A. No.

Q. Is it your experience in most courts when you choose to impeach a witness with prior inconsistent testimony, that

the prosecutor can insist that that the greater portion also be read to the jury?

A. Yes.

Q. Do you perceive any disadvantage had that happened in this case?

A. Yes.

Q. Might that go into your decision to not bring out these inconsistencies at trial?

A. Yeah.

Q. When we were discussing your evaluation and credibility of the children, correct me if I'm wrong, I kind of got the impression that sometimes you were talking about your opinion of whether they are telling the truth and sometimes you're talking about the perception of the jury of whether they were telling the truth. Am I correct?

A. Yes.

Q. Okay. Is that part of your job as a trial lawyer to anticipate what the jury might believe?

A. Yes.

Q. Are you any good at it?

A. I like to think so.

Q. Could you describe for the Court the nature of your strategy relating to the tattoos?

A. The tattoos came to my knowledge immediately

following the preliminary hearing. Mr. Maki told me about the tattoos, especially the tattoos around his pubic area.

At that point, I also was very careful about looking at the children's tape or the video tapes of the children and what they had to say there. And I believe one of the children, at least Desiree, said there was no tattoos around there. While Chuck had tattoos all over his body, but none down there. I had an investigator go out and make photographs of Mr. Maki for the tattoos and our strategy was that had Mr. Maki been the person who committed these offenses, it would have been extremely hard for the tattoos to have been missed. They're very apparent, they're very colorful, and this is something the children would really zero in on.

Q. And so did you have a plan on how to inform the jury of the existence of the tattoos?

A. We were going to have and did have the investigator from my office, who made the photographs of Mr. Maki, come in to have the photographs entered as evidence through his testimony.

My intent always had been to argue to the jury these tattoos are so clear and so obvious that these children would have automatically mentioned them under any questioning and to show -- and we did show the jury the pictures of the tattoos.

Q. Did you intend to argue if they had seen Mr. Maki

without clothes, that in response to the question, you know, describe what you saw, the children would have on their own mentioned the tattoos?

A. Exactly.

Q. Yes. And that's why you didn't ask the children on the witness stand about the existence of tattoos?

A. Yes.

Q. And then in the defense case, you did present the jury with pictures of the tattoos?

A. Yes.

Q. Did you ever tell Mr. Maki anything along the lines of that because you had been assaulted yourself, you were not going to put forth your best efforts on his behalf?

A. No.

Q. Did you ever tell him that you had been assaulted yourself?

A. No.

Q. Did you ever tell him that there was any reason at all why you wouldn't put forth your best efforts?

A. No.

Q. Did you tell him you thought he was guilty?

A. No.

Q. Did you tell him that he would be found guilty?

A. Yes.

Q. Do you make it a habit of telling your clients what you think is the proper result, whether you think they are guilty.

A. No, I don't. I don't see any place for that.

Q. Do you make it a habit to give them frank advice about the probable outcome of a trial?

A. Yes.

Q. Did you do that in this case?

A. Yes, I did.

Q. Mr. Maki gave you some names prior to trial of people who might have helpful evidence, is that right?

A. That's correct.

Q. Did you employ an investigator in this case to assist you in trying to find any witnesses?

A. Yes, I did.

Q. Can you give us kind of a synopsis of the results of those efforts?

A. I had actually two investigators from my office working on this case. Initially, Bob Howell was involved in working on the case and he spoke with several people or tried to speak with several people that Mr. Maki had put us in touch with, one of which was a guy named Frances that Mr. Maki had explained he was kind of like a Dutch Uncle to the girls and spent a lot of time with them and was very involved with them.

And he believed that there could have been something -- that he could have been the person who had actually done this.

Mr. Howell was in touch with him and he could provide us no information at all. It was my understanding, and this, again, came through from Mr. Howell, that he was of no help in terms of providing any information in this case and did not know anything.

I know he also contacted -- tried to contact the downstairs neighbors. There was a lady named Doris, who was the grandmother of the boy John who Mr. Maki believed was having some sort of sexual relationship with at least one or both Desiree and Summer. Mr. Howell left -- I know on a lot of occasions left cards on the door to have Doris contact him. She never responded to any of those requests for him to contact her.

There was another neighbor named Jay that Tim Ford contacted and so spoke with him and we had been told that he knew about a particular incident with the two girls and with John in which there was something -- some kind of physical relationship. Whether the kids were playing doctor, it wasn't exactly clear.

Tim Ford did speak with Jay, and Jay told him that he only knew about this incident from Mr. Maki. And he was somewhat reluctant to provide any information or to come in and help us

out at all.

Q. He didn't claim to have any firsthand knowledge?

A. Exactly. We -- I had an investigator speak with a woman named Carla who was a friend of Mr. Maki's. I believe she spoke with Carla on two separate occasions. I had some real concerns about her because I think she was extremely inebriated at least on one occasion when he talked to her very early in the morning.

MR. McCARTHY: Your Honor, could you instruct the petitioner to quit making gestures, shaking his head, if he disagrees.

THE COURT: I'm sorry. I had my head down.

MR. McCARTHY: I'm sorry, your Honor. I catch it out of the corner of my glasses.

THE COURT: Mr. Maki and I have had a run in with that stuff before, so just knock it off. Go ahead.

THE WITNESS: I'm trying to remember the other names. Mr. Maki gave me the name of a woman named Linda, and I believe her last name was Stallings and I spoke with her. I made contact with her specifically to ask her. He felt as though she would be a good character witness at the sentencing and she informed me that she would not choose under any circumstances to come in and testify in his defense and he had in fact assaulted her on one occasion and she was quite sure he was capable of doing

these things.

BY MR. McCARTHY:

Q. Was she in your opinion a good character witness for Mr. Maki?

A. No, she was not.

Q. Were there any witnesses who -- or potential witnesses whose names were given to you by Mr. Maki who claimed to have no knowledge of him?

A. I'm trying to remember, because there was quite a few people that we contacted. There was a man named Ken Daniels who did call me before the trial and left a message for me to call him back. It was -- I remember this, because I have a memo specifically about this, and it was late in the afternoon. I asked my investigator, Tim Ford to call him, and he called him the next day and Mr. Daniels said: I don't know anything about this. And I didn't call him.

