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 REPLY BRIEF

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3. THE COMBINATION OF COUNSEL'S DEFICIENCIES CONSTITUTES A MISCARRIAGE OF JUSTICE

4. THE BRADY VIOLATION CANNOT BE GLOSSED OVER SIMPLY BECAUSE THE 15-YEAR-OLD APPELLAN DID NOT TELL HER COUNSEL
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FACTS IN SUPPORT OF REPLY BRIEF

At the inception, the State incorrectly claims in its Answering Brief, P 5, that Appellant testified that "Once in Las Vegas, they lacked money and engaged in "trick-troll" robberies. III AA 65-67. THIS IS INACCURATE. Appellant testified to the following AAA III p 65:

And isn't it true that one of the ways that you guys would try to get money from people was, and we'll just use the term, you know, trick rolling people. Would that be fair?

A Prostitution, yes.
Q Okay. But not -- but not just prostitution. Potentially, bringing a John into the room and then maybe stealing from him, correct?

A That had not happened before.

Q Okay. So it's -- it's your testimony today that you had not ever engaged in anything like that?

A. Correct. (*See also* VOL IV 376)

The state's inaccurate mischaracterization of her testimony unfairly paints her in a sinister light.

The State talks about the statement that Appellant allegedly gave to Teresa Daka. Not only did Appellant deny the statement, but also demonstrated how it could not have happened. She explained, and it was not rebutted, at VOL III pp 039-40, that it was during a shift change, people are on lockdown, especially juveniles, and "So it doesn't make any sense that she would leave shift change to come over and talk to me about a random reason."

Notwithstanding, her alleged "Daka statement" this does not show that she was not a brainwashed victim of sex trafficking by KACZMAREK. Commons sense: What 15-year-old sex-trafficking victim just simply writes a detective and confesses to a murder? Only one who was totally manipulated. When the Court stated that Appellant failed to show that

letters sent by Kaczmarek told her to save them was belied by the record, Vol II P 717, it erred. Kaczmarek, with all the motive to save his hide, was writing her letters and finally convinced her to write the detective AOB 5, LL 5-14. She was unable to produce the letters (of which the State clearly had knowledge), she testified that she was able to retrieve "some of the letters when she was transferred back from Ohio to CCDC. AOB 5, LL 15-16. Appellant testified clearly and unequivocally that she was in solitary confinement from December 5-December 18, and that he was her only communication with the outside world. The letters said that she had the power to save them both, like signing a confession saves her, Vol III P 041. This is totally irrational. The court erred when it stated that her statement was belied by the record. She cannot produce what was lost by the jail during the transfer; further is it extremely naïve to believe that the authorities were not in the know about the constant manipulative correspondence. Vol III P 43. Her counsel pointed out the fact of her illegal detention as early as December 10, 2002, AOB 5, yet filed nothing. Her solitary confinement continued, all the while receiving Kaczmarek's letters, to and through December 18, 2002, when Kaczmarek's scheme succeeded. Only after Appellant sent the statement was received did she coincidentally get out of solitary confinement and get sent back.

The issue of the illegal detention was recognized and raised, so why not develop? Totally deficient representation; the State breached their promise to **two** different jurisdictions: Ohio as well as Nevada, when it failed to immediately return her. Was the State retaliating against her for refusing to voluntarily testify, even though she could be compelled to testify in any event? The state also promised she would be free from criminal process. This is egregious misconduct, and Phil Kohn, Esq. said nothing about it.

Truth is, had she testified at his preliminary hearing, she would have laid out this compelling case of being sex trafficked, and she would never have been charged. As was pointed out, she went from being a victim to a defendant. VOL III 25. This is precisely the point; it was known that she was a victim of sex trafficking; Kaczmarek controlled her. As a victim of sex trafficking, she lacked the capacity to act on her own free will,
The manipulated statement she wrote and mailed demonstrates how much she was under the undue influence of Kaczmarek. Further, this was the direct product of her illegal detention when the state violated its contract with Ohio and the Nevada Courts to immediately return her.

