

*IN THE SUPREME COURT OF THE STATE OF NEVADA*

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Elizabeth A. Brown  
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ALISHA BURNS

Appellant,

vs.

THE STATE OF NEVADA  
Respondent

CASE NO. 82686

D.C. CASE NO: 03C191253

APPELLANT'S OPENING BRIEF

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2  
3 1. NRAP 26.1 DISCLOSURE

4 The undersigned counsel of record certifies that there are no persons or entities  
5 that must be disclosed as persons or entities as described in NRAP 26.1(a). The  
6 following parties have appeared in this case:  
7

8 FOR PLAINTIFF, THE STATE OF NEVADA:  
9

10 Steve Wolfson, Esq.

11 FOR DEFENDANT/PETITIONER, ALISHA BURNS:  
12

13 Tony L. Abbatangelo, Esq.,  
14

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**JURISDICTIONAL STATEMENT**

9 This is an appeal the denial of a Petition for Habeas Corpus, said Order entered  
10 on March 10, 2021, 2018, BURNS R 703-710 473-489 Jurisdiction is authorized  
11 pursuant to NRS 34.575 (1) since the grounds for appeal are the denial of her  
12 Petition for Habeas Corpus

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**ROUTING STATEMENT**

9 This case is presumptively assigned to the Nevada Supreme Court, since it  
10 involves a postconviction appeal that involve a challenge to a judgment of a  
11 Category A felony, pursuant to Nev. R. App. P. 17 (b) (2) (A)

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. THERE EXISTS A FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER STATE AND FEDERAL GROUNDS TO EXCUSE THE TIME BAR
2. PETITIONER IS INNOCENT; NEWLY DISCOVERED EVIDENCE TO WIT: ADVANCES IN FORENSIC SCIENCE REGARDING VICTIMS OF SEX/CHILD TRAFFICKING EXCUSES THE TIME BAR; BECAUSE OF FORENSIC EVOLUTION OF VICTIMS OF SEX TRAFFICKING THIS EVIDENCE WOULD HAVE CAUSED A DIFFERENT RESULT.
3. THERE EXISTS A FEDERAL AND STATE BRADY VIOLATION BECAUSE THE STATE WITHHELD THE MANY LETTERS WRITTEN TO PETITIONER, FIFTEEN YEARS OLD, WHICH SHOW THE EXTREME UNDUE INFLUENCE AND CONTROL THAT STEVEN KACZMAREK WIELDED OVER PEITITIONER, WHICH WOULD HAVE THOURGHLY DISCREDITED HER STATEMENT WRITTEN TO THE DETECTIVE.

1 4. HER TRIAL COUNSELS RENDERED INEFFECTIVE ASSISTANCE OF  
2 COUNSEL AS GUARANTEED BY THE NEVADA AND FEDERAL  
3 CONSTITUTION.

4 A. Original Habeas Corpus Counsel Failed to conduct a constitutionally  
5 inadequate investigation.

6 B. Trial Counsel Was Ineffective for Failure to Obtain a Psychological  
7 Exam, by Allowing a Contact Visit Between Kaczmarek and Petitioner.,  
8 which caused Petitioner to be Exponentially Unduly Influenced by  
9 Kaczmarek, by Failing to Attempt to Suppress her Statement, and by Failing  
10 to Move to Dismiss the Charges based on the State's Failure to Honor its  
11 Promise to the State of Ohio that She Would be Free from Prosecution.

12 5. THE STATE COMMITTED EGREGIOUS PROSECUTION  
13 MISCONDUCT BY BREACHING ITS CONTRACT WITH OHIO  
14 REGARDING RETURNING THE PETITIONER AND BY INSTITUTING  
15 THESE CHARGES, RESULTING IN AN ILLEGALLY OBTAINED  
16 STATEMENT AS WELL AS THE WRONGFUL INSTITUTION OF  
17 CHARGES

18 6. THE COURT ABUSED ITS DISCRETION BY NOT ALLOWING  
19 LIMITED DISCOVERY TO SIMPLY RE-RUN THE UNIDENTIFIABLE  
20 PRINTS AT THE SCENE, AFTER THE ROBBERY, THE SCENE WAS  
21 WIPED YET THERE ARE FINGERPRINTS ON OVER 20 ITEMS, THE  
22 FACT THAT THAT WAS NO MATCH IN 2002, IT IS REASONABLY  
23 POSSIBLE/PROBABLE THAT IF RAN THROUGH ANB UPDATED  
24 DATABASE THAT THERE WOULD BE A MATCH

25 **STATEMENT OF THE CASE**

26  
27 1. PROCEDURAL HISTORY AND FACTS

28 To say that the history of this case is tortured in an understatement.



1       Petitioner was the victim of sex trafficking, kidnapping, statutory sexual  
2 seduction and more at the hands of Steve Kaczmarek, 17 years her senior.  
3  
4       Originally, Steve Kaczmarek was charged on October 14, 2002, with FIRST  
5 DEGREE KIDNAPPING (Felony - NRS 200.310, 200.320); STATUTORY  
6 SEXUAL SEDUCTION (Felony - NRS 200.364, 200.368); POSSESSION OF  
7 STOLEN VEHICLE (Felony - NRS 205.273) and POSSESSION OF FORGED  
8 INSTRUMENT (Felony - NRS 205.160), in the manner following, to-wit: That the  
9 said Defendant, on or between September 2, 2002, and October 7, 2002, at and  
10 within the County of Clark, State of Nevada, VOL II 234-235.  
11  
12

13  
14       The State then entered into an agreement with the State of Ohio where the State  
15 of Nevada promised that she, a ward of Ohio (having been a runaway over 30  
16 times from foster homes at the tender age of 15 years) would be immediately  
17 returned back to Ohio and WOULD BE FREE FROM CRIMINAL PROCESS  
18 FOR ANY CRIMINAL PROCESS FOR ANY MATTERS WHICH OCCURRED  
19 PRIOR TO HER BEING BROUGHT HERE. VOL II 1 236-240, specifically 237,  
20 section 5.  
21  
22

23  
24       Petitioner indicated to her counsel that she did not want to testify, and the  
25 above charges against Kaczmarek were dismissed. He was later charged with  
26 was charged with BURGLARY, SECOND OFFENSE, WITH THE  
27 ASSISTANCE OF A CHILD (Felony - NRS 205.060, 193.162); ROBBERY,  
28

1 WITH THE ASSISTANCE OF A CHILD (Felony - NRS 200.380, 193.162);  
2 FIRST DEGREE KIDNAPPING WITH THE ASSISTANCE OF A CHILD  
3  
4 (Felony - NRS 200.310, 200.320, 193.162); and MURDER WITH THE  
5 ASSISTANCE OF A CHILD (Felony - NRS 200.010, 200.030, 193.162), on or  
6  
7 about the 27th day of September, 2002, within the County of Clark, State of  
8 Nevada, contrary to the form, force and effect of statutes in such cases made and  
9 provided, and against the peace and dignity of the State of Nevada, VOL II 228-  
10  
11 229.

12 On November 26, 2002, there was a hearing in front of Hon. James Bixler,  
13  
14 BURNS R 242-250. At the hearing, the State represented by Gary Guymon, Esq.,  
15 stated to the Court, at VOL II 243: “*I don’t know that we will ever charge a*  
16 *second defendant,*” and since there is not a second defendant that it should go to  
17  
18 the Special Public Defender. VOL II 244. Counsel was appointed for Kaczmarek.  
19 Phil Kohn, Esq. was appointed to represent the Petitioner, since she was a witness  
20  
21 in the Kidnapping case and possibly the murder case. VOL II 245. The Court  
22  
23 adroitly mentioned that she could be a possible defendant, however, VOL II 245.