I talked to Mr. Maki at some point after that, and he said Mr. Daniels will only talk to you, he won't talk to your investigator. So I called Mr. Daniels again and spoke with him about any information he could give about the case. And he said that what he knew about the case came from Mr. Maki also and whether I spoke with him specifically about coming in and testifying to Mr. Maki's good character or bad character, he basically said, I don't know him. I don't know anything good,

I don't know anything bad about him.

Q. Prior to reading the petition for habeas corpus in this case, did you ever hear the name Paul Grubbs?

A. No.

Q. Did you attempt to get Jackie Maki to appear?

A. Yes, we did.

Q. Run into some difficulty?

A. Yes. I had a lot of contact with Jackie Maki, Mr. Maki's sister. She called me regularly and would talk to me about his case and agreed on several occasions to provide us with particularly with clothes and we were having concerns about his hearing aids and she was going to help us out with those kinds of things.

I also wanted her to come in and testify, specifically at the sentencing hearing, and this was even before I knew about his sister Jocelyn coming to testify. We tried on at least two different occasions to subpoena Miss Maki, because I could never see her face-to-face and I became increasingly concerned, because I could never see her face-to-face, only talk to her on the phone. And my investigator could never talk to her face-to-face, that we really needed to have her under subpoena.

I know Tim tried to have her subpoenaed. Both times he was unsuccessful. In the one occasion where we actually got close enough to her to talk to her, she came to our office, I believe

the afternoon before trial, and did bring some clothes for Mr. Maki to wear at trial. She did not bring the hearing aid and she ran out the door before anyone could have contact with her. In fact, I think Tim even tried to follow her down the street and couldn't catch her.

I've never seen the woman face-to-face. I've only talked to her on the phone.

Q. Would you have any hesitations about putting her on as a witness if she had appeared?

A. Yes, I would have had some hesitations about putting her on as a witness, without having a chance to actually see her face-to-face and speak with her. That was one of the primary reasons, again, because we had been trying to subpoena her.

MR. McCARTHY: Can I have Exhibit A? Is that around here?

BY MR. McCARTHY:

Q. Miss Schmuck, I'll show you what has been marked as Exhibit A and ask if you can identify that?

A. Yes. That's a letter that I wrote to Mr. Maki.

Q. Was it sent out in the ordinary course?

A. Yes.

MR. McCARTHY: I'll offer A, your Honor.

THE COURT: Any objection?

MR. McCARTHY: I still didn't make a copy for Mr. Plater.

He might want to take a minute to read it.

MR. PLATER: I have no objection.

THE COURT: A will be admitted.

BY MR. McCARTHY:

Q. Miss Schmuck, did you and Mr. Maki ever discuss his right to testify at trial?

A. Yes, we did.

Q. Can you tell the Court the nature of those discussions?

A. I explained to Mr. Maki that he had the right to testify at the trial. The choice to testify or not testify was solely his and that if you chose not to testify, the State could not use that against him.

I believe I spoke with him about that on several occasions from reviewing my memos, because I know that was of concern to him. And I remember going into trial and not knowing whether or not he was going to testify.

Q. Did you ever tell him that you had the authority to prohibit him from testifying in his own behalf?

A. No, I never told him that.

Q. Did you give him your frank advice?

A. Yes, I did.

Q. What did you tell him?

A. That I didn't think he should testify.

Q. Why not?

A. The primary concerns that I had were, one, about his prior record, that that would be brought in against him. And the other concerns that I had were because Mr. Maki was very prone to try to plug up all the holes, so to speak, in terms of explaining everything and I had talked to him about that and I believe that I referred to that in the letter. I was very concerned about his attempts to do that.

And I was very concerned about his ability to maintain his composure on the stand, I think that was my primary concern, under cross examination.

Q. Do you recall at the trial the Court informed Mr. Maki of his right to testify?

A. I don't remember that in the trial.

Q. In any event, did he eventually accept your advice and not testify?

A. I know he didn't testify. I don't know if it was based on my advice. I know that he didn't testify.

Q. Okay. Do you recall photographs being produced as a result of the Saints exam?

A. Vaguely, I remember some photographs, yes, or photographic evidence.

Q. I'm sorry?

A. Yes, some photographic evidence.

Q. Okay. Do you have any reason -- withdraw that.

MR. McCARTHY: May I have a moment, your Honor?

BY MR. McCARTHY:

Q. Did Mr. Maki ask you to make a motion to withdraw from the case?

A. No.

Q. As I recall earlier, quite a bit earlier, we were talking about Miranda and such things. Let me ask your legal opinion here. Is it your opinion that the concepts of probable cause and the concepts of custody are equivalent?

A. No.

Q. Okay. So if, for instance, a police officer on the side of the road has probable cause to believe someone has committed a crime, we'll say, for instance, DUI, and that police officer asks that suspect, have you been drinking, there's no Miranda violation?

A. Yes. I agree.

Q. Because the person is not in custody?

A. Yes.

Q. Okay. Is that your opinion alone or nine learned individuals also agree with that?

A. Yes.

Q. I withdraw that. That was inappropriate, too. I can't help it, Judge. It's my nature.

THE COURT: Go ahead.

BY MR. McCARTHY:

Q. Do you recall being asked by Mr. Maki to secure the attendance of someone named Fried or Fried for sentencing?

A. The only knowledge I have of that name was from a letter that Mr. Maki gave me the day of sentencing. I believe that name was in there.

Q. Mr. Maki gave you a letter at the sentencing hearing?

A. Yes.

Q. That letter, he suggested that this individual would be a good sentencing witness for him?

A. I think so. I think that his name was in the letter.

Q. Did you have any notice of that, the existence of that individual, before the sentencing hearing?

A. No.

Q. Were you licensed to practice law in this state at the time you represented Mr. Maki?

A. Yes.

MR. McCARTHY: That's all I have.

THE COURT: Redirect?

MR. PLATER: Just a couple.