Exculpatory issues permeated her defense; counsel's failure to develop the federal and state unconstitutionality of her detention and resultant statement, the failure to have her psychologically examined in order to

flesh out her mental capacity and ability to assist in a meaningful way with her defense served to heap more constitutional violations into this case.

The Failure to develop the detention issues and failure to have her evaluated is not *sound strategy*, keeping the obvious client control issues from the Court clearly falls below the *Strickland* standard.

On remand, this issue, in fairness, needs to be thoroughly addressed AND DEVELOPED. Counsel stopped advocating for her, and submitted to her immature brainwashed position. She punctuated her state of being thoroughly brainwashed and manipulated, stating at Vol III p 42, she was "in love and had the power to save him."

There is no strategic reason for her counsel to simply pass the torch to the discretion of this 15 year old, who was patently not acting in HER best interests. It logically flows that neither was counsel. He abandoned his duty, not moving to suppress the statement, and not having the client submit to a psychological exam, not informing the Court. Here is a 15-year old who was clearly not acting in her best interest, and her counsel in essence threw in the towel and let her run her case.

Notwithstanding, Phil Kohn, Esq. did not even attempt to suppress the statement she gave, a statement that Kaczmarek told her to write. He could have filed to suppress 'without her permission." He testified that if sex trafficking had been recognized in 2002, "he would have been able to

defend her differently…" "Without her permission" ….VOL IV 309. The facts didn't change, the forensic science simply caught up with the facts of this case. She would not have been prosecuted now, and but for her desire not to testify against the parole violator Kaczmarek, she would not have been prosecuted. The advancement of forensic DNA is no different that the advancement of what sex trafficking really involves. Counsel testified that only in 2013 did sex trafficking be recognized as a "serious felony in the state of Nevada'" VOL IV P306-307. The Court even recognized that "***the issue that goes to her actual innocence is the sex trafficking and the influence she's claiming was exerted over her by Steven Kaczmarek.***"[1] VOL IV P 305. Mr. Kohn, Esq., understood prostitution, but … can't say that sex trafficking was something we really discussed back in 2002-defense or prosecution." VOL IV P 307.

Appellant's psychologically coerced statement to the Detective totally misrepresents her culpability on a lot of levels. She assumes the role of instigator; this is what Kaczmarek told her to copy from HIS letter(s). If anything is belied by the record it is Kaczmarek's record. HE PIMPED

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[1] 1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his (her) welfare. Restatement (Second) of Contracts § 177 (1981)

HER OUT! VOL III P 25. HE WAS ON PAROLE IN ILLINOIS AND OHIO! VOL III P 19. He controlled this 15-year-old! Her counsel's testimony punctuates the undue influence.at VOL IV P 301:

> "And you said she didn't trust you; was there anybody you know that she did trust?
> A Yeah, Kaczmarek.
> Q And what do you mean by that she trusted Kaczmarek? Can you elaborate on why you believe that?
> A Well, I don't know if it was trust or love or what emotion -- I'm not sure I'm qualified to even opine who she trusted or she loved, but clearly she was much more concerned about the wellbeing of Mr. Kaczmarek than she was about her own wellbeing." *See also* VOL III P041-42.

An evidentiary hearing should be conducted; both sides can retain psychological experts who can interview her, look at the entirety of the case, and then provide expert testimony on the issue of undue influence, which the trial court recognized as possible actual innocence.

Her counsel complains to the court about the state's breach, did nothing, and she languished in solitary and be further manipulated by Kaczmarek's letters until she finally submitted to him. She testified at follows, at VOL IV PP 340-41:

> "Yes. I was housed at CCDC for 13 days.
> During that time, my social worker in Ohio and the judge in Ohio had been contacting the DA's office out here telling them, "We had an agreement." She was sending -- my social worker in Ohio was sending copies of the agreement, faxing them over, telling them, "We had an agreement." And, "She was free from prosecution. She wasn't

> supposed to be arrested. She was supposed to be returned to us." And after 13 days, they finally gave in and released me back to Ohio…
>
> I was in solitary confinement. I wasn't allowed to talk to any of the other inmates because they were adults, and I was a juvenile. I came out one hour every two or three days to shower by myself. I couldn't use the phone. And the only I had any contact with outside of officers was Kaczmarek."