24 On December 5, 2002, Petitioner was charged in Justice Court with Murder,  
25  
26 VOL II 255. Even though she was fifteen, the State served her with a Notice of  
27  
28 Intent to Seek the Death Penalty, VOL I 025. The State certainly knew that a 15-

1 year-old was NOT eligible for the death penalty, but apparently that didn't stop the  
2 State from this unfair intimidating tactic.  
3

4 As reflected in the record, on December 10, 2002, Mr. Kohn, Esq., raised the  
5 issue that she was being held unlawfully and was only brought to Nevada to testify.  
6  
7 VOL II 255. She is fifteen and is languishing in the adult detention center, CCDC.

8 She is not immediately returned to Ohio, she remains in the adult jail, for the  
9 most part in solitary confinement, and the main correspondence is letters that  
10  
11 Kaczmarek is writing her from jail. Eventually, Kaczmarek was able to convince  
12 this vulnerable victim of sex/minor trafficking to write the detective and make a  
13  
14 statement, to make her statement, VOL V 049-054.

15 Petitioner was able to retrieve some of the letters when she was transferred back  
16 from Ohio to CCDC. VOL VII 001-079. These letters are read by the detention  
17 staff, an agency of the State; these letters show the undue influence exerted on  
18  
19 Petitioner, especially with her being in solitary confinement. In one of the letters,  
20  
21 he states that he is the killer and to LET ALISHA GO. VOL VI 154, towards  
22 bottom. He writes that her "Fucking lawyer is an idiot and will sell her out." VOL  
23 VI 110 top. For instance, at VOL VII 008 he wants to make sure she is not  
24  
25 testifying against him. He is pushing her to set up a meeting with her and  
26  
27 respective counsels, VOL VII 63. He is telling her not to listen to her lawyer as he  
28  
is trying to make a deal with the State, VII 68-69.

1 These letters are exculpatory and were never provided to defense counsel. Mr.  
2 Kohn, Esq. only heard of the existence of these letters the day before he testified  
3  
4 on Jan. 22, 2021, VOL IV 301-301. He also testified *without objection* that nothing  
5 goes out from a defendant without first being reviewed by detention officers, VOL  
6 IV 309. Appellant did not have all the letters since she was transferred from jail to  
7 jail; she testified that not all of the letters she received from Kaczmarek were  
8 there, that the letters she received from Kaczmarek instructing her what to write to  
9 the Detective were not there. VOL IV 321.  
10  
11

12 On April 1, 2003, Petitioner waives the preliminary hearing, VOL III 001-005.  
13 Note that she was “wavering a little bit.” VOL III 002. Subsequently, on April 16,  
14 2003, a Stipulation and Order for a Contact Visit was executed. VOL I 003-004.  
15 The undue influence worked, and on April 23, 2003, a Guilty Plea was entered.  
16 VOL I 005-011. A conviction was entered on June 10, 2003. VOL I 012.  
17  
18

19 On November 21, 2003, Appellant filed her original Petition for Habeas Corpus.  
20 VOL I 014-028 She alleged, among other grounds, that her counsel was ineffective  
21 for “failing to have her examined by a psychologist to quantify her psychological  
22 and emotional problems from being a ward of the state and being bounced from  
23 foster home to another, as well as her emotional dependence on Kaczmarek.” VOL  
24 I 024. This statement is foretelling and certainly has that “ring of truth.” Petitioner  
25 also pointed out defensive avenues that were not developed; These are more  
26  
27  
28

1 particularly described in the innocence packet sent to the conviction integrity  
2 division. VOL I 042-137, said packet submitted to undersigned's application to be  
3 appointed for Post-Conviction Relief on September 29, 2019. VOL I 029-041.  
4

5 The Original Pro Se Petition was withdrawn; her prior counsel, now deceased,  
6 advised her to focus on her emancipation and that she would be losing the writ.  
7 VOL III 055. Prior counsel did not explain any ramifications of withdrawing the  
8 writ. VOL III 056.  
9  
10

11 On March 19, 2019, undersigned files a Motion to be Appointed for Habeas  
12 Corpus Relief. VOL I 029-041. A timeline of Relevant events was submitted in the  
13 Exhibits which were submitted to the Conviction Integrity Unit. VOL I 055-057.  
14

15 One of the many compelling points is that the items taken and pawned by  
16 Kaczmarek occurred on **September 25**, 2002, but on **September 27**, 2002, the  
17 chain lock was on, water was running, and later the chain lock is off. Obviously,  
18 there are people present AFTER the robbery. Further, when the body is found,  
19 there is no stench, nothing to indicate that Mr. Villareal had died two days prior.  
20  
21 Further, other suspects are questioned. Additionally, on October 29, 2002,  
22 Kaczmarek is questioned about a murder that occurred on **September 27**, 2002.  
23  
24

25 The timeline also goes into Kaczmarek's letters telling her what to say in the  
26 unprecedented statement to the detective. Clearly, this 15-year-old, who was kept  
27 in solitary confinement, not immediately returned to Ohio in breach of the State's  
28

1 agreement with Ohio, buckled to the undue influence of Kaczmarek. These facts  
2 were submitted to the Conviction Integrity Unit and were made part of the record.  
3  
4 VOL I 042-137.

5 On November 12, 2019, Petitioner files a Motion for Limited Discovery. VOL  
6 I 192-197. Specifically, she requested that the prints be re-run, since at the time of  
7 the robbery the premises were wiped clean, and there existed unidentifiable prints  
8 at the scene on September 27, 2002. VOL I 193. Also, the date of the homicide  
9 became a moving target. VOL I 193. The date of death changed. VOL I 194. She  
10 requested that the prints be re-run to see if any of the previous suspects may have  
11 been arrested since the original running of the prints. VOL I 197

12 The Court granted an evidentiary hearing on the issue of timeliness. VOL III  
13 011. TRANSCRIPT SEPT. 18, 2020 Appellant (Petitioner) testified that "I was a  
14 foster child. I had been a foster child since I was 11. My adopted parents -- I  
15 was adopted when I was 3. My adopted parents had put me back up for  
16 adoption, so I had been in foster care. And I had been in 36 placements, so I  
17 was bounced around a lot. And I was very alone, and I felt like I didn't have  
18 anyone" VOL III 016. When she met Kaczmarek he told her he was 22. VOL  
19 III 016. He was 32 and she was 15, VOL III 016. She testified that "I had some  
20 physical and sexual abuse when I was a small child, which is why I ended up  
21 getting adopted in the first place. And then once I was in a foster home, there  
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1 was some sexual abuse, and I was moved to another foster home before I was  
2 adopted. And then once I got back into foster care, there was physical and  
3 sexual abuse. VOL III 017. He paid a lot of attention to her, VOL III 018.

4 Kaczmarek convinced her to move to Las Vegas after 2-3 weeks tops, she took  
5 her then foster mother's car. VOL III 018. This was around August 2002 id.

6 Appellant at this time stood five feet tall and weighed 87-88 pounds. VOL III  
7 020. Kaczmarek was arrested for parole violations at the Stardust in October,  
8 2002, and a SANE exam was conducted, whereupon he was charged with  
9 kidnapping, with sexual assault, and the statutory sexual seduction.

10 Appellant was taken into custody as a runaway and was transported to Ohio  
11 since she did not have a social worker here. VOL III 022. She was listed as  
12 a victim of a crime for kidnapping, sexual assault and statutory sexual  
13 seduction. VOL III 022.