REDIRECT EXAMINATION

BY MR. PLATER:

Q. Miss Schmuck, regarding your testimony about whether

minor inconsistencies should be brought in or not, I take it that if had you see a major inconsistency in a witness' testimony at trial as opposed to what he or she testified to at another date, that's something you want to bring out?

A. Yes.

Q. And you said that it was -- you said that Mr. Maki did not testify, but you weren't sure what his thinking process was?

A. What I -- yes, that's exactly what -- I didn't say I wasn't sure what his thinking process was. I said I wasn't sure why he chose not to testify. I knew we had discussed whether or not he was going to testify, and I did not know at the time -- at the beginning of trial or even at the -- I'm not even sure at the close of the State's case whether or not he was going to testify. When he chose not to testify, that I cannot recall right now what his reasoning was or if he told me why he was not testifying.

Q. Okay. So you remember after the State's case in chief that had you sat down with Mr. Maki and you had a discussion?

A. No. I don't remember that. I remember having discussions with him prior to the trial, the beginning of trial, several times, weeks before the trial. But I don't remember specifically sitting down with him when the State

closed its case and having a discussion like that.

Q. So you don't remember him ever telling you: I'm not going to testify.

A. I don't remember him saying specifically: I'm not going to testify.

MR. PLATER: That's all I have.

MR. McCARTHY: Nothing. Thank you.

THE COURT: Thank you, Miss Schmuck. You can step down.

MR. PLATER: I don't have any other further witnesses.

THE COURT: Okay. Let's take a break and we can sum up.

(A short break was taken at this time.)

THE COURT: We're back on the record. Mr. Maki is present with counsel. Mr. McCarthy is here for the State.

Mr. McCarthy, do you have anything to present prior to argument?

MR. McCARTHY: I have two stipulations, your Honor. No evidence.

THE COURT: Okay.

MR. McCARTHY: The parties agree that at the time she represented Mr. Maki, she represented Mr. Maki Robin Wright was regularly licensed to practice law in the State of Nevada.

Also, Mr. Plater has a whole series of document. I agree those were all generated by the State provided to the public defender as part of the discovery.

THE COURT: Okay. How do you want to mark them?

THE CLERK: Defendant's one, two, three, four marked for identification.

MR. McCARTHY: With that, the State has no additional evidence.

THE COURT: Okay. Let's go ahead and sum up. Mr. Plater?

MR. PLATER: Your Honor, basically, Mr. Maki's petition alleges ineffective assistance of counsel. You know the standard, it's a two-prong test. You have to show that a counsel's actions or decisions were deficient. Number two, that if they were, they prejudiced the client so that the acts or omissions, if they didn't occur, or would have occurred, there's a probability that a different result would have been obtained.

In this case, the probably is the best issue, as I see it, is the fact that counsel did not petition the Court to have these victims undergo an independent physical and/or psychological examination. And that would have been important, even though, and Mr. Maki went to trial on ten counts, he was acquitted of the first sexual assault and I believe that was on Desiree. He was acquitted of that one and the jury couldn't reach a decision, I believe, on Count Two, which was sexual assault against Desiree. So two of the five were gone, but he suffered three convictions for sexual assault and five

conviction for lewdness.

Now, the case law in Nevada and Miss Schmuck's testimony was that she doesn't -- she decided not to do one of these motions to the Court, because, basically, as I understand it, she thought the credibility of the children was fine and really the defense was focused on Mr. Maki's tattoos had not been properly identified by the children.

Although she conceded that the children were not correct or possibly were not telling the truth that it was Mr. Maki, the defense was that, well, they had been probably assaulted, but they were identifying Mr. Maki and he was the wrong perpetrator.

So she did afterwards concede the fact, well, their credibility would have been an issue, because they're saying when they knew better that it was Mr. Maki who had done this. So that's why I think still the position about getting an examination was important, because these examinations are to test the credibility of the people involved. And that's what a psychological or a psychological doctor or psychiatrist could have done, could have examined the children or a medical doctor in terms of their physical appearance.

Now, we didn't bring in the doctor, but I think under the circumstances, if you found that one of these motions should have been made, that it should be presumed prejudicial against

Mr. Maki, because obviously at this point, a doctor can't go examine them physically and psychologically. We couldn't have gotten an order from the Court allowing it at this point in time.

But the reason I think this should have been done are inconsistencies that the children made and these aren't minor inconsistencies. These are fairly major. The most major one is that under oath at the preliminary hearing, it was Summer who said, and I'll quote on page 42 of the preliminary hearing transcript: Question, and then later on, did he ever put his private inside your private? Answer: I'm not sure. Question: Summer, did his private ever go inside your private in December? Answer: No. That's pretty clear. Is that a minor inconsistency regarding Count Five where Summer alleges Mr. Maki sexually assaulted her with his penis? That's a glaring inconsistency.

Now, later on, in examination, right after that, Mr. Greco said: Wait a minute, Summer, didn't you tell an officer when he interviewed you that Mr. Maki assaulted you? Yeah. Did you tell him the truth? Yes. But the point is, whether you want to believe it, your Honor, this was really good ammunition. This was real good information that a defense lawyer could have used to present the Court such as yourself after a preliminary hearing to say: Judge, this is the basis of a motion to have

the Court order this child to undergo an independent examination, because she says one thing under oath, completely denies it happened and then she says in the next sentence it happened.

And Summer was a young girl. Who knows why it happened. It may have been for independent innocent reasons, but the point is, it's a pretty good basis upon which to base this type of motion.

It doesn't stop there, Judge. If you review the preliminary hearing transcript, the material that was provided to counsel before trial, such as the statements from the children, Mr. Maki's statement, the video taped statements, the statements from Detective Bohach, you'll see some pretty inconsistent statements by these children and these exams should have been ordered.

And another inconsistency is Detective Bohach. He interviewed -- he interviewed that I guess I put it into evidence. But he interviewed. It wasn't Bohach. It was Officer Ballue. He interviewed Desiree. When he got the report, he ran over to the girls' apartment and he spoke briefly with Desiree and then the next day both girls were taken down to RPD for a formal interview.

But he -- Desiree told that she was touched three times all together and that was it. Twice at Mr. Maki's apartment and

once at her apartment.