The Court states that Appellant "participated" and therefore cannot be considered innocent. Vol II, 717. This is fundamentally inconsistent with her early statements regarding undue influence, which was established. Appellant testified that she never went against him. AOB 10, LL 18-20. She stated that it was "just horrible." VOL III P 031. This was not something in which she wanted to be voluntarily involved. Kaczmarek was abusive. VOL III P 74. He slapped her to get her to perform acts of prostitution. VOL IV PP359-60. She did not use force against Mr. Villareal. VOL III P109. The prosecutor even conceded that she was a "teenager," VOL III P163. As to the statement, she copied Steve's letter. VOL III P127. She acknowledged that at 16 she did not know what was in her best interests. VOL III P164. She also said that she wanted to go to trial. VOL III P165. Kaczmarek totally controlled her mind. He even convinced her to take the plea offer, making her counsel nothing more than a mere spectator.

The USSG creates a rebuttable presumption of undue influence:

> "If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels….
>
> "In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor."
>
> U.S.S.G. 2G1.3

Based on the record before this Court, without even further development, Appellant was unquestionably under Kaczmarek's undue influence. The State's argument that about sex trafficking not being a defense to murder was addressed recently by the Wisconsin Supreme Court. In State v. Kizer, 976 N.W.2d 356 (Wis. 2022), decided July 6, 2022, Defendant, who allegedly was a trafficking victim, was charged with first-degree intentional homicide and other offenses. The Circuit Court, Kenosha County, entered a ruling that effectively prevented defendant from introducing evidence that the alleged offenses were committed as a direct result of the trafficking, which was an affirmative defense under state statute. Defendant received leave to file an interlocutory appeal. The Court of Appeals, 398 Wis.2d 697, 963 N.W.2d 136, reversed and remanded. State petitioned for review. The Supreme Court held that:1) an offense is "committed as a direct result" of a violation of the human trafficking statutes, as required for the corresponding statute-based affirmative defense for a trafficking victim who commits such an

offense, if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation, and 2) the statute providing that affirmative defense creates a complete defense to a charge of first-degree intentional homicide. Statutes are not arbitrarily enacted; the fact that there is such an affirmative defense in some states demonstrates a more accurate picture and understanding of sex trafficking involving minors. The Wisconsin Supreme recognized the significance of merely raising sex trafficking as a defense, placing it on equal footing with self-defense, holding, at 360, if she puts forth "some evidence" to support its application. the burden will be on the State to prove beyond a reasonable doubt that the defense does not apply. See Moes v. State, 91 Wis. 2d 756, 765-66, 284 N.W.2d 66 (1979). In reversing the Court stated at 362:

> Based on the above dictionary definitions of "direct" and "result," the ordinary usage of the phrase "direct result," and the language of § 939.46(1m), we conclude that an offense is "committed as a direct result of the violation" of the human-trafficking statutes if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation. Additionally, we emphasize that the offense need not be a foreseeable result of the trafficking violation and need not proceed "relatively immediately" from the trafficking violation. Kizer, 398 Wis. 2d 697, ¶15, 963 N.W.2d 136. In this respect, we disagree with the court of appeals' decision, which interpreted § 939.46(1m) to apply when an offense "arises relatively immediately from" and is a "logical and reasonably foreseeable

consequence" of the trafficking violation. State v. Kizer, 976 N.W.2d 356, 362 (Wis.2022)

The conviction as it relates to her was, and remains, a total travesty of justice; the multiple failures and deficiencies by her counsel resulted in a fundamental miscarriage of justice. The reasoning of the statute should apply here and be persuasive to this Court.