14 When she was returned to Ohio, Nevada requested that she come to Las  
15 Vegas to be a witness, VOL III 023. She was told that she would come out,  
16 testify, and take the next flight back. VOL III 024. She, at 15, (probably  
17 like most 15-year-old victims) told her public defender that she did not  
18 want to testify against him, and she was then told that she was being made  
19 a murder co-defendant. VOL III 025. Instead of being immediately sent  
20 back, she stayed in CCDC for two more weeks, and then booked for  
21 murder VOL III 026. She is 15, weighs 90 pounds, and is in solitary

1 confinement at CCDC. VOL III 026. She is only allowed to leave her cell  
2 an hour a day, to roam around in an isolated situation, id. She was not  
3 aware of any updates in her charges. VOL III 027.  
4

5 At this hearing, Petitioner then goes into the facts of the incident. It is  
6 September 25, 2002, she is hanging out with Kaczmarek and Tommy, with  
7 no place to go; Kaczmarek said they needed to get some money, VOL III  
8 028. She waits for someone to approach her about having sex. VOL III  
9 028. Mr. Villareal asked Alisha at the McDonalds at Fitzgerald's if she  
10 would have sex with him for \$200.00 and Kaczmarek agreed. VOL III 028-  
11 029.  
12

13 She thought they were going to have sex. VOL III 030. Kaczmarek  
14 lured Villareal towards the bathroom, VOL III 030. Next Tommy and  
15 Kaczmarek knocked him unconscious. VOL III 031. Steve (Kaczmarek)  
16 instructed Appellant to grab a knife and cut the cord from a fan, id. She  
17 said that that she "listened to Steven. I -- I did what he -- I never went against  
18 him." VOL III 032.  
19

20 He was moved into the bathroom by Steve and Tommy, VOL III 034.  
21 Steve told them to wipe everything down. VOL III 034. When they left,  
22 Villareal was alive. VOL III 036.  
23

24 In the events culminating in her sending the letter to the detective  
25 regarding the instant case As she testified, once Petitioner was transferred  
26  
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28



1 to Nevada to be a witness pursuant to the Court orders, she was placed in  
2 juvenile detention until December 5, 2002, and then transferred to CCDC,  
3  
4 VOL III 040. While in CCDC she was put in solitary confinement, not  
5 allowed to use the phone, yet was receiving letters daily from Kaczmarek.  
6 VOL III 041. She testified that in the letters that he said “That he loved  
7 me. That I had the power to save both of us. That if I did what he said and  
8 took responsibility for everything, I wouldn't get much time because I was  
9 a kid, and I would be saving him, and he wouldn't get much time either.  
10 And then we would both get out around the same time and we could be  
11 together and..” VOL III, 041. She was 15, in love, and insisted on writing  
12 the detective that it was all her idea in order to save Kaczmarek. VOL III,  
13 041-042. She gave the letters to her post-conviction attorney, who passed  
14 away. She did not tell Mr. Kohn about the letters as stated earlier. Mr.  
15 Kohn learned about the letters for the first time shortly before testifying.  
16 VOL IV 301-301.

21 Appellant simply relied on Kaczmarek's assurances that she would not  
22 get much time. VOL III 044. At the preliminary hearing, it should be  
23 noted Petitioner indicated that was hesitant to take the plea offer, VOL III  
24 044. After the most unusual contact meeting between her and Kaczmarek,  
25 she then entered her plea.  
26  
27  
28

1 The Court allowed her to testify over objection about this meeting  
2 because it went to her actual innocence.<sup>1</sup> VOL III 044-046. They were in a  
3 small room, JUST THE TWO OF THEM. VOL III 047. It was a 20–30-  
4 minute private meeting, she was not given advance notice, and during this  
5 time he kept telling her to take the deal, that he had been convicted. They  
6 were allowed physical contact. VOL III 049. KACZMAREK TOLD HER  
7 THAT SHE DID A GOOD JOB WRITING THE STATEMENT, VOL III  
8 049. This testimony establishes that she was nothing more than his pawn,  
9 praising her for claiming that this entire incident was HER idea.

13 Petitioner timely filed a pro se Petition. She was appointed counsel She  
14 testified that she never met her court appointed post-conviction counsel,  
15 and there was only one meeting with an investigator and a couple phone  
16 calls with counsel. VOL III 053. With the meager information, counsel  
17 advised her to drop the writ and go to court to get emancipated due to her  
18 health issues. VOL III 054. Petitioner testified about her health issues:

21 “I was having issues, like, with my -- my menstrual cycle. It was  
22 causing me to faint. My blood pressure was bottoming out. It turned out  
23

---

25 <sup>1</sup> A habeas petitioner may secure review of the merits of defaulted claims by  
26 showing that the failure to consider the petition on its merits would amount to a  
27 fundamental miscarriage of justice; this standard is met when the petitioner makes  
28 a colorable showing he is actually innocent of the crime. Berry v. State, 363 P.3d  
1148 (Nev. 2015).

1 that I had some ovarian cysts that were putting pressure on, like, a main  
2 vein or something. But my -- my heart had stopped at one point. It -- it  
3 was bad. And the paramedics had to come. They weren't allowed to treat  
4 me because I was underage until they could get consent from the director  
5 of prison. They went ahead and treated me. It was an emergency thing  
6 anyway. I guess they had gotten in trouble for doing that. So to avoid  
7 having to again -- because it happened every month.”

9 “So, to avoid having to again -- because it happened every month for  
10 about six to eight months when I got my cycle. So, to avoid it happening  
11 again, I was afraid that I would end up dying if they couldn't treat me and  
12 if they didn't get consent fast enough. So, I had filed for emancipation.”

14 VOL III, 055. It should go without saying that only a couple of phone  
15 calls and a visit by the investigator is clearly insufficient preparation,  
16 given the complexity of this case and the vulnerable mental and physical  
17 state of the Appellant. This is utter and complete neglect, and should count  
18 for nothing.

20 When Petitioner was released, she gets in another abusive relationship.  
21 He is arrested for domestic violence and child abuse charges with -- against  
22 her and her daughter. She went to the Nevada Women's Shelter. And CPS  
23 took her daughter from her. VOL III 057-058.

25 She waited over ten years to do anything about this case because she  
26 had given up hope, somewhat based on Mr. Longabaugh's advice. VOL III  
27  
28

1 059. Also, for 16 years she had been told that she was responsible. VOL III  
2 060.