Now, at trial, and it all occurred on the same day. But she said all together there's only three times, but at trial she testified to seven times. Another inconsistency was that Summer testified at the preliminary hearing she was not sure if Mr. Maki rubbed or touched her. And, in fact, later on, on page 46, she completely denied it. She said, no, it never happened.

Now, those are minor inconsistencies, and I'll concede the point, but it seems to me those are pretty important statements that somebody would want to look into and why they were said. What was the mental process of the child? What was the physical condition of the child such that perhaps we need an independent witness. And on the case law this has been established through State v. Kenney, that's a Nevada case, and it says whenever you present a compelling reason to the Court, the Court can order an independent examination. One of the things you look at is does the State have its own expert and did the expert testify at trial. And that's what occurred here. The State had an expert, Miss Peele, testified who testified that the girls had been abused.

One of the other things that made this look like it was somewhat suspicious is the fact that Miss Peele testified that Desiree's exam showed a normal hymen. There was no sign of

abuse. But, nevertheless, Desiree testified she had been sexually assaulted four different times by Mr. Maki. And Miss Peele testified there was no healing, no signs of anything wrong. So, again, that's some -- there's some point as to whether this should have been pursued.

Summer testified -- Miss Peele testified that Summer had suffered chronic sexual assault, meaning more than once, and yet Summer only testified at trial and the State agreed to this that she was only sexually assaulted once by Mr. Maki. And yet, according to Miss Peele, she showed signs of having been sexually assaulted on more than one occasion. You'll probably remember the picture of her that was taken and described by Miss Peele.

If that was the case, if there was chronic assault going on, an independent evaluation might have revealed who was responsible, who else was responsible, even if it had been Mr. Maki, but it certainly -- it certainly lends credence to the argument that maybe somebody else was involved in this.

Miss Peele testified that there was behavior problems with Summer. She couldn't pinpoint when they began. They may have begun prior to these allegations and she tried to tie in the fact that these behavior problems were the result of a sexual abuse, but she couldn't say when they were started.

Some of the other problems we touched on that showed that

there was conflicts and inconsistencies in the statements given by the victims were that Desiree testified at the prelim she was not sure where she was being babysat. She said she guesses she was at home with Mr. Maki. She said also during the first sexual assault, she said at one point that his penis was going down, another point, she said I'm not sure if I ever saw it up a little bit. This was during the first sexual assault. And another time apparently his penis was sticking straight out. She even said at one point she wasn't sure if it even went in. At one time she thought it was outside and then she changed her testimony on that.

She testified also that nothing else happened that day after the third sexual assault so that one might infer that there was no lewdness that ever occurred between him and Summer.

These are just things that should have been -- that could have been brought out in a motion for an independent examination.

They also -- Summer, or I mean Desiree at one point said all of this occurred before Christmas. And then at another statement in the discovery, she said she wasn't sure when it occur. Summer said, on the other hand, this occurred after Christmas.

Regarding Summer, she said -- she said he humped with me

and Desiree also used the word humped. Desiree used the word to mean sexual assault. That was in the preliminary hearing. When Summer used the word humped, she meant it to be lewdness. That was explained in her testimony. I think it would have been helpful for an independent person to inquire what these girls meant by these words and what occurred in that sense.

At one point, Summer said during the first lewdness charge, she said he moved his hand around my private part and moved his private part on hers. Then she said she couldn't remember if he started rubbing, if he started rubbing with his private part under her private part. She said he moved it around, I think, on the outside and then she appeared to completely deny it on page 46 of the preliminary hearing.

And, of course, we already went over the fact that she completely denied any sexual penetration at one point, but asserted it later on.

There are other inconsistencies we can talk about, but the point is, this is something that should have been done by trial counsel.

As far as Miranda is concerned, the only point is that the Supreme Court ruled Miranda didn't apply when Mr. Maki was first in custody, because it was not a custodial situation. But after some period of time, it becomes pretty clear that it was a custodial interrogation, because Mr. Maki admits to

lewdness with Summer. He said, yeah, I'm guilty with Summer. She washed my back, maybe she touched my genitalia. He said it's hard to get it outright. I got to get this off my chest. It had to come out sooner or later and it was all -- I did something wrong.

And at that point, it's pretty clear there's probable cause to arrest him for lewdness, and, of course, the sexual assault. Nevertheless, the officers didn't do anything. They kept questioning this person, Mr. Maki, and finally when he made an admission regarding Desiree that he was guilty of what she said he had done, they said: Okay. We're going to Mirandize you now. He said: I'm going to be under arrest? And they said: No, you're not. There was no question in their mind it was custodial at that point.

But the inquiry should be, and it is, according to case law, not what the officers think custodial means or when it occurs, but what a reasonable person would believe given the circumstances. And certainly a reasonable person would believe after he confessed to lewdness and there's police arrested for sexual assault that it was a custodial interrogation after everything after that.

I think reasonable counsel would have argued that Miranda should have been read to him after he made the first confession regarding Summer and that because it wasn't done, everything

else should not have been used against him at trial.

Regarding sentencing, what Mr. Fried would have done, Mr. Maki maintains he the anticipated testimony of Jocelyn Coombs and what could have been done to rebut that and Mr. Fried would have been one of those people, according to him, she was less than credible person who had a real drug addiction problem.

So those are the reasons, your Honor, we'd ask that you grant his petition.

THE COURT: Thank you. Mr. McCarthy?

MR. McCARTHY: Preliminarily, your Honor, there are a number of other issues raised in the petition which have not been addressed either by evidence or argument. I'd ask the Court at the conclusion summarily rule those are unsupported by evidence and no relief shall be granted on those.

As to the things that are the subject of the hearing today, Mr. Plater and I agree on a lot. But primarily, the standard. The petitioner bears the burden of showing by clear and convincing evidence the representations by his attorney fell below an objective standard of reasonableness, not that they were bad, not that could have been better. But they fell below an objective standard of reasonableness, such that no reasonable lawyer could do this, and that but for those counsel's failings, the result may well have been different.

So the first alleged failing that we have here, your Honor,

is in the failure to seek independent examinations of these child victims. Your Honor may recall that they were eight and eleven years old at the time.