Fingerprints found at the scene after the area was wiped. There were unknown prints found. For all we know, there could be a match now, and given that there was activity in premises days after they left, not the least of which was water running and the door being chain locked from the inside, VOL I PP 044-051, 055, 062-069. The Court should treat this possible new evidence like DNA evidence. There are other suspects! What is the harm? This kind of evidence is in the exclusive possession and control of the State, the defense cannot simply run the prints

The State claims that there was no Brady violation as to the letters, since she had them in her possession. This is a 15-year-old girl, who would have no idea if these letters were material to her defense, especially given her age. Conversely, it was undisputed that agents of the state read all inmate mail, and further it is highly unusual for inmates to receive letters from fellow inmates. The letters that Kaczmarek sent during her solitary confinement from Dec 5, 2002-December 13, 2002, were an obvious

attempt to psychologically coerce her to writing a statement taking the lead blame. Agents of the state were clearly aware of what he was doing, how he was psychologically coercing her to write a statement to the detective. Who does this? Only a manipulated 15-year-old unduly influenced by a person who was looking after HIS, not HER, best interests. The notion that the state is absolved from Brady violations is the functional equivalent of her representing herself in proper person while being in the bowels of being trafficked. Might as well give her a bar number.

ARGUMENT

1. THERE EXISTS A FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER STATE AND FEDERAL GROUNDS TO EXCUSE THE TIME BAR-PETITIONER MADE A VIABLE CLAIM OF ACTUAL INNOCENCE AND AN ACTUAL CLAIM OF INCOMPETENCY

It is said that mental incompetency exists where a person is incapable of understanding and action with discretion in the ordinary affairs of life. Fish v. Deaver, 71 Okl. 177, 176 P. 251, 253; Vol. 27 Words and phrases, Perm.Ed.,page 52. Whereas, undue influence means an influence that restrains, controls, directs and diverts or coerces and overcomes and confuses the mind of the victim. Patton v. Shelton, 328 Mo. 631, 40 S.W.2d 706, loc. cit. 712. Soden v. First Nat. Bank of Kansas City, 74 F. Supp. 498, 499 (W.D. Mo. 1947). Under New York law, undue influence exists where a relationship of control exists between the contracting

parties, and the stronger party influences the weaker party in a way that destroys the weaker party's free will and substitutes for it the will of the stronger party. Kazaras v. Manufacturers Trust Co., 164 N.Y.S.2d 211, 220 (N.Y.App.Div.1957), aff'd, 4 N.Y.2d 930, 175 N.Y.S.2d 172, 151 N.E.2d 356 (N.Y.1958); In re Will of Walther, 188 N.Y.S.2d 168, 172 (N.Y.1959); see also Restatement (Second) of Contracts § 177 ("Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare."). N. Am. Rayon Corp. v. C.I.R., 12 F.3d 583, 589–90 (6th Cir. 1993). The facts in the instant case square with these CIVIL cases, and the reasoning applies with greater force in this criminal case, which carries more federal and state due process rights.

The Court was clear: undue influence can provide a basis for actual innocence. VOL IV P 305. Both counsel and Appellant stated that Kaczmarek was the only person she would listen to. It is of some significance that her statement put her at the scene, and described the facts, but the uplaying of her involvement is the product of the undue influence which occurred. Here is a 15-year old in solitary confinement for weeks, and the state is allowing Kaczmarek to exert his felon-Machiavellian talents on her, to save his own soul. Kaczmarek's conduct fits

squarely with all the parameters of undue influence, and psychologically coercing her to even write this statement is part and parcel of the undue influence that wove its way like a golden thread from the "relocating" to Las Vegas to her statement, all the way to the eventual convincing her to plead. There was no psychological evaluation, no attempt to evaluate her competency, no attempt to develop undue influence, no attempt to suppress the s statement. With or without the statement, she was a victim of sex trafficking, and was at all times unduly influenced by Kaczmarek. He was abusive, she had no one to turn to at the tender age of 15.

2. APPELLANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO HAVE HER COMPETENCY EXAMINED, NOT EVEN OBTAINING A PSYCHOLOGICAL EVALUATION, AND FAILING TO FAILED TO RAISE HER OBVIOUS COMPETENCY ISSUES TO THE COURT.