3  
4 When she got her discovery back the second time, she then realized that  
5 there were other prints at the scene, VOL III, 060. Bear in mind, this is a  
6 girl who is 15 years old, and although standing trial as an adult, can hardly  
7 be expected to make adult decisions. She learned that there was a witness  
8 placing someone placing in the room one hour before the body was found,  
9 and this was two days after the robbery. Also, the place was completely  
10 destroyed when the police arrived, VOL III 061. There was also the issue  
11 of the chain lock, VOL III 061. At the age of 15-16, how could she be  
12 expected to know much about her case. Further, how could she be  
13 competently advised after a couple of phone calls and a visit from the  
14 investigator?  
15

16 She then started taking classes while she was locked up. And it started off  
17 as a domestic violence class. And they started talking about trafficking, and  
18 sex trafficking, and human trafficking. "I came to realize. that that was the  
19 situation that I was in. That I was a kid. And I started learning more about  
20 sex trafficking and that I wasn't alone with what I was going through, and  
21 that there were people that understood, that they -- that people had started  
22 to understand what happens and -- and how it feels to go through that  
23 situation. VOL III 061-062.  
24  
25  
26  
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28

1 On cross, she denied every getting into a trick roll. VOL III 065. She  
2 also said that she did what he wanted her to do because he was abusive  
3 to her and also that she cared about him. VOL III 074. She also  
4 acknowledged that Kaczmarek became abusive, but not at the beginning  
5 of their relationship. We are talking about a trapped 15-year-old who  
6 had been in 36 different placement homes who was away from Ohio  
7 solely depending on a predator/parolee.  
8

9  
10 She also testified that an inmate did the original writ for her. VOL  
11 III 083, that she gave that inmate the discovery.084. As to reading over  
12 the writ she said that “I was 16 years old, and I was letting an older  
13 inmate that worked in the law library assist me because I didn't know  
14 anything about the courts.” VOL III 085.  
15

16  
17 At the evidentiary hearing in support of her Petition, Dr. Thomas  
18 Bennett, MD, then testified. VOL III 181-245. He testified in sum at VOL  
19 III 184:  
20

21 “Just an overview? My opinions were that number one, it's unlikely he  
22 had died on the 25th. The findings are much more consistent from a  
23 forensic point of view that he died on the 27th.  
24

25 “Second opinion, asphyxia is the mechanism of death, and he  
26 probably did have suffocation and possibly strangulation as the  
27 underlying cause for that asphyxia.  
28

1 “Third opinion, he was intoxicated, a .13 blood alcohol. I believe  
2 it was a whole blood alcohol content. That's certainly sufficient to  
3 qualify as alcohol intoxication. Fourth opinion, I agree with the  
4 coroner/medical examiner that death occurred on the 27th. There  
5 was decomposition, other changes that the autopsy again supported  
6 that. I also mentioned the fact that from the scene, the floor is  
7 described as wet, and the scene sort of supports that he was not in  
8 the tub getting water on him for that. long.

10 “Most of that was because if you're in water for a period of eight  
11 hours or more, it can cause diffuse skin slippage. His skin slippage  
12 appeared to be only under the bindings that held his hands or his wrists  
13 and ankles. And then just to summarize, in my opinion Mr. Villareal  
14 died on the 27th not the 25th, and then there's a few more little sub-  
15 opinions.”

17 At VOL III 199 he gave his expert opinion on why Mr. Villareal did  
18 not die on September 25, 2002, the day of the robbery:

20 “Q Last question. If the body, Mr. Villareal, had been deceased for  
21 two days, what would you have expected to see or notice about a  
22 body that's been in water for two days?

24 “A body that's been in water for two days will have a much  
25 more prominent diffuse skin slippage as we talked about,  
26 maceration, edema of the corneas, the whites, the sclera of the  
27 eyes. Many more changes because it gives more time for the body  
28 to soak up the water. The description we see here is as a pathologist

1 gives a good description of the degree of maceration that supports  
2 just being in there for, you know, a matter of maybe a very few  
3 hours, one to three hours, somewhere in that range, just as an  
4 estimate, not -- not two days.

5 "Q Would you notice anything about an odor?  
6

7 A You would. After a couple days, the bacteria that are  
8 inherent in our GI track it's 25 percent of our feces are bacterial by  
9 volume, and they take over and they start to breakdown the body.  
10 That's for decomposition and it's -- it changes texture, colors, smells,  
11 many other changes that are part and parcel that we comment on in  
12 the autopsy reports if present because they help determine the time  
13 of death."  
14

15 Dr. Bennett's report was also submitted, VOL V 002-007.

16 Phil Kohn, Esq., then testified. As a prelude, undersigned stated the  
17 following concerning the relevance of Mr. Kohn's testimony, at VOL IV  
18 249: "Also just to finish up, he did believe she was a victim of the  
19 kidnapping and sex assault, which she -- Ms. Burns refused to testify to.  
20 When she indicated that she did not want to testify, Mr. Guymon  
21 [phonetic] did go get very upset, and that's when she was charged with  
22 murder.  
23  
24  
25

26 Then, at VOL IV 252:

27 MR. ABBATANGELO: And let me also clarify a little bit, Your Honor  
28 and Mr. Hamner, is that at the time in 2002, sex trafficking wasn't viewed

1 the same way as it is today, and that's why I should have clarified that he  
2 believed that Ms. Burn was brought out here by Mr. Kaczmarek. They  
3 had sex and that ties into her being an original, the original reason for her  
4 to come to Nevada as a witness, not as a defendant. The reason she was  
5 brought out here was she was a victim in Kaczmarek's other case.  
6

7  
8 MR. HAMNER: Right.

9 MR. ABBATANGELO: Then she refused to testify, that got dismissed  
10 and they both get in a murder case.

11 Phil Kohn, Esq. then testified VOL IV 296-312:

12 He testified that she trusted Kaczmarek more than she trusted him, that  
13 she was a teenager and very good at it. VOL IV 300-301. He did not know  
14 that his 15-year-old teenage client was communicating with the 32-year-old  
15 Mr. Kaczmarek. VOL IV 301. Mr. Kohn testified about the legislative  
16 changes he helped bring about with Senator Cortez-Masto, to which the  
17 state objected. VOL IV 304-305. However, the Court overruled this  
18 objection and stated at 305 that "Well, I mean, but the issue that goes to her  
19 actual innocence is the sex trafficking and the influence that she's claiming  
20 was exerted over her by Mr. Kaczmarek. So I think this does go to that, so  
21 I'll allow him to answer that question. Mr. Kohn explained that in 2013  
22 sex trafficking became a serious felony. VOL IV 306. He stated "but I  
23 can't say that sex trafficking was something that we really discussed back in  
24  
25  
26  
27  
28



1 2002 -- defense or prosecution.” VOL IV 307. He later said that he would  
2 have defended her differently if sex trafficking was recognized in 2002,  
3 either with or without her permission. VOL IV 309.  
4

5 Appellant was then recalled on cross. To give an idea of her maturity,  
6 she stated that she was sorry, at VOL IV P 333:  
7

8 “It's absolutely true that I'm sorry for my involvement in what  
9 happened to Mr. Villareal.

10 Q Because you --

11 “A I'm sorry that I ran into him that day. I'm sorry for all of it that  
12 happened. I really am. And I did say that to them. I spent 16 years of  
13 my life thinking that I was responsible for someone's death. That  
14 tortured me for 16 years. So, yes, when I saw them, I did tell them that  
15 I was sorry.”  
16

17  
18 The Court also questioned Appellant, and the agreement for her not to  
19 be prosecuted came up, at VOL IV 0340:

20 THE COURT: You never went to court for the murder?  
21

22 THE WITNESS: No, ma'am.  
23

24 MR. ABBATANGELO: Your Honor, this is in December.  
25

26 THE COURT: Right. In December of 2002.

27 THE WITNESS: No.  
28

1 THE COURT: But you said the complaint was filed December 5th,  
2 right?

3 THE WITNESS: Yes. I was housed at CCDC for 13 days. During  
4 that time, my social worker in Ohio and the judge in Ohio had been  
5 contacting the DA's office out here telling them, "We had an agreement."  
6 She was sending -- my social worker in Ohio was sending copies of the  
7 agreement, faxing them over, telling them, "We had an agreement." And,  
8 "She was free from prosecution. She wasn't supposed to be arrested. She  
9 was supposed to be returned to us." And after 13 days, they finally gave  
10 in and released me back to Ohio.  
11

12 THE COURT: Okay.

13 BY MR. ABBATANGELO:

14 Q But you had not gone to court on the murder charge and pled not  
15 guilty or guilty, you just were sitting in CCDC --  
16

17 A I was --  
18

19 Appellant then explained her conditions of confinement at VOL IV 340-341:  
20

21 Q And describe the conditions you were housed in while you were at  
22 CCDC  
23

24 A I was in solitary confinement. I wasn't allowed to talk to any of the  
25 other inmates because they were adults, and I was a juvenile. I came out  
26 one hour every two or three days to shower by myself. I couldn't use the  
27  
28

1 phone. And the only I had any contact with outside of officers was  
2 Kaczmarek.

