IN THE SUPREME COURT OF THE STATE OF NEVADA

David Coil, Appellant vs. The State of Nevada, Respondent,	)))))))))	Supreme Court Case No.: 74949

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 3 day of November, 2018.

NEVADA APPEAL GROUP, LLC
Respectfully Submitted By:

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction over this appeal as the final judgment or verdict in a criminal case following a guilty plea, resulting in a Category A or B felony pursuant to NRS 177.015(3).

NRAP 17 ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this matter is presumptively retained by the Nevada Supreme Court. Under NRAP 17(b)(1), the Court of Appeals may hear all post-conviction appeals except jury verdicts which "involve a conviction for any offenses that are category A or category B felonies." In this case, Appellant was sentenced to an aggregate sentence of **11 years to life**.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Is Appellant guilty of Sex Trafficking (Category A Felony) or Facilitating Sex Trafficking (Category B Felony) when his conduct is limited to providing the location and presence of females without actually participating in the females' activities or receiving any benefit therefrom?

2. By entering a plea to a charge outside the scope of his actual conduct, resulting in *at least* double the possible sentence, can Appellant withdraw his plea as not knowingly and intelligently made?

II. Statement of the Case

On or about September 27, 2016, Appellant unconditionally waived his preliminary hearing without negotiations, after which the State filed an Information charging Appellant with Sex Trafficking of a Child, Attempt Sex Trafficking, Pandering, and Soliciting Prostitution (Bates 001). He invoked his right to a speedy trial (Bates 011).

The trial was continued several times for outstanding discovery, forcing Appellant to waive his right to a trial within 60 days so that Defense Counsel may be adequately prepared with the new discovery (Bates 016). On or about January 18, 2017, a month before his trial setting, Appellant was referred for a competency evaluation (Bates 022). However, he was found competent, and the trial date was reset (Bates 024).

Appellant filed a Motion to Dismiss Counsel, and during the hearing the District Court proceeded to conduct a long discourse with Appellant regarding the qualifications of his counsel, ultimately denying the Motion as a fugitive document (Bates 027). A short time later, on Appellant's renewed request to represent himself made in open court, District Court conducted a *Faretta* canvass on July 24, 2017 (Bates 047). Upon being questioned by the Court regarding rules and proper procedure in criminal court, Appellant opted to withdraw his request for self-representation (Bates 056).

At the following calendar call on September 18, 2017, both Defense and the State announced ready for trial (Bates 061). Appellant again requested to represent himself, and the District Court conducted a second *Faretta* canvass on September 25, 2017 (Bates 066). After the Court informed Appellant that his trial could not be continued again, and he would have to proceed to trial at

the scheduled time whether or not he was represented by counsel, Appellant again withdrew his *Faretta* request (Bates 073).

The State filed an Amended Information on September 26, 2017, and jury selection began the same day (Bates 075; 078). Testimony was heard on the second day of trial, but before the matter could resume for the third day, Appellant's Counsel informed the Court that Appellant wished the change his plea to Guilty on all counts without negotiations (Bates 084; 161). The District Court canvassed Appellant and accepted his plea and freely and voluntarily made (Bates 175).

Appellant was sentenced on November 8, 2017, to the following:

- Count 1, Sex Trafficking of a Child Under 18: 60 months to **life**
- Count 2, Soliciting Prostitution: 12-30 months, suspended and placed on probation for a period not to exceed 3 years, concurrent with Count 1
- Count 3, Soliciting Prostitution: 12-30 months, suspended and placed on probation for a period not to exceed 3 years, concurrent with Count 2
- Count 4, Soliciting Prostitution: 12-30 months, suspended and placed on probation for a period not to exceed 3 years, concurrent with Count 3
- Count 5, Soliciting Prostitution: 12-30 months, suspended and placed on probation for a period not to exceed 3 years, concurrent with Count 4
- Count 6, Attempt Sex Trafficking of a Child Under 18: 72-180 months, **consecutive** to Count 5

- Count 7, Dismissed (lesser included offense)

The aggregate sentence came to 132 months (11 years) to life in the Nevada Department of Corrections, with 443 days credit for time served. Appellant will further be required to register as a sex offender upon release from custody.