Appellant was clearly. not competent: at a minimum, there is existed a substantial issue as to her competency. To be competent to stand trial, a defendant must demonstrate an ability '*to consult with his (her in this case) lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.*' " Douglas v. Woodford, 316 F.3d 1079, 1094 (9th Cir.2003) (quoting *Godinez,* 509 U.S. at 396, 113 S.Ct. 2680 (internal quotations and citation omitted)). When "the evidence raises a '*bona fide* doubt' " about the defendant's competence to stand trial, a trial judge must *sua sponte* conduct an evidentiary hearing. *Pate,* 383 U.S. at 385, 86 S.Ct. 836; *see*

also Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir.2001) (same). This case is a classic example of letting a legally incompetent person run her case, the result is why we are here today.

Due process requires a state court to hold a hearing where substantial evidence before the court "indicate[s] the need for further inquiry" into the defendant's competency. Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Because there are no "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed[,] the question [of competency] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." Id.; *see also* Williams v. Woodford, 384 F.3d 567, 604 (9th Cir.2004) ("Although no particular facts signal a defendant's incompetence, suggestive evidence includes the defendant's demeanor before the trial judge, irrational behavior of the defendant, and available medical evaluations of the defendant's competence to stand trial.").McMurtrey v. Ryan, 539 F.3d 1112, 1118–19 (9th Cir. 2008).[2] The attorney must speak up, however.

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[2] In *McMurtrey* the federal district court also found that McMurtrey's trial counsel rendered ineffective assistance because his failure to renew a request for a competency hearing regarding McMurtrey's competency at the time of trial was objectively unreasonable. McMurtrey v. Ryan, 539 F.3d 1112, 1114–15 (9th Cir. 2008).

Appellant was anything but rational. She would only listen to Kaczmarek. She was not able to assist her attorney; he was not able to effectively assist her. Counsel stated at VOL IV PP 300-301 that it was very difficult to -- ***and maybe it never really did*** --***develop much of a trust between counsel – she only trusted Kaczmarek.*** This is without the fact of the letters Kaczmarek was senidng Kaczmarek was always in control: ***Don't sign shit until we talk face to-face."*** Letter dated February 28. VOL IV P 324. ***Tell your lawyer that you won't take no deals until the four of us have a meeting. Baby, remember what I said. You've got to be strong about it."*** VOL IV P 325, March 3, 2022 letter .Here is an Appellant had been in 36 foster homes; she was easy prey for Kaczmarek.

FRCP 52 (b) states that plain errors affecting substantial rights may be noticed although they were not brought to the attention of the court. United States v. Carmichael, 216 F.3d 224, 228 (2D Cir. 2000). If a defendant is incompetent**,** due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in (her) defense and understand the proceedings against him. *See* Dusky v. US, 362 US 402 (1960)

The conviction of an accused person while he is legally incompetent violates due process, Bishop v. United States, 350 U.S. 961 (1956). Pate v. Robinson, 383 U.S. 375 , 378 (1966) The Due Process Clause affords an

incompetent defendant the right not to be tried, Drope v. Missiouri 420 US, at 172-173. , 420; Pate v. Robinson, supra, 383 U.S. at 386.

It was patently obvious that the Appellant was not competent, based upon her inability of counsel to advise her in any meaningful way. Counsel's failure to have her competency evaluated fell below any objective standard of care. It resulted in the conviction of a youth who was not legally competent.

It is analogous to a client being under the influence of drugs. Whether trial counsel were constitutionally ineffective [for failing to pursue a competency hearing] may depend on their interactions with [petitioner]. The more obvious his incompetence at the time, the more likely that they were deficient for failing to recognize it."); Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir.2003) ("**Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired**." U.S. v. Howard, 381 F.3d 873, 881 (9th Cir. 2004) THIS NEVER HAPPENED. Here Appellant was under the undue influence of Kaczmarek, this is patently obvious from the record itself. Counsel was admittedly aware of Kaczmarek's control of Appellant, and failed to bring this to the attention of the Court.

The Court wanted to know if Appellant told counsel whether or not she had been trafficked, at VOL IV, PP 251-52:

> "But if she told Mr. Kohn that she had been kidnapped and she felt like she had been trafficked, that's absolutely relevant to these proceedings."