3  
4 THE COURT: And how did you have contact with him? WITNESS:  
5 Through the letters. He was --

6 THE COURT: How were you getting the letters? Were they coming in the  
7 inmate mail, or how did you get the letters?

8  
9 THE WITNESS: Through the mail, yes.

10  
11 THE COURT: So when they would bring the in- -- like if they were --  
12 if your sister or somebody had written you letter, they came with the  
13 inmate mail like that?

14  
15 THE WITNESS: Yes, ma'am, through the -- THE

16 COURT: Okay.

17  
18 THE WITNESS: -- mail every day.

19  
20 Appellant was never released when she was in Ohio, as she was a runaway.  
21 She kept receiving letters from Kaczmarek. "I remained in custody from the  
22 time they sent me back to Ohio, probably around December 18th or so,  
23 until I was returned back to Las Vegas, I don't know, in February or so,  
24 whenever -- whenever I was rebooked. Because they -- they issued a  
25 second warrant for my arrest on the murder charge, the same -- the same  
26 charge. So they reissued the warrant so that they could arrest me again and  
27  
28

1 rebook me since they had to let me go after the first detainment.” VOL IV  
2 342. From the point of return, she still received the letters. VOL IV 342  
3

4 Appellant explained that she wrote the letter to the Detective on  
5 December 18, 2002, the first time she was in CCDC before they let her go  
6 back to Ohio. VOL IV 345. ALL THIS TIME IN CCDC WHEN SHE  
7 WROTE THE LETTER SHE WAS IN SOLITARY. VOL IV 345.  
8

9 Also, she had been receiving letters that said or inferred that this will be  
10 over soon. VOL IV 346. All during this time Appellant was manipulated  
11 into believing “I honestly thought that it was like some type of program, or  
12 they were going to release me back to Ohio again.”  
13  
14

15 She later testified “ but like I said, my social worker in Ohio and the  
16 judge in Ohio were like freaking out about it and contacting the DA's office  
17 out here and telling them, "We had an agreement. She was free from  
18 prosecution. You have to return her to us." VOL IV 347.  
19

20 It should be clear that the State breached its promise to Ohio and  
21 consequently to this 15-year-old girl. She could have been compelled to  
22 testify. Instead, she was subjected to cruel and unusual pretrial  
23 confinement and the State, charged with knowledge of law enforcement,  
24 allowed a floodgate of manipulation to be her only source of  
25 communication to and from the world. The broken promises and the cruel  
26 and unusual punishment did its number on the Appellant, who was  
27  
28

1 manipulated into give a statement that pleased her master, that it was all  
2 her idea.

3  
4 She testified how Kaczmarek turned her into a victim of sex  
5 trafficking, at VOL IV 357: "So -- I don't know. Some state somewhere  
6 between Ohio and here was the first time that he had approached me with like  
7 alternate ways to make money. He had said -- we were at a motel, and he was  
8 like, "Hey, there's this guy. He's like a couple rooms down. He" -- "he just  
9 wants to touch you. Like he just wants to touch on you over your clothes. He's  
10 not gonna do anything else. And I'll be there the whole time. He's just gonna  
11 give us some cash for it." He slapped her to get her to give a blow job for  
12 money. VOL IV 358. Slapping extended to get her to commit acts of  
13 prostitution. VOL IV 359. She explained that robbery never happened  
14 before, she would just perform the sex acts, get paid, and away they went.

15  
16 For a host of reasons, the Appellant is actually innocent, and she should be  
17 granted relief. Any conduct at the premises was the result of undue influence  
18 and duress; that is the inescapable reality.

19  
20 Brionna Alex then testified. VOL IV 389-415. She testified at 405 that it is  
21 very common for a victim to follow the commands of their trafficker. Ms.  
22 Alex has a master's degree in science psychology from UNLV and is  
23 employed by Cupcake Girls. VOL IV 390-391. They provide services for folks  
24  
25  
26  
27  
28

1 in the service industry as well as aftercare for survivors of sex trafficking. VOL  
2 IV 391.

3  
4 When asked about patterns of behavior of persons who have been victims  
5 of sex trafficking, she answered, at VOL IV 395:

6 “A. Sure. That could be performing sex acts they don't want to  
7 perform, maybe even escorting with people they don't want to -- basically  
8 any behavior. But there are crimes that have been committed that sex  
9 trafficking victims or survivors don't necessarily want to be doing but they  
10 feel like they have to because they're under threat or manipulation. So  
11 that's a pretty big part of what we've seen in our clients thus far.”

12 She gave examples of manipulation, both of which apply in this case at  
13 VOL IV 395:

14 “the Romeo trafficker who uses love to get what they want out of their --  
15 out of the victim. So, you know, using words like, "I love you," for  
16 building a relationship initially under the guise of really caring about this  
17 person and then kind of isolating them and making them, you know, their  
18 only support system until they don't have anything else, and then they have  
19 to rely on that person and do what that person says. There are also people  
20 who use threats of violence or actually abuse to get what they want out of  
21 the victim. Controlling of money...”  
22  
23  
24  
25  
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28

1 She then testified that a victim of sex trafficking would do the things that  
2 Ms. Burns was ordered to do, at VOL IV 406-407:

3  
4 "because they are in fear for their safety, their family members' safety.

5 There could be a number of things at play there.  
6

7 Q So if a trafficker told a victim, "Hey, wipe this room down for  
8 fingerprints," is that something a victim would do?  
9

10 A That's possible.  
11

12 Q And if they -- the trafficker said, "Hey, cut a cord off, give me  
13 this so I can tie somebody up," is that something a victim would do?  
14

15 A That is also possible depending on the situation.  
16

17 Q And if that trafficker said, "Hey, put your foot on the back of  
18 this guy's neck, keep him" -- "hold him down," is that something a  
19 trafficker [sic] would do?  
20

21 A I would say the same of that as well.  
22

23 Q And in the same situation, a trafficker was to tell the victim to go  
24 find a sock and put it in his -- "help me so I can put it in a victim" --  
25 "another person's mouth," is that something they would do?  
26

27 A Possibly.  
28

1 Q And what about age difference, have you ever been familiar  
2 with any age difference in sex trafficking?  
3

4 A. Commonly we've seen younger people be more susceptible to  
5 trafficking, especially grooming as it relates to trafficking. If someone is  
6 in a relationship or believes they're in a relationship with the trafficker,  
7 then it's a lot easier for the trafficker to groom them for trafficking.  
8

9 On MARCH 10, 2021, the Court entered judgment denying the  
10 Petition. VOL II 714-720. Appellant submitted her notice of appeal on  
11 March 22, 2020. VOL II 721-730.  
12

### 13 **STANDARD(S) OF REVIEW**

#### 14 *NEVADA STATE STANDARD OF REVIEW*

15 This court “give(s) deference to the district court's factual findings if supported  
16 by substantial evidence and not clearly erroneous but reviews the district court's  
17 application of the law to those facts de novo.” Lader v. Warden, 121 Nev. 682,  
18 686, 120 P.3d 1164, 1166 (2005). Repinec v. State, 131 Nev. 1338 (Nev. App.  
19 2015)  
20  
21  
22