The first question that I have that isn't answered by anything I've heard here today is: Is there any reason to believe this Court would have allowed such a thing had the motion been made? Would the Court have granted it? Unfortunately, your Honor, there's only one person in this room that can tell us the answer to that. That, of course, would be yourself. I just have to ask you, when it comes time to rule, I guess I'm going to ask I can't argue to you what your ruling would have been, but I can point out that I haven't heard anything compelling here today.

There are a number of factors that would have been considered had the motion been made. They are more recently in the State v. Griego, 111 Nevada 444.

There are four primary factors to be considered. One of them is whether or not it's necessary to level the playing field.

Did the State employ a psychiatric or psychological witness to testify about the psychological makeup of the children and their voracity, their credibility? No. In fact, as I read Griego, if any of those questions are answered no, that's the end of the hunt, then there's no need to appoint or to allow an

independent examination. Other people read it differently. Other people say you balance all four factors. Frankly, I don't know the answer to that. But there are others. One of them is there has to be a showing to the Court that there's something about the psychological makeup of the children that affects their credibility.

Not that there are questions about their credibility. And inconsistent statements by any witness gives rise to questions about that witness' credibility. That's what a jury does. But sometimes you say there's something about the psychological makeup of the witness, something in that person's past, something about what has happened to that person, something about their id.

If Miss Schmuck wanted an examination, she would have had to come to your Honor and in good faith point out some reason to believe there was something about the id of these children that affected their credibility. Well, if there is, I haven't heard it. There's at least two factors, two of the four which would weigh in favor saying, no, you may not have this independent examination.

But the bigger question, your Honor, what's the result of the exam? Would it have changed the outcome? Well, got to hear from the doctor, or at least hypothetically. Let's get a psychologist up here, find a psychologist, some psychologist in

the world, geez, if I had been asked I would say any child that makes these kinds of inconsistent statements must be crackers, unworthy of belief. And I don't have to say part. You're not allowed to say unworthy of belief.

But there's something I can tell from these things, someone would say, the psychologist, that this person is unable to perceive and relate the truth. Is there any reason at all to believe from the evidence presented here today that there's any psychologist, any therapist or any quack in the world who is willing to come before your Honor and testify in that fashion? If there is such evidence, I haven't heard it.

The next question on the same subject. Would that have affected the verdict? If you could find some psychologist come in here and say, yes, there's something about the psychological makeup of these children that affects their credibility, would the 12 people in the box gasp in horror and return not guilty verdicts? That's another reason why we need to know what the testimony of this proposed psychologist would have been so your Honor could tell if it would have affected the verdict.

There was a comment that the failure to have an exam should be presumed prejudicial, because we can't have one now. Your Honor may recall that in Chapter 34 proceedings, there can be discovery as under the civil rules upon motion. We didn't have any. You have an opportunity for full discovery just like in

any civil case and present it and if the party who bears the burden of proof doesn't present it, there are certain consequences to that.

But at least we could have done hypothetical questions. We could have gotten in the psychologist and asked him hypothetically, but we don't even have that.

There was no expert by the State about -- no psychiatric expert. Miss Peele is a nurse. She made physical observations and related her opinions about those physical observations, nothing more.

And just in passing, I just happened to think of this. There also seems to be an assumption going on here that penetration in the sexual assault must be -- how do I say it delicately -- as complete as possible. That is not the law, your Honor, and that was not the testimony. So these alleged inconsistencies about the hymen not being damaged since you can have penetration however slight, including fellatio and cunnilingus. I don't see that as any big problem. That was kind of an aside. Something I happened to think of. I didn't want to forget it.

But the primary question on the first issue about this independent investigate examination, the one we cannot get past, is was it unreasonable for Miss Schmuck to make the determination that it's not going to help. It's not going to

be sufficiently helpful to ask the Court for an independent examination. Would all reasonable lawyers have acted to the contrary? If not, then this individual is not entitled to relief.

And as I was saying, even if you did fall below the subjective standard of reasonableness, there's no prejudice. At least no showing, because the Court wouldn't have ordered and there's no psychologist available and it wouldn't have affected the verdict anyway.

On the proposed additional motion to suppress, the variation in the theory, your Honor, I'll repeat what I said before. The Supreme Court ruled that all statements made by him were not the product of custodial interrogation.

That should be the end of it. It was litigated here and reviewed by the Court of last resort. I don't think this Court ought to be authorized to revisit that question. If you are, though, well, let's do it. It seems to be a theory proposed that when an officer has probable cause to arrest, then the suspect is in custody, is subject to custodial interrogation.

Well, you know, that's not right, your Honor. That's not the law. Never has been. I doubt if it ever will be. I mean, if it was, then the Supreme Court was wrong because your Honor may recall the officers had probable cause when they went to pick Mr. Maki up at his house. They had child victims

identifying him as a perpetrator of a sexual assault. If having probable cause means that any questioning is custodial interrogation, then the Supreme Court was wrong, he's been unlawfully convicted and so has damn near everybody else in Nevada State Prison and we ought to go kick them all loose.

I don't suggest that, because that's not the law, and it's very simple decision.

Finally, there is the jailhouse sentencing witness, who was not called as a witness at sentencing. Your Honor may recall the testimony was that for reasons of his own, Mr. Maki elected not to tell his lawyer about his sentencing witnesses until the morning of sentencing. Even if you believe that's why he did it, she still couldn't act. They don't let her have the keys. I don't know why they won't let her have the keys and run down and get whoever she wants out of the jail. They're very picky. They insist on orders to produce and things like that.

But supposing the reasonable lawyer would have found a way to get that witness here. Again, we would have had the question: Would it have made a lick of difference to the Court that in 1979 this person was a junkie. This person was not trustworthy. I can think of one way where that kind of evidence would backfire.

Suppose the Court believed both. Yes, Jocelyn the sister was abused as a child by Mr. Maki, and yes, in 1979 she was a

an untrustworthy junky. The Court could see a cause and effect and be inclined to be somewhat more harsh. So even if Miss Schmuck had the opportunity to present this witness, I don't think it's possible to say that there was any prejudice arising from her failure to do so, certainly not to the point where the Court can rule -- should rule that a different sentence would have been imposed. And so, your Honor, I'd ask that for the issues argued here today and the issues acknowledged in the petition, that the petition be denied in its entirety. Thank you.