In her conduct and in the pleadings, in so many words, he knew. Kaczmarek's original charges conclusively established that she was kidnapped and sexually assaulted! Knowing what Kaczmarek did to her, and knowing that she would not rationally cooperate in her defense raises the necessary red flags of legal incompetency. Counsel stated at the evidentiary hearing that "They had sex and that ties into the original reason for her to come to Nevada as a witness, not as a defendant. The reason she was brought out here was she was a victim in Kaczmarek's other case." VOL IV P 252. Both trial counsel and appellant agreed that there was no client control. The Court recognized that this could constitutionally impact the proceedings, stating at VOL IV P 254:

> "If he wants to come in here and say the day she entered that plea, she was standing in the courtroom, like she was crying, I didn't have any client control, things of that nature. He can absolutely testify to those things. He has direct knowledge of those things, and he was her lawyer at the time. But getting into all of this occurred because Kaczmarek was If he wants to come in here and say the day she entered that plea, she was standing in the courtroom, like she was crying, ***I didn't have any client control, things of that nature. He can absolutely testify to those things. He has direct knowledge of those things, and he was her lawyer at the time***. But getting into all of this occurred because Kaczmarek was influencing her. ***Unless she told him that, he is not qualified to give an opinion on any of those things***

This is what both Mr. Kohn, Esq. and Appellant stated at the hearing, at VOL IV P 298: "***She was alleged to have been the victim of kidnap and statutory sexual seduction."***

Plain error occurred, as Appellant was not competent at the time of her representation. Relief for plain error is available if there has been (1) error; (2) that was plain; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." United States v. Cannel, 517 F.3d 1172, 1176 (9th Cir.2008). As a practical matter, a district court's failure to conduct a competency hearing on its own motion will always be subject to plain error review. This is because a defense counsel who is attuned to his client's mental condition and recognizes that the defendant's competency is in question would not leave it up to the district court to order a competency hearing. sua sponte, rather, he would move for such a hearing himself. U.S. v. Dreyer, 705 F.3d 951, 960 (9th Cir. 2013). Had the Court been aware of counsel's inability to reason with her, when placed in the context of her being a victim of sexual assault of a minor and kidnapping, it would have sua sponte ordered an evaluation or be reversed due to plain error.

3. THE COMBINATION OF COUNSEL'S DEFICIENCIES CONSTITUTES A MISCARRIAGE OF JUSTICE.

If where a petition is procedurally barred and the petitioner cannot demonstrate good cause, the district court may nevertheless reach the merits of any constitutional claims if the petitioner demonstrates that failure to consider those constitutional claims would result in a fundamental miscarriage of justice. Pellegrini, v. State, 117 Nev.860, 887, 34 P.3d 519, 537 (2001). A fundamental

miscarriage of justice requires "a colorable showing" that the petitioner "is actually innocent of the crime or is ineligible for the death penalty." *Id*.

What is the strategy of not suppressing the Appellant's statement? None, there is no reason that counsel, knowing about her illegal confinement, did not move to suppress her statement. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). This case satisfies both prongs. It is most perplexing that counsel did not move to dismiss the charges based on the state's breach of its promise that she would be free from criminal process for all matters that arose before the Subpoena was issued. VOL V P 020.

Appellant weighed less than 90 pounds. With or without Kaczmarek's directive to Appellant at the scene, Mr. Villareal was going to be murdered by Kaczmarek. She was fearful of Kaczmarek, he had been abusive, on top of everything else. As to the wiping the prints, this does not retroactively bootstrap intent at the time of the act.[3] She is actually innocent because she was acting under undue influence

Appellant has made a colorable showing that she is actually innocent of the crime." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. With the forensic advancements and constitutionally adequate representation she has demonstrated that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup,* 513 U.S. at 327, 115 S.Ct. 851. "[A] petition supported by a convincing *Schlup* gateway showing 'raises[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that was untainted by constitutional error'; hence, 'a review of the merits of the constitutional claims' is justified." *House v. Bell*, 547 U.S. 518, 537, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (quoting *Schlup*, 513 U.S. at 317, 115 S.Ct. 851).[2] *Berry v. State*, 363 P.3d 1148, 1154 (Nev. 2015). It is highly unlikely that Ms. Burns, (not simply more likely than not) that no reasonable juror