III. Statement of Facts

In this case, Appellant was charged with four mandatory-probation offenses (soliciting prostitution) and two charges of Sex Trafficking of a Child and Attempt Sex Trafficking of a Child. Appellant does not challenge the mandatory-probation charges for soliciting prostitution; in fact, it is precisely because he paid the females that he should not be found guilty of Sex Trafficking because he received no benefit, actual or implied, whether in the form of money, sexual favors, or by some other means. His conduct was limited in nature to when he and the female would "meet at the Carl's Jr., they would talk a little bit, and then he takes [her] to his house where an interview begins" (Bates 086). The interview was purely verbal.

Appellant told the females that he owned a residence wherein he allowed them, in this case a sixteen year old female, to provide body rubs to independent clients if they so desired. He was very strict about two "rules of the house," namely that the girls were required to be nude, but *no sexual intercourse with clients was allowed* (Bates 121). "There was no sex in the bedroom or there was no sex with clients. There was no dating clients." *Id.* When one girl inquired as to whether oral sex was permissible, he told them that the girls were free to do whatever they want (as they were above the age of consent), but they could not charge for it.

> Q: Did he say anything about how much you should charge for if you should charge anything extra for oral sex if that was your thing?
> A: No. It was just – it was just – it was always just $80.
> Q: And he didn't talk about charging more for oral sex?
> A: No (Bates 142).

The only sexual contact during these body rubs consisted of genital touching, but the female who testified "could not remember" if Appellant instructed her to engage in this activity or if she did so of her own accord:

> Q: Did the defendant talk to you about what you were supposed to do in a body rub?
> A: I can't remember.
> Q: Okay. Did he talk to you about certain parts of the body that you were supposed to touch on a client?
> A: I can't remember (Bates 122).

Again, Appellant received no benefit of any kind from allowing these girls to use rooms in his home; while he did patronize females occasionally for body rubs, he paid them the standard rate as a typical customer. This distinction is particularly noteworthy because, in sentencing Appellant, the District Court was under the mistaken impression that Appellant had received sexual favors as payment from the females to compensate him for use of his residence to conduct their activities (Bates 191)[1]. The females did not pay him at all, nor did they provide sexual favors. From the State's own opening argument, they concede as much: "*He doesn't take money from the females in the house*. But the way you pay him is you don't have any clothes on in his house and you show him all the money that you're making. Because he wants to be able to brag about [the females]" (Bates 088) (emphasis added).

IV. Summary of the Argument

Appellant's conduct in this case is limited to *facilitating* sex trafficking rather than actual participation in sex trafficking. As such, he should have been charged with a Facilitating Sex Trafficking, a Category B felony under

[1] THE COURT: "But the testimony that I heard is the sexual favors that were being given to you."

NRS 200.301. He received no benefit from the females' unlawful activities, and participation was limited to arranging the females' presence at a particular place. The State argued that "the way you pay him is you don't have any clothes on in his house and you show him all the money that you're making. Because he wants to be able to brag about [the females]" (Bates 088). Even under a tenuous stretch, "bragging rights" is not an actual benefit conferred from the females' activity.

Therefore, because he entered a plea to a charge that was beyond the scope of his conduct, his plea was not knowingly and intelligently entered, and he should be permitted to withdraw his plea on the Sex Trafficking and Attempt Sex Trafficking charges.

ARGUMENT

I. Appellant Cannot have Committed "Trafficking" Without Some Kind of Benefit Incurred

Given that Appellant is never alleged to have used the threat of duress or violence to force girls to work in his residence, the only applicable statute regarding sex trafficking is NRS 201.300(2)(a)(1), which states:

2. A person:

(a) Is guilty of sex trafficking if the person:

(1) Induces, causes, recruits, harbors, transports, provides, obtains or maintains a child to engage in prostitution, or to enter any place within this State in which prostitution is practiced, encouraged or allowed for the purpose of sexual conduct or prostitution;

Notably, the statute requires the defendant to induce, cause, recruit, or transport a child to engage in prostitution, or to enter any place in which prostitution is practiced, encouraged or allowed. In this case, however, Appellant received no actual benefit from the girls' activities, and was uninvolved with the females' day-to-day conduct.

Prostitution explicitly requires a benefit received; per NRS 201.295, "Prostitution" means "engaging in sexual conduct with another person in return for a fee, monetary consideration or other thing of value." By receiving no benefit from the females' conduct, Appellant is legally not implicated in the prostitution activities themselves. Therefore, Appellant should have been charged with "Facilitating Sex Trafficking," a Category B felony (1-6), rather than Sex Trafficking, a Category A felony (5 to life).