THE COURT: Thank you. Mr. Plater?

MR. PLATER: Your Honor, when the State cites Griego, Griego is just a reiteration of what the Court in Kenney v. State, 109 Nevada 200 something. I've got 224, somewhere around 220. But -- and Mr. McCarthy is right. I don't read Kenney and Griego like he does. The Court says a general psychological examination should be permitted if the defendant has submitted compelling reasons therefor. And it goes on to state several factors that can be used in a psychological examination of a sexual assault case, but it certainly doesn't say this is -- these are necessary elements that have to be met.

Number one, if the State has employed an expert, that's something you look at. Had the State employed an expert in

this case? No question about it. Miss Peele was an expert in terms of her physical diagnosis of the children. She related based upon her findings, she was an expert in terms of that. She did more than the State offers in this hearing. She didn't merely just say there are physical findings. She also said in terms of Desiree, I think she was physically or sexually abused, even though I found no physical signed of that. And what was the basis of that?

It was based on the interview that she did with her when Desiree said I was touched by Mr. Maki. I submit that's a psychological finding, because she made no physical finding otherwise, yet she testified that Desiree was abused. So the State had its expert.

The second factor is the victim is not shown by compelling reasons to be in need of protection and that could have been avoided by an independent examination.

Evidence of the crime has little or no corroboration beyond the testimony of the victim. That is the third factor. In terms of a sexual assault, that was true as to Summer. In fact, she even denied it happened.

And then the one that the State was concerned about, is there a reasonable basis for believing that the victim's mental or emotional state may have effected his or her voracity. That's hard to say when you come into a case when you don't

know anything about the children in the first place and the State is the one that has the discovery and the evidence and certainly the defense can't go to those people and say: Well, you know, will you submit, give us your medical records, submit to the examination.

That's why you have to have apply to the Court for the examination. I think if you go come in with their inconsistent statements, and they're substantial, you can infer there's a basis for believing there's an emotional or mental situation that may have affected the voracity. So I don't think that the case law says you got to come in with independent evidence, but if you have evidence that suggests that it might be there, it affects voracity, then it's okay.

So I think she should have gone ahead and at least tried. I agree, we did not present an expert at this point and an expert could not have told us what he would have observed, a medical doctor, for example, something that occurred back in December of 1993. That obviously is impossible.

In terms of the psychological state of the children back then, the best he could have given us was hypothetical situations that would have said: I would have had a concern given the state of the evidence at this time and I would have liked to have examined the children. But beyond that, we can't show any more prejudice. That's why we suggested it ought to

be presumed.

In terms of the Miranda, I don't argue probable cause should be the basis for determining custodial interrogation, because that's not what the Supreme Court said. I gave you the test. The test is what a reasonable person would perceive in the circumstances of a criminal defendant who is being interrogated.

I suggest a reasonable person in Mr. Maki's situation, after he was down in police custody and after he had confessed to lewdness on one of the children, would have believed at that point he was in custody and not free to leave. It's not what the police believed. It's not whether there's probable cause, like Mr. McCarthy says, but it's what a reasonable person would believe. That's why a motion should have been filed challenging the lack of Miranda warnings that were not given up for him, but were delayed until later on. Thank you.

THE COURT: Submit it, gentlemen?

MR. PLATER: Yes.

MR. McCARTHY: Yes.

THE COURT: The petition is denied. The biggest and the most talked about issue is the ineffective issue, and I find that Miss Schmuck's conduct did not fall below the acceptable standards and therefore did not change anything. This happens an awful lot when somebody -- never mind. I'm not going to

comment on it. Miss Schmuck's conduct was -- she did the best she could with what she had. We'll be in recess.

--oOo--

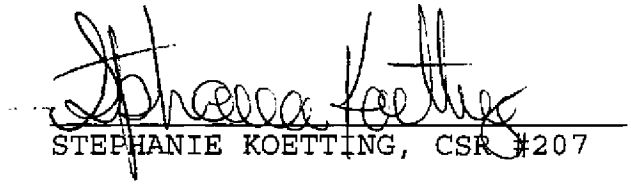
STATE OF NEVADA)
) ss.
County of Washoe)

I, STEPHANIE KOETTING, a Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify;

That I was present in Department No. 8 of the above-entitled Court on Friday, July 18th, 1997, at the hour of 10:00 a.m., and took verbatim stenotype notes of the proceedings had upon the post conviction in the matter of CHARLES MAKI, Petitioner, vs. THE STATE OF NEVADA, Respondent, Case No. CR94P0345, and thereafter, by means of computer aided transcription, transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 129, both inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

DATED: At Reno, Nevada, this 10th day of February, 1998.



STEPHANIE KOETTING, CSR #207

IN THE SUPREME COURT OF THE STATE OF NEVADA

'HARLES JOSEPH MAKI,
ppellant,
vs.
HE STATE OF NEVADA,
espondent.

'00 NOV -9 A9:27

AMY HARVEY CLERK

Supreme Court No. 30904

District Court Case No. CR940345

REMITTITUR

TO: Amy Harvey, Washoe County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 7, 2000

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on Nov 9, 2000.

Amy Harvey by [illegible]
County Clerk

00-17948
V7.242

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

'00 NOV -9 A9:27

CHARLES JOSEPH MAKI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

AMY H. HARVEY, CLERK
BY

Supreme Court No. 30904

District Court Case No. CR940345

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: ". . . we affirm the judgment of the district court."

Judgment, as quoted above, entered this 10th day of October, 2000.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 7th day of November, 2000.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 30904

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

On May 17, 1994, appellant Charles Joseph Maki was convicted, pursuant to a jury verdict, of three counts of sexual assault of a child under age fourteen and five counts of lewdness with a child under age fourteen. Maki was sentenced to serve consecutive terms of life imprisonment with the possibility of parole, along with lesser terms of imprisonment. This court dismissed Maki's direct appeal. See Maki v. State, Docket No. 26049 (Order Dismissing Appeal, October 4, 1995).