#### 23 *FEDERAL STANDARD OF REVIEW*

24 The Federal Courts may grant habeas relief only if the state court's decision (1)  
25 ‘was contrary to, or involved an unreasonable application of, clearly established  
26 federal law, as determined by the Supreme Court ...; or (2) resulted in a decision  
27  
28



1 that was based on an unreasonable determination of the facts in light of the  
2 evidence presented in the State court proceeding.’ ” Davis v. Woodford, 384 F.3d  
3 628, 637 (9th Cir. 2004) (quoting 28 U.S.C. § 2254(d)). Jurado v. Davis, 12 F.4th  
4 1084, 1090 (9th Cir. 2021), cert. denied, 21-6954, 2022 WL 1205875 (U.S. Apr.  
5 25, 2022)

## 8 ARGUMENT

### 10 1. THERE EXISTS A FUNDAMENTAL MISCARRIAGE OF JUSTICE 11 UNDER STATE AND FEDERAL GROUNDS TO EXCUSE THE TIME 12 BAR

13 If where a petition is procedurally barred and the petitioner cannot demonstrate  
14 good cause, the district court may nevertheless reach the merits of any  
15 constitutional claims if the petitioner demonstrates that failure to consider those  
16 constitutional claims would result in a fundamental miscarriage of  
17 justice. Pellegrini, v. State, 117 Nev.860, 887, 34 P.3d 519, 537 (2001). A  
18 fundamental miscarriage of justice requires “a colorable showing” that the  
19 petitioner “is actually innocent of the crime or is ineligible for the death  
20 penalty.” *Id.* This generally requires the petitioner to present new evidence of  
21 his innocence. *House v. Bell*, 547 U.S. 518, 536–37, 126 S.Ct. 2064, 165 L.Ed.2d 1  
22 (2006); *Schlup v. Delo*, 513 U.S. 298, 316, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).  
23  
24  
25  
26  
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1 Again, for mere argument that there exists a procedural bar, a habeas petitioner  
2 may overcome these bars and secure review of the merits of defaulted claims by  
3 showing that the failure to consider the petition on its merits would amount to a  
4 fundamental miscarriage of justice. Schlup v. Delo, 513 U.S. 298, 314–15, 115  
5 S.Ct. 851, 130 L.Ed.2d 808 (1995); Mitchell v. State, 122 Nev. 1269, 1274, 149  
6 P.3d 33, 36 (2006); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537  
7 (2001). This standard is met when the “petitioner makes a colorable showing he  
8 is actually innocent of the crime.” *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. This  
9 means that “the petitioner must show that it is more likely than not that no  
10 reasonable juror would have convicted him in the light of the new  
11 evidence.” *Schlup*, 513 U.S. at 327, 115 S.Ct. 851. “[A] petition supported by a  
12 convincing *Schlup* gateway showing ‘raises[s] sufficient doubt about [the  
13 petitioner’s] guilt to undermine confidence in the result of the trial without the  
14 assurance that that was untainted by constitutional error’; hence, ‘a review of the  
15 merits of the constitutional claims’ is justified.” *House v. Bell*, 547 U.S. 518, 537,  
16 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (quoting *Schlup*, 513 U.S. at 317, 115 S.Ct.  
17 851). *Berry v. State*, 363 P.3d 1148, 1154 (Nev. 2015). It is highly unlikely that  
18 Ms. Burns, (not simply more likely than not) that no reasonable juror would have  
19 convicted her.  
20  
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1 There was substantial activity at scene two days after the robbery. Dr.  
2 Bennett's report and testimony demonstrates that if he had died on September 25,  
3 2002, there would have been slippage in the skin and a stench. The chain lock  
4 was from the inside, indicating that people were present on September 27, 2002.  
5 The area was a mess. Prints belonging to other persons were present.  
6  
7

8 As to her letter to the detective, she would have easily explained the  
9 circumstances she was in when she wrote the letter: she was 15 years old, totally  
10 manipulated by Kaczmarek her "master," and did whatever he told her to do. The  
11 letters were the only contact with the world at the tender age of 15 years old.  
12  
13

14 Her treatment after she voiced that she didn't want to testify against her  
15 "master" constitutes an extreme violation of her right to be free from cruel and  
16 unusual punishment. Her statement is both suppressible and unreliable in  
17 egregious violation of her federal and state constitutional rights. Confidence in the  
18 reliability of this statement is severely undermined. This was a fifteen year old girl  
19 who had been in 36 different homes, kidnapped by a felon who totally controlled  
20 her thoughts. Just the fact that she would write this letter taking the blame  
21 exponentially amplifies the fact that she was a victim of sex/child trafficking and  
22 should not be considered culpable, and this is assuming that the trier of fact found  
23 that the homicide was on September 25, 2002, rather than on September 27 2002.  
24  
25 The confluence of facts lead to the inescapable conclusion that a fundamental  
26  
27  
28

1 miscarriage of justice has occurred. Habeas Corpus relief is warranted, let this  
2 woman finally have her day in Court.  
3  
4  
5

6 2. PETITIONER IS INNOCENT; NEWLY DISCOVERED EVIDENCE TO  
7 WIT: ADVANCES IN FORENSIC SCIENCE REGARDING VICTIMS OF  
8 SEX/CHILD TRAFFICKING EXCUSES THE TIME BAR; BECAUSE OF  
9 FORENSIC EVOLUTION OF VICTIMS OF SEX TRAFFICKING THIS  
10 EVIDENCE WOULD HAVE CAUSED A DIFFERENT RESULT.

11 \_ The Court stated at BURNS 305: Well, I mean, but the issue that goes to  
12 her actual innocence is the sex trafficking and the influence that she's  
13 claiming was exerted over her by Mr. Kaczmarek. Mr. Kohn testified at  
14 BURNS 306 that in 2013, working with the legislature, he testified that  
15 finally in 2013, sex trafficking was recognized as a serious felony. He said that  
16 he would have represented her differently, even without her permission. Burns  
17 309. This is particularly important because he had never seen the letters, *and*  
18 *also testified without objection that nothing goes out from a defendant without*  
19 *first being reviewed by detention officers*, Burns P 309. The letters may be  
20 considered newly discovered evidence, known to the State at the time. This 15-  
21 year-old girl cannot be expected to give these letters to her attorney.  
22  
23

24 Additionally, Brionna Alex testified at BURNS 405 that it is very  
25 common for a victim to follow the commands of their trafficker. Ms. Alex  
26 has a master's degree in science psychology from UNLV, and had worked  
27 at Cupcake Girls since 2019. BURNS 391. The advancements in the  
28 forensic science enabled Brionna to explain in depth the behavior of sex

1 trafficking victims, especially young girls. Again Mr. Kohn testified that  
2 had this knowledge been prevelant in 2002 that he would have defended her  
3 differently, even without her consent. No evidence has been lost, this case  
4 can be tried on actual testimony and trial testimony, even from  
5 Kaczmarek's trial. She is deserving of relief.  
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7  
8 3. THERE EXISTS A FEDERAL AND STATE BRADY VIOLATION  
9 BECAUSE THE STATE WITHHELD THE MANY LETTERS WRITTEN  
10 TO PETITIONER, FIFTEEN YEARS OLD, WHICH SHOW THE  
11 EXTREME UNDUE INFLUENCE AND CONTROL THAT STEVEN  
12 KACZMAREK WIELDED OVER PEITITIONER, WHICH WOULD  
13 HAVE SUBSTANTIALLY DISCREDITED HER STATEMENT  
14 WRITTEN TO THE DETECTIVE.