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[3] As an issue of first impression, felony-murder doctrine requires that the actor must intend to commit the predicate enumerated felony before or at the time the killing occurred, Nay v. State, 167 P.3d 430 (Nev. 2007)

would have convicted her. The letters, known to the state, constitutionally established the undue influence that existed in this case. This is in addition to the fact of her being legally incompetent at the time of the proceedings. At a minimum, a remand is required in order to develop the issues of her competence and her counsel's competence. At the end of the day, there is no way she would be convicted, everyone involved in this case, including this Honorable Court, knows it. The state has not suggested that there is evidence that is not available. "Laches," argued by the state, needs to be established, by facts, not mere rhetoric. This is for a later time. She deserves a new trial.

4. THE BRADY VIOLATIONS CANNOT BE GLOSSED OVER SIMPLY BECAUSE THE 15 YEAR OLD APPELLANT DID NOT TELL HER COUNSEL ABOUT WHAT SHE VIEWED WERE CONFIDENTIAL LOVE LETTERS

Appellant was not defending herself, and should not be held to that standard. Why have an attorney then? Kaczmarek assumed this role. HE WAS NOT PRO SE AND CANNOT BE HELD TO SOME STANDARD OF WHAT A COMPETENT ATTORNEY WOULD RECOGNIZE AS EXCULPATORY. On the other hand, the state was aware of the letters, and the undue effect they would have on the Appellant. These letters are unprecedented on many levels.

The exculpatory value of these letters is evident. They demonstrated the absolute control Kaczmarek had over her. In *Brady*, the Supreme Court held that the

"suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 S.Ct. 1194.

Supreme Court cases following Brady clearly established that the defendant must prove three elements in order to show a Brady violation. First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Second, the evidence must have been suppressed by the State, either willfully or inadvertently. See United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Third, prejudice must result from the failure to disclose the evidence. See *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375. Benn v. Lambert, 283 F.3d 1040, 1052–53 (9th Cir. 2002).

These letters satisfy all three prongs. Further, the state does not have to wilfully suppress the letters. Had any counsel seen these letters, he would have promptly raised this issue, and the results would have been different. These letters show unquestionably the undue influence of Kaczmarek. This culminated in the unprecedented in person meeting between the two parties, all directed by Kaczmarek.

5. THE STATE VIOLATED ITS PROMISE TO IMMEDIATELY RETURN THE APPELLANT AND BREACHED ITS PROMISE THAT SHE WOULD NOT BE PROSECUTED.

The State's promise to Ohio is that she would be free from process. "A "prosecution" of an individual simply referred to "the manner of [his] formal accusation." 4 W. Blackstone, Commentaries on the Laws of England 298 (1769) (Blackstone); see also N. Webster, An American Dictionary of the English Language (1st ed. 1828) (defining "prosecution" as "the process of exhibiting formal charges against an offender before a legal tribunal"[4] The Order stated that she would "be free from arrest and service, civil and criminal process to and from the Court where such prosecution is pending. VOL 5 P 013. The order further stated that she be returned back to Ohio "as soon as the first reasonable flight arrangements can be made. VOL V P 014. The State's affidavit, its promise to Ohio, was clear: she "will have protection from arrest or service of process, civil or criminal, ***for matters which arose before her entrance into said state pursuant to said Subpoena***. VOL IV P 020. The state's wilful breach of their promise to to return her promply directly and proximately led to her remaining in solitary confinement for two weeks while Kaczmarek is psychologically coercing her to write the statement. No way this can be considered an act of her own free will free

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[4] U.S. v. Haymond, 139 S. Ct. 2369, 2376 (2019)

from psychological coercion. The state created this situation and was the proximate result of the statement.