On May 9, 1996, Maki filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed supplemental points and authorities in support of the petition. After holding an evidentiary hearing, the district court denied Maki's petition. This appeal followed.

Maki claims that he demonstrated that he received ineffective assistance of counsel and that the district court erred in denying him relief. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102

(1996). We conclude that Maki has not shown that the district court erred in denying him relief on his claims. We will address each claim in turn.

Maki first argues that his trial counsel was ineffective for failing to request independent physical and psychological/psychiatric examinations of the two victims. However, the evidence adduced at the post-conviction hearing demonstrates that counsel acted reasonably in deciding not to request independent examinations.[1] Trial counsel testified that she did not request independent physical examinations of the victims, in part because she was satisfied with the examinations that had been performed and reported to the defense. Trial counsel cited several reasons why she did not request independent psychological or psychiatric examinations. Having reviewed the documents before this court, we conclude that the reasons cited by counsel are legitimate.

For example, one reason counsel cited was that she was informed that the State would not call an expert witness in psychiatry or psychology. Counsel also explained that she had not received any information that the victims had received counseling or been seen by a psychiatrist. These facts are relevant both to the reasonableness of counsel's decision and to the question of whether Maki would have been entitled to an examination upon request. See Keeney v. State, 109 Nev. 220, 224-26, 850 P.2d 311, 314-15 (1993). Maki has not shown that the State employed an expert witness in psychology or

[1]We note that the district court found trial counsel's testimony at the evidentiary hearing to be "more credible" than Maki's testimony, which the court characterized as "in large part incredible and unworthy of belief." We defer to these factual findings. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (indicating that a district court's factual findings regarding claims of ineffective assistance of counsel are generally entitled to deference).

psychiatry.[2]

In ruling that counsel acted reasonably, we are cognizant of Maki's claims that the victims expressed uncertainty and made inconsistent statements about the relevant events prior to trial. However, we emphasize that the victims' allegations were at least partially corroborated by Maki's own incriminating admissions that he had engaged in sexual misconduct with the victims. An important factor in determining the need for independent psychological or psychiatric examinations is whether there is "little or no" corroborative evidence. See Keeney, 109 Nev. at 226, 850 P.2d at 315.

Accordingly, we conclude that Maki failed to overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. Maki has not demonstrated that counsel acted unreasonably, let alone that he would have been entitled to independent examinations of the victims had counsel requested such examinations. See Keeney, 109 Nev. at 224, 850 P.2d at 314 ("Generally, a psychological examination of a sexual assault victim should be permitted if the defendant has presented a compelling reason therefor.").

Additionally, Maki has another hurdle to overcome. To properly demonstrate prejudice he must show a reasonable probability that counsel's deficient performance affected the outcome of the proceedings. Maki argues, without citation to supporting authority, that prejudice should be presumed, given the amount of time that has passed and the difficulty of showing what independent examinations would have yielded. We reject

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[2]Maki notes that a nurse testified about behavioral problems that one of the victims was experiencing and the possible source of those problems. It also appears that the nurse concluded that this victim was sexually abused, although that finding appears to be primarily based on the physical examination. Maki has not shown that the nurse was qualified as an expert in psychology or psychiatry; nor could her testimony be reasonably viewed in this light.

this argument. Maki was required to show that such evaluations had a reasonable probability of affecting the outcome of the proceedings. He failed to do so.

Maki next claims that his counsel was ineffective, at trial, for failing to more effectively cross-examine the victims to reveal allegedly inconsistent and exculpatory prior statements. We question whether this issue was properly presented in the district court.[3] In post-conviction cases, this court will generally decline to review issues not properly raised in the district court. See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Further, Maki has not included a complete copy of the trial transcript in the documents submitted to this court, or even the full portion of the transcript detailing the trial testimony of the victims. Accordingly, it is impossible to properly evaluate Maki's claim. Under these circumstances, the deficiency should be resolved against Maki. It is his responsibility to provide the materials necessary for appellate review. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

Maki also argues that his counsel was ineffective for failing to properly cross-examine the victims on tattoos in Maki's genital area, which apparently extended downward from Maki's lower abdomen. It is similarly impossible to properly evaluate this claim because of Maki's failure to include all relevant portions of the trial transcript. We further note that the documents before this court, particularly the post-conviction evidentiary hearing transcript, reflect that trial

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[3]The issue of the victims' prior statements was discussed, and testimony adduced on this point, at the post-conviction evidentiary hearing. However, the discussion and testimony appear to have been related to Maki's claim that counsel should have requested independent examinations of the victims. At one point the State asked to "exclude everything [regarding the victims' inconsistencies] that was raised at trial, because by that point it was far too late to seek examination." Post-conviction counsel responded, "That's fine."

The trial transcript and analysis of all the evidence in relation to all the charges are necessary to properly resolve this and Maki's even less specific contentions of insufficient evidence and other duplicative charges.[5] Again, it was Maki's responsibility to provide the materials necessary for our review as well as relevant authority and cogent argument.[6] See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

Maki next claims that appellate counsel was ineffective for failing to argue that the district court erred in failing to sanction the State or grant Maki a continuance, after the State disclosed evidence, shortly before trial, concerning physical examinations of the victims. Again, Maki has failed to include pertinent documents in the appendix on appeal. Maki has not included transcripts of the proceedings concerning the State's disclosure of the report and Maki's motion for the continuance. Thus, it is impossible to determine whether the district court acted improperly.

For the reasons cited above, and after further review

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[5]We are not persuaded by Maki's specific contention that counsel was ineffective for failing to challenge the charge of digital penetration prior to trial. A victim did testify that the incident of digital penetration occurred "[w]hen he was doing the same thing in our room," meaning "[w]hen he was putting his penis inside" of her. However, a reasonable reading of this victim's testimony does not necessarily suggest that the digital penetration occurred simultaneously with the other charged offense, but simply that the two incidents were part of the same molestation episode. We emphasize that the trial transcript could clarify the relationship between the act of digital penetration and the other offenses. We also note that the jury did not return guilty verdicts on each of the charges of sexual assault, and thus the question of prejudice is also speculative.