15 Any evidence a prosecutor has in his or her possession which would  
16 tend to exculpate an accused must be revealed to a defendant. Brady v.  
17 Maryland. 373 U.S. 87 (1963). This includes evidence which can impeach a  
18 prosecution witness, United States v. Bagley 473 U.S. 667 (1985). Further,  
19 any evidence in the possession of any law enforcement actor is deemed in the  
20 possession of the prosecutor. Kyle v. Whitley 514 U.S. 419 (1995). This  
21 would comprise of the field notes, or other documentation of the interviews  
22 with these witnesses who were taken to the police and/or were interviewed at  
23 the scene.  
24

25  
26 In *Brady*, the Supreme Court held "that the suppression by the  
27 prosecution of evidence favorable to an accused upon request violates due  
28

1 process where the evidence is material either to guilt or to punishment,  
2 irrespective of the good faith or bad faith of the prosecution.” 373 U.S., at 87,  
3  
4 83 S.Ct. 1194. The Supreme Court has since held that the duty to disclose such  
5 evidence is applicable even though there has been no request by the accused,  
6  
7 United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342  
8 (1976), and that the duty encompasses impeachment evidence as well as  
9 exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct.  
10 3375, 87 L.Ed.2d 481 (1985). Moreover, the rule encompasses evidence  
11 “known only to police investigators and not to the prosecutor.” *Id.*, at 438, 115  
12 S.Ct. 1555. In order to comply with Brady, therefore, “the individual prosecutor  
13 has a duty to learn of any favorable evidence known to the others acting on the  
14 government's behalf in this case, including the police.” Kyles, 514 U.S., at 437,  
15 115 S.Ct. 1555.

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19 The State was on constructive, if not actual notice, of Kaczmarek’s letters.  
20  
21 Mr. Kohn testified without objection that nothing gets to an inmate without being  
22 reviewed. These letters, given to her while in solitary confinement bear directly on  
23 the admissibility and credibility of the bizarre letter she wrote to the detective.  
24  
25 Who does this? No one, only a manipulated 15-year-old whose will have been  
26 overborne by a felon 17 years her senior.  
27  
28

1       4. HER PREVIOUS COUNSELS RENDERED INEFFECTIVE ASSISTANCE  
2       OF COUNSEL AS GUARANTEED BY THE NEVADA AND FEDERAL  
3       CONSTITUTION.

4       A. ORIGINAL HABEAS CORPUS COUNSEL FAILED TO  
5       ADEQUATELY INVESTIGATE HER CASE UNDER STATE AND  
6       FEDERAL AUTHORITY

7       There were two phone calls and a visit from an investigator. This is woefully  
8       insufficient and woefully inadequate. As the Supreme Court has stated, there is a  
9       “belief, long held by this society, that defendants who commit criminal acts that  
10      are attributable to a disadvantaged background or to emotional and mental  
11      problems, may be less culpable than defendants who have no such excuse.” Boyde  
12      v. California, 494 U.S. 370, 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)  
13      Summerlin v. Schriro, 427 F.3d 623, 630 (9th Cir. 2005). To that end,  
14      the investigation should include inquiries into social background and evidence of  
15      family abuse. Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir.2005). We have long  
16      “recognized an attorney's duty to investigate and present mitigating evidence of  
17      mental impairment.” Bean, 163 F.3d at 1080 (citing Evans v. Lewis, 855 F.2d 631,  
18      636-37 (9th Cir.1988)). This includes examination of mental health records.  
19      Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir.1989). Defense counsel  
20      should also examine the defendant's physical health history, particularly for  
21      evidence of potential organic brain damage and other disorders. Stankewitz v.  
22      Woodford, 365 F.3d 706, 723 (9th Cir.2004).

1 Although there is a strong presumption that counsel's conduct falls within the  
2 wide range of reasonable professional assistance, and judicial scrutiny of counsel's  
3 performance must be highly deferential, ... counsel must, at a minimum, conduct a  
4 reasonable investigation enabling him to make informed decisions about how best  
5 to represent his client.” Sanders v. Ratelle, 21 F.3d at 1456 (internal citation and  
6 quotations omitted). “[C]ounsel has a duty to make reasonable investigations or to  
7 make a reasonable decision that makes particular investigations unnecessary.”

8 Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. The Ninth Circuit has found  
9 counsel to be ineffective where an attorney neither conducted a reasonable  
10 investigation nor demonstrated a strategic reason for failing to do so. Hendricks v.  
11 Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995)

12 The scant amount of time her post-conviction counsel spent with her should  
13 constitute irrefutable proof of a constitutionally inadequate investigation.  
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21 B. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBTAIN  
22 A PSYCHOLOGICAL EXAM, BY ALLOWING A CONTACT VISIT  
23 BETWEEN KACZMAREK AND PETITIONER., WHICH CAUSED  
24 PETITIONER TO BE EXPONENTIALLY UNDULY INFLUENCED  
25 BY KACZMAREK, BY FAILING TO ATTEMPT TO SUPPRESS HER  
26 STATEMENT, AND BY FAILING TO MOVE TO DISMISS THE  
27 CHARGES BASED ON THE STATE’S FAILURE TO HONOR ITS  
28 PROMISE TO THE STATE OF OHIO THAT SHE WOULD BE FREE  
FROM PROSECUTION.

Mr. Kohn knew that she was being controlled by Kaczmarek. She was



1 fifteen years old. He knew about her runaway status. There is simply no reason  
2 why he failed to obtain a psychological interview as to her mental capacity. It  
3 should be obvious that given her age, horrible circumstances of her life at the  
4 tender age of fifteen, that her mental state as relates to culpability needed to be  
5 investigated. The same authority enunciated in section “A” of this ground applies  
6 with equal if not greater force. This is at the trial level.  
7

8  
9 Counsel was ineffective for failing to enforce the agreement made between  
10 Nevada and Ohio wherein Appellant would be free from criminal process.  
11 Although this was not a plea bargain, it was a contract, a promise made after much  
12 concern by the State of Ohio. By analogy, the Supreme Court has recognized that  
13 the government's breach of the parties' plea agreement is “undoubtedly a violation  
14 of the defendant's rights.” U.S. v. Whitney, 673 F.3d 965, 970 (9th Cir. 2012). As  
15 further stated in Whitney at 970: “To prevail on plain error review, Whitney must  
16 additionally show that the government's conduct affected both his substantial rights  
17 and the integrity, fairness or public reputation of the judicial proceedings.  
18  
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20  
21 *Cannel*, 517 F.3d at 1176.” To conclude that a defendant's substantial rights were  
22 affected, “there must be a reasonable probability that the error affected the  
23 outcome. *Id.*, at 972. She should never have been put on trial, that was the quid pro  
24 quo between the State of Nevada and the Ohio Court. She was not even allowed to  
25 challenge extradition. There is no reason, consistent with the duties owed to a  
26  
27  
28

1 client, not to raise this broken promise. As further held in Whitney, at 974: “The  
2 final consideration under plain error review is whether the error affected the  
3 fairness and integrity of the judiciary.” The broken promise by the State does just  
4 that, it especially affects the integrity of the judiciary. As held in Santobello v.  
5 New York, 404 U.S. 257, 263 (1971) the staff of the prosecution is a unit and each  
6 member must be presumed to know the commitments made by any other member.  
7 If responsibility could be evaded that way, the prosecution would have designed  
8 another deceptive ‘contrivance,’ The mutual promises were made for the  
9 Appellant, who clearly has standing to assert this fundamental error. Petitioner  
10 posits: If the United States seeks foreign extradition for a capital offense when the  
11 holding country does not have the death penalty, and the United States agrees not  
12 to seek the death penalty, could it simply breach its promise and proceed with the  
13 death penalty? The same promises between two governments, the State of Nevada  
14 and the State of Ohio, acting on behalf of Petitioner, must likewise be honored.