The state breached its promise made that she would be free from criminal process for matters which arose before her entrance into said state pursuant to said subpoena. The State must be judicially estopped from being permitted to prosecute her. Judicial estoppel is a principle designed to "guard the judiciary's integrity," and "a court may invoke the doctrine at its own discretion." Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 287, 163 P.3d 462, 469 (2007). It is a doctrine that applies "when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." Id. at 288, 163 P.3d at 469 (internal quotation marks omitted). "Whether judicial estoppel applies is a question of law that (is) reviewed de novo." Deja Vu Showgirls v. State, Dep't of Taxation, 334 P.3d 387, 391 (2014).

Judicial estoppel is a principle designed to "guard the judiciary's integrity. integrity,"and "a court may invoke the doctrine at its own discretion." Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 287, 163 P.3d 462, 469 (2007). It is a doctrine that applies "when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." Id. at 288, 163 P.3d at 469 (internal quotation marks omitted). "Whether judicial estoppel applies is a

question of law that we review de novo." Deja Vu Showgirls v. State, Dep't of Taxation, 334 P.3d 387, 391 (2014).

"[O]ne of [judicial estoppel's] purposes is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter." Vaile v. Eighth Judicial Dist. Court, 118 Nev. 262, 273, 44 P.3d 506, 514 (2002). "[A] party who has stated an oath in a prior proceeding, as in a pleading, that a given fact is true may not be allowed to deny the same fact in a subsequent action." Id. (internal quotation marks omitted).

When considering a claim of judicial estoppel, Nevada's courts look for the following five elements:
(1) the same party has taken two positions; (2)
the positions were taken in judicial or quasi-judicial administrative proceedings;
(3) the party was successful in asserting the first position (i.e.,
the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.[5]

The State promised Ohio that if she could be released from Ohio to come to the Clark County court system, that she would be free from criminal process.

Appellant summed up the position of Ohio at VOL IV P 374:

> "They had scheduled for a prelim, but like I said, my social worker in Ohio and the judge in Ohio were like freaking out about it and contacting the DA's office out here and telling them, "We had an agreement. She was free from prosecution. You have to return her to us." And so they -- they ended up releasing me back."

The State sent her back, only to bring her back to the Clark County Courts. This is not the position the State took when it proceeded to persuade Ohio to release her to Clark County. Notwithstanding the wilful failure to immediately return her, the decision to prosecute her is irreconcilably different than the prosecutor's earlier position that she was free from criminal process for anything that happened prior to the Subpoena. This Court, in equity, should invoke judicial estoppel. If the State cannot be trusted to be honest, there is no due process.

6. THE FINGERPRINTS SHOULD BE RE-RUN

Upon remand, the fingerprints should be re-run. It is important to her defense to know whose prints may now be identified. There was clear activity in the room days after the alleged homicide. This is established by the maintenance man's testimony, as well as the door being chain locked from the inside and then being unlocked. There were other suspects. VOL I PP 044-051, 055, 062-069. These other suspects may not be in the system. The Court erred by not granting this simple request.

CONCLUSION

[5] Matter of Frei Irrevocable Tr. Dated October 29, 1996, 390 P.3d 646, 651–52 (Nev. 2017)

WHEREFORE, the appellant prays for the following:

1. That this Court reverse the District Court,
2. That this Court remand the case for full and fair development of the competency issues of Appellant and the ineffective assistance claims.
3. That this Court remand the case to develop the state and federal constitutional claims in order to establish a fundamental miscarriage of justice, since no reasonable jury would convict the Appellant if she is afforded her federal and state due process rights.
4. That this Court order fingerprint testing of the prints in the possession of the State.
5. That her conviction be set aside and the case remanded to the district court for trial, and
6. For any further relief that this court believes is fair and just.

Dated this 5th day of August, 2022

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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 Reply 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 6988 words.

4. Finally, I hereby certify that I have read this Reply 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

5. Nevada Rules of Appellate Procedure.

Dated this 5th day of August, 2022.

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CERTIFICATE OF SERVICE

A copy of this Reply brief was sent to all parties this 5th day of August, 2022.

/s/ Tony L. Abbatangelo, Esq.,
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