[6]We also note that Maki has failed to include specific citation to the appendix indicating how these claims were raised in the district court in the post-conviction proceedings. Indeed, Maki's argument on these claims in the supplemental opening brief is quite general and arguably insufficient to even state a valid claim.

counsel did present pictures to the jury showing Maki's tattoos and that counsel argued this issue to the jury. Counsel indicated that an important point of the defense was that the victims would have mentioned the tattoos, on their own, had they observed Maki's genital area.

Maki also claims that his prior counsel was ineffective for failing to more effectively argue that certain statements made by Maki to police were erroneously admitted pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Because the Miranda issue was fully litigated in the district court and on direct appeal, Maki's claim is barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Although Maki attempts to reformulate his argument in terms of ineffective assistance of counsel, this court has fully considered issues pursuant to Miranda, and this court reviewed the complete transcript of the police interview in resolving these issues.[4] Maki may not avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See Hall, 91 Nev. at 316, 535 P.2d at 799.

Maki next claims that trial and appellate counsel were ineffective for failing to raise issues of duplicative and redundant charges and sufficiency of the evidence. Maki specifically notes that at the preliminary hearing one of the victims testified that an incident involving digital penetration occurred at the same time as one of the incidents in which Maki placed his penis in her vagina. He contends that this constituted only one sexual assault and therefore counsel should have sought dismissal of the digital penetration charge.

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[4]This court held that Maki "was not 'in custody' before he was read his Miranda warnings" and that, after Maki was read the warnings and invoked his rights, police failed to scrupulously honor Maki's invocation of his right to remain silent. This court noted, however, that only one incriminating statement made after Maki invoked his rights was admitted at trial, and concluded that admission of this statement was harmless error.

of the briefs and appendix, we conclude that Maki has not shown that he is entitled to relief. In closing, however, we admonish Maki's former appellate counsel, Joseph R. Plater, and his current counsel, Karla K. Butko. On several occasions, counsel failed to cite to relevant portions of the appendix and discuss how issues were raised in the district court, discussed at the post-conviction evidentiary hearing (if applicable), and resolved by the district court. The critical issue to be resolved in a post-conviction appeal is whether the district court erred in denying the post-conviction petition. Counsel should not relegate to this court the task of parsing the record to resolve appellate claims. See NRAP 28.

Having concluded that Maki has not demonstrated error, we affirm the judgment of the district court.

It is so ORDERED.

Shearing, J.

Agosti, J.

Leavitt, J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Joseph R. Plater
Karla K. Butko
Washoe County Clerk

PLAINTIFF FILED-RETURN COPY

FILED

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HOWARD W. CONYERS

BY _____ DEPUTY

CHARLES MAKI
NDOC #42820
Northern Nevada Correctional Center (NNCC)
Post Office Box 7000
Carson City, Nevada 89702-7000

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

CHARLES MAKI,
Plaintiff,

vs.

STATE OF NEVADA
Respondent. /

Case No. CR-94P0345

Dept No. 8

MOTION FOR TRIAL COURT RECORDS

COMES NOW, I, CHARLES MAKI, Plaintiff, In Proper Person request copies of the trial court records for case number CR-94-0345 to include all papers, exhibits, transcripts of proceedings, district court minutes, and docket entries by the district court clerk.

These records are requested for use in my Writ of Habeas Corpus petition.

DATED this 25 day of NOVEMBER, 2008.

Respectfully Submitted

Charles Maki, Plaintiff,
In Proper Person

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

MOTION FOR TRIAL COURT RECORDS

_____

(Title of Document)

filed in case number: CR-94-0345

[XXX] Document does not contain the social security number of any person

-OR-

[ ] Document contains the social security number of a person as required by:

[ ] A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

[ ] For the administration of a public program

-or-

[ ] For an application for a federal or state grant

-or-

[ ] Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 11-25-2008

_____
(Signature)

CHARLES MAKI
(Print Name)

IN PROPER PERSON
(Attorney for)

V7.252

courts copy

CHARLES MAKI
NDOC #42820
Post Office Box 7000
Carson City, Nevada 89702-7000

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

CHARLES MAKI
Plaintiff

vs

STATE OF NEVADA
Respondent

Case No: CR-94P0345

REQUEST FOR SUBMISSION

Comes now, Plaintiff, CHARLES MAKI (hereinafter "Plaintiff"), appearing in proper person, and files this Request for Submission, in the above entitled action.

This Request is made pursuant to District Court Rules , whereas, Plaintiff respectfully request that his

MOTION FOR TRIAL COURT RECORDS, be submitted to the appropriate Honorable Court for a review and a decision.

Dated this 25th day of nov., 2008.

Charles Maki
CHARLES MAKI
Proper Persona Plaintiff

23

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

REQUEST FOR SUBMISSION

_____

(Title of Document)

filed in case number: CR-94-0345

[XXX] Document does not contain the social security number of any person

-OR-

[ ] Document contains the social security number of a person as required by:

[ ] A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

[ ] For the administration of a public program

-or-

[ ] For an application for a federal or state grant

-or-

[ ] Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 11-25-2008

Charles Maki
(Signature)

CHARLES MAKI
(Print Name)

IN PROPER PERSON
(Attorney for)

V7.254

CODE 2840

FILED

JAN 30 2009

HOWARD W. CONYERS, CLERK
By: K. Rogers
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CHARLES MAKI,

Petitioner,

vs.

Case No. CR94P0345

Dept. No. 8

STATE OF NEVADA,

Respondent.

/

ORDER DENYING MOTION FOR TRIAL COURT RECORDS

The Court has learned that Mr. Maki has received two complete copies of his court records from his previous counsel, Karla Butko, Esq. Therefore, the Court hereby orders Mr. Maki's Motion DENIED.

Dated this 29 day of January, 2009.

DISTRICT JUDGE

V7.255

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30 day of January, 2009, she mailed copies of the foregoing ORDER DENYING MOTION FOR TRIAL COURT RECORDS in Case No. CR94-0345 to the following:

Charles Maki, #42820
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702-7000

Rex Reid
Offender Management
Nevada Dept. of Prisons
P.O. Box 7011
Carson City, NV 89702

Kathryn Rogers
Administrative Assistant