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

THE STATE OF NEVADA, ,

PLAINTIFF,

vs.

BRENDAN DUNCKLEY,

DEFENDANT.

_____/

Sup. Ct. Case No. 83867
Case No. CR07-1728
Dept. 4

RECORD ON APPEAL

VOLUME 5 OF 14

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59957

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Brendan Dunckley's post-conviction motion to withdraw his guilty plea. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Dunckley argues that he did not knowingly and intelligently plead guilty because he erroneously believed that probation was a possible sentence when it was not as a matter of law under NRS 201.230(2) as it existed at the time of his offense. See 1997 Nev. Stat., ch. 641, § 19, at 3190.[1] Dunckley is mistaken. Having reviewed the statute, we conclude that probation was available as a possible sentence at the time of his offense through NRS 176A.110(3)(j). See 1997 Nev. Stat., ch. 524, § 7, at 2504-05. Moreover, at all times throughout these proceedings the district court, the State, Dunckley, and even this court, believed and operated as if

[1]The amended information contained allegations that Dunckley committed lewdness with a child under the age of fourteen years, a violation of NRS 201.230, on or between August 14, 1998, and August 13, 2000.

probation was a possibility under the statute and Dunckley would have received probation had the district court found that it was appropriate. Because Dunckley's belief that probation was a possible sentence was not erroneous, we conclude that the district court did not abuse its discretion in denying his motion. Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001) ("When reviewing a district court's denial of a motion to withdraw a guilty plea, this court presumes that the district court properly assessed the plea's validity, and we will not reverse the lower court's determination absent abuse of discretion."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.

DATE: February 11, 2013
Supreme Court Clerk, State of Nevada

By: Deputy

FILED
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Joey Orduna Hastings
Clerk of the Court
Transaction # 3533263

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59957
District Court Case No. CR071728

CR07-1728
DF

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

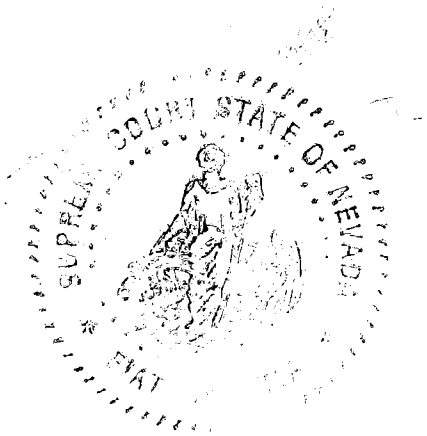
"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 11th day of February, 2013.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 11, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk



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Joey Orduna Hastings
Clerk of the Court
Transaction # 3533263

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59957
District Court Case No. CR071728

CR07-1728
D4

REMITTITUR

TO: Joey Orduna Hastings, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 11, 2013

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Connie J. Steinheimer, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on FEB 14 2013

District Court Clerk

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR07-1728
Judge:	CONNIE STEINHEIMER
Official File Stamp:	02-14-2013:14:35:28
Clerk Accepted:	02-14-2013:14:36:08
Court:	Second Judicial District Court - State of Nevada
Case Title:	STATE VS. BRENDAN DUNCKLEY (D4)
Document(s) Submitted:	Supreme Court Order Affirming
	Supreme Ct Clk's Cert &Judg
	Supreme Court Remittitur
Filed By:	Deputy Clerk ASmith
	You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE &PROBATION

ROBERT STORY, ESQ. for BRENDAN DUNCKLEY

GARY HATLESTAD, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

BRENDAN DUNCKLEY

STATE OF NEVADA

BRENDAN DUNCKLEY #1023236
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419
PETITIONER IN PRO SE

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

BRENDAN DUNCKLEY,

PETITIONER,

VS.

STATE OF NEVADA,
ROBERT LEGRAND,

RESPONDENT.

CASE NO: CR07P1728 / CR07-1728

DEPT. NO: 4

PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST STATE CLAIMS

PURSUANT TO UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA'S ORDER (ECF. NO. 35) IN CASE NO: 3:13-CV-00393-RCJ-VPC, DUNCKLEY V. LEGRAND, THIS IS A **PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST** ALL HIS GROUNDS FOR RELIEF IN STATE COURT.

AS THE STANDARDS UNDER **RHINE V. WEBER**, 544 U.S. 269, 278 (2005) HAVE BEEN MET {GOOD CAUSE FOR HIS FAILURE TO EXHAUST, HIS UNEXHAUSTED CLAIMS ARE POTENTIALLY MERITORIOUS, AND THERE IS NO INDICATION THAT THE PETITIONER ENGAGED IN INTENTIONALLY DILATORY LITIGATION TACTICS) (EMPHASIS ADDED)

ALL THESE CLAIMS AND ENTIRE PETITION IS BASED UPON ALL THE PLEADINGS, PAPERS AND FILING OF THIS ENTIRE RECORD OF CR07-1728 AND THE FOLLOWING ORDER ATTACHED GRANTING THE PETITIONER JUDICIAL PERMISION TO FILE.

TABLE OF CASE CITATIONS:

TABLE OF CASE CITATIONS: CON'T

STATEMENT ON JURISDICTION:

ON JULY 21, 2009, PETITIONER DUNCKLEY FILED A PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) (AA 94-170). ON JUNE 3, 2011, THE SECOND JUDICIAL DISTRICT COURT (STEINHEIMER, J.) CONDUCTED AN EVIDENTARY HEARING. (AA 226 - 346.) ON DECEMBER 29, 2011, THE DISTRICT COURT ENTERED ITS ORDER DENYING PETITIONER'S WRIT OF HABEAS CORPUS, AND FINDINGS OF FACTS, CONCLUSION OF LAW AND JUDGMENT. (AA. 357-367) ON DECEMBER 30, 2011, PETITIONER DUNCKLEY, BY WAY OF HIS APPELLATE COUNSEL (POST-CONVICTION, APPOINTMENT) ROBERT STORY, FILED HIS NOTICE OF APPEAL. (AA 348-368).

ON JUNE 25, 2012, THE APPELANT OPENING BRIEF WAS FILED IN THE NEVADA SUPREME COURT UNDER CASE NUMBER: 59958. THE STATE FILED ITS ANSWERING BRIEF ON AUGUST 24, 2012. FINALLY ON OCTOBER 24, 2012 THE REPLY BRIEF WAS FILED. ON JANUARY 16, 2013 THE NEVADA SUPREME COURT ISSUED AN ORDER OF AFFIRMANCE. IN CASE NUMBER 59958, AND FILED ITS REMITTITUR TO THE SECOND JUDICIAL DISTRICT COURT ON FEBRUARY 14, 2013. (EX"1")

AS ALL ISSUES RAISED IN THIS INSTANT WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254 HAVE BEEN PRESENTED TO ALL AVAILABLