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

STATE OF NEVADA
Plaintiff,
vs.

CHARLES JOSEPH MAKI,
Defendant.
_____/

Sup. Ct. Case No. 69049
Case No. CR94-0345
Dept. 8

RECORD ON APPEAL

VOLUME 7 OF 9

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APPELLANT
Charles Joseph Maki #42820
Warm Springs Correctional Center
P.O. Box 7007
Carson City, NV 89702

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

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V7. 1

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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

V7.2

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.

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 5

CASE NO: CR94-0345

DEPT NO: VIII

FILED

'96 MAY -9 A7:54

JUDITH A. MEX, CLERK

BY _____ DEPUTY

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

///

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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:

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)

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

11.) Counsel failed to move the court for a continuance to discuss with petitioner the guilty plea and plea bargain that counsel had obtained for petitioner, in that petitioner did wish to plea guilty to the charges of lewdness and was willing to plead to the charges that he had admitted committing but was not willing to plead to the charges that he did not 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.

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

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

GROUND FOUR SUPPORTING FACTS:

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

V7. 20

CHARLES JOSEPH MAKI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 26049

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

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.

. . . . .

. . . . .

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
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
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. 30

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 28, 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

V7. 30

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

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

0-8
5-9
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

* * * *

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

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

6-8
S-9
Post

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
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(702) 324-1113

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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.

[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 19th 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.

David A. Hardy

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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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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 [illegible] "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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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. 63

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 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 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

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 OCT -8 P4:56

JUDI BA[illegible] 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.

ORDER

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

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

DATED, this 4 day of October, 1996.

_____
District Judge

0-8
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 K. Duncan 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 BAILEY, CLERK

BY [signature] DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * *

CHARLES MAKI,

Petitioner,

vs.

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.

[signature]

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

CASE NO: CR94P-0345

DEPT. NO: 8

FILED

'96 DEC 11 A8:24

JUDICIAL 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

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

V7. 81

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. 81

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

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 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

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

JUDI BAILEY 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

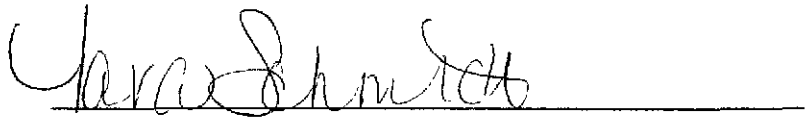
_____ facsimile (fax)

_____ 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.

THE STATE OF NEVADA,

Defendant.

_____/

ORDER TO PRODUCE PRISONER

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

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

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

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

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

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 E Duncan
DEPUTY

* * * * *

CHUCK 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

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.

_____/

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

CERTIFICATE OF TRANSMITTAL

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

JUDI BAILEY, COUNTY CLERK

BY _____
RUTH MORGAN
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. DEY, 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 Pattinori