Facilitating Sex Trafficking is defined in NRS 201.301, and states:

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> 1. A person is guilty of facilitating sex trafficking if the person:
>
> (a) Facilitates, arranges, provides or pays for the transportation of a person to or within this State with the intent of:
>
> (1) Inducing the person to engage in prostitution in violation of subparagraph (1), (2) or (3) of paragraph (a) of subsection 2 of NRS 201.300;
>
> (2) Inducing the person to enter any place within this State in which prostitution is practiced, encouraged or allowed for the purpose of sexual conduct or prostitution in violation of subparagraph (1), (2) or (3) of paragraph (a) of subsection 2 of NRS 201.300; or
>
> (3) If the person is a child, using the person for any act that is prohibited by NRS 200.710 or 200.720;

Since Appellant was not actually involved with the conduct or benefit received by any females within the residence, his transgression is confined to the act of arranging the females' presence in the household. His involvement was limited to getting the females to the location, not actually benefiting from any activities conducted within. He would meet the females at a public location, discuss the job and rules, and then arrange for their presence at the household if they so desired to take part. Aside from providing the space and some basic equipment of an entirely legal nature (i.e. massage tables, massage oils, etc.), once the girls were there, they appeared to be more or less left to their own devices. In summation, because Appellant did not take part in nor receive benefits from the females' activities, his unlawful conduct is limited to

providing the location and transportation to where the prostitution was committed, not engaging in sex trafficking itself. This is the precise legal definition of "facilitating."

The issue arises because the statute governing Sex Trafficking, NRS 201.300, includes a proscription against "transporting" persons to engage in or encourage prostitution. The statute governing Facilitating Sex Trafficking, NRS 201.301, likewise prohibits conduct that "facilitates, arranges, provides or pays for the transportation of a person" for the same underlying purpose. The same proscription is duplicative and redundant under both statutes.

Numerous canons of statutory interpretation would favor a charge of Facilitating Sex Trafficking rather than actual Sex Trafficking. It is more specifically applicable to Appellant's actual conduct, and "[u]nder the general specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute." *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017) (citing *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005)). Additionally, when two statutes are potentially applicable and it is ambiguous as to which, the defendant should be given the benefit of the doubt in a criminal matter. "We also follow the doctrine of lenity, whereby we interpret criminal statutes liberally and construe

inconsistencies or ambiguities in the defendant's favor." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

Even by colloquial definition, Appellant's conduct likewise falls under "facilitation" rather than direct action. Facilitation is simple and broadly defined as "to help bring about" or "to make easier."[2] By providing the locale and arranging for the females' presence, he is undoubtedly acting as a facilitator; but when the females are free to come and go as they please, work however often they want, have their own independent clientele, and he receives no benefit (monetary or otherwise) from their actions, Appellant's conduct does not stretch into active trafficking. By simply "helping bring about" the females' unlawful activities but not actually participating or benefitting from such, he is guilty of a Category B felony, punishable by 1-6 years, rather than Category A felony, punishable by 5-life.

By entering a plea to a charge that is beyond the scope of his actual conduct, his plea was not knowingly and intelligently made. "A defendant's guilty plea must be voluntary, knowing and intelligent to satisfy constitutional due process." *State v. Freese*, 116 Nev. 1097, 1108, 13 P.3d 442, 449 (2000).

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[2] Merriam-Webster Online, "Facilitate," available at https://www.merriam-webster.com/dictionary/facilitate.

The United States Supreme Court has used slightly different language when describing the voluntary, knowing and intelligent requirement, but the same general standard is likewise federally enforced. See, *Parke v. Raley*, 506 U.S. 20, 28-29, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) (describing the standard as both "knowing and voluntary" and "voluntary and intelligent"); *Boykin v. Alabama*, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) ("intelligent and voluntary"); *McCarthy v. United States*, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969) ("voluntary and knowing").

CONCLUSION

For these reasons, Appellant's case should be remanded so that he may withdraw his plea to the charges of Sex Trafficking and Attempt Sex Trafficking, as the statute goes beyond the scope of his actual conduct in this matter.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 3 day of November, 2018.

NEVADA APPEAL GROUP
Respectfully Submitted By:

KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 3,114 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3 day of November, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 3 day of November, 2018, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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Employee of Nevada Appeal Group, LLC