15 Further, Mr. Kohn was ineffective for failure to move to suppress her statement.  
16 Appellant was not immediately returned to Ohio. Any continued detention after  
17 she told her attorney that she did not wish to testify must be deemed unlawful. It  
18 was during this illegal detention that the jail flooded her with letters from  
19 Kaczmarek. She is alone, in solitary, and her detention is unlawful. She was 15, in  
20 solitary, and Kaczmarek, her master, is inducing her to “save them both.” The

1 causal chain between the unlawful detention and her letter was unbroken. In order  
2 for the causal chain, between the illegal arrest and the statements made subsequent  
3 thereto, to be broken. *Wong Sun* requires not merely that the statement meet the  
4 Fifth Amendment standard of voluntariness but that it be ‘sufficiently an act of free  
5 will to purge the primary taint.’ Wong Sun v. US, 371 U.S. at 486, 83 S.Ct. at 416.  
6 Brown v. Illinois, 422 U.S. 590, 602 (1975). To state a claim of ineffective  
7 assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner  
8 must demonstrate that counsel's performance was deficient in that it fell below an  
9 objective standard of reasonableness, and prejudice such that counsel's errors were  
10 so severe that they rendered the jury's verdict unreliable. Greene v. Warden, Ely  
11 State Prison, 238 P.3d 815 (Nev. 2008). In this case, it was not objectionably  
12 reasonable to fail to address the illegality of her statement.  
13

14 Similarly, there is no valid reason not to move to dismiss the charges due to the  
15 state’s failure to abide by its promise made to and detrimentally relied upon by the  
16 State of Ohio, which was acting on Appellant’s behalf.  
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24 5. THE STATE COMMITTED EGREGIOUS PROSECUTION  
25 MISCONDUCT BY BREACHING ITS CONTRACT WITH OHIO  
26 REGARDING RETURNING THE PETITIONER AND BY INSTITUTING  
27 THESE CHARGES, RESULTING IN AN ILLEGALLY OBTAINED  
28 STATEMENT AS WELL AS THE WRONGFUL INSTITUTION OF  
CHARGES.

Appellant, after the told the State, through counsel, that she did not want to

1 testify, prolonged her detention, in solitary detention no less, failed to turn over  
2 the coercive letters sent to her while in this coercive setting, in violation of her  
3 Brady rights and her Eighth and Fourteenth Amendment rights. She is in CCDC, 15  
4 years old when she succumbed to Kaczmarek. Claims by pretrial detainees are  
5 analyzed under the Fourteenth Amendment Due Process Clause, rather than under  
6 the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861,  
7 60 L.Ed.2d 447 (1979). Because pretrial detainees' rights under the Fourteenth  
8 Amendment are comparable to prisoners' rights under the Eighth Amendment,  
9 however, courts apply the same standards. *See* Redman v. County of San  
10 Diego, 942 F.2d 1435, 1441 (9th Cir.1991). Frost v. Agnos, 152 F.3d 1124, 1128  
11 (9th Cir. 1998)

12 She was not a threat to anyone, she was simply being punished for  
13 punishment's sake, unlawfully held. The confluence of the State's conduct  
14 constitutes prosecution misconduct, and this misconduct directly resulted in her  
15 wrongful conviction.

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22 6. THE COURT ABUSED ITS DISCRETION BY NOT ALLOWING  
23 LIMITED DISCOVERY TO SIMPLY RE-RUN THE UNIDENTIFIABLE  
24 PRINTS AT THE SCENE, ATER THE ROBBERY, THE SCENE WAS  
25 WIPEYET THERE ARE FINGERPRINTS ON OVER 20 ITEMS, THE  
26 FACT THAT THAT WAS NO MATCH IN 2002, IT IS REASONABLY  
27 POSSIBLE/PROBABLE THAT IF RAN THROUGH ANB UPDATED  
28 DATABASE THAT THERE WOULD BE A MATCH

1 There is tangible evidence that established that other persons were in Mr.  
2 Villareal's residence after the robbery. After the robbery, the prints were wiped  
3 clean. Appellant's prints were not found at the scene (nor were Kaczmarek's) and  
4 unknown prints were also found on September 27, 2002. Additionally, after the  
5 September 25, 2002 incident, the premises were wiped clean. On September 27,  
6 2002, the premises were disheveled, and prints, which did not match the Petitioner,  
7 were found. It is highly possible that these prints may now be able to be matched.  
8 discovery is available to habeas petitioners at the discretion of the district court  
9 judge for good cause shown, regardless of whether there is to be an evidentiary  
10 hearing. Rules Governing § 2254 Cases Rule 6(a); Calderon v. United States  
11 Dist. Court for N. Dist. of Cal., 98 F.3d 1102, 1104 (9th Cir.1996). Jones v. Wood,  
12 114 F.3d 1002, 1009 (9th Cir. 1997). In the state context, After the writ has been  
13 granted and a date set for the hearing, a party may invoke any method of discovery  
14 available under the Nevada Rules of Civil Procedure if, and to the extent that, the  
15 judge or justice for good cause shown grants leave to do so. Nev. Rev. Stat. Ann. §  
16 34.780. In a civil context dealing with NRCP 55(c) 'good cause shown' in Rule  
17 55(c) is broad in scope, and includes the 'mistake, inadvertence, surprise or  
18 excusable neglect' referred to in Rule 60(b)(1). Intermountain Lumber & Builders  
19 Supply, Inc. v. Glens Falls Ins. Co., 424 P.2d 884, 886 (Nev. 1967).  
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1 Dr. Bennett provided his findings, and also testified. To no surprise, the State  
2 also called an expert to oppose his findings. The theories are disputed, but at the  
3  
4 time Appellant asked for limited discovery, Dr. Bennett's report, coupled with the  
5 physical evidence found on September 27, 2020, there clearly existed good cause  
6  
7 for the re-running of the prints. On this ground alone, the district court abused its  
8 discretion, and reversal is warranted.

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11 **CONCLUSION**  
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13  
14 WHEREFORE, the appellant prays for the following:

- 15 1. That her conviction be set aside and the case remanded to the district court  
16 for trial, and,  
17  
18 2. Alternatively, that this court remand this matter to the district court for the  
19 purposes of limited discovery, and  
20  
21 3. For any further relief that this court believes is fair and just.

22 Dated this 23<sup>rd</sup> day of May, 2022

23  
24 /s/ Tony L. Abbatangelo, Esq.,  
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## **CERTIFICATE OF COMPLIANCE**

1.I hereby 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:

2. This brief complies with NRAP 32 (a) (5) in that this brief has been prepared in a proportionally spaced typeface using Microsoft Word is in 14 Point Font, Times New Roman.

3.I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), is proportionately spaced, has a typeface of 14 points, and contains 9782 words.

4. Finally, 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the

1 5. Nevada Rules of Appellate Procedure.

2 Dated this 23<sup>rd</sup> day of May, 2022.

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13 **CERTIFICATE OF SERVICE**

14 I certify that on May 23, 2022, a copy of the Appellant's Opening Brief and  
15  
16 Appendixes was served on all parties of record.

17 /s/ Tony L. Abbatangelo, Esq.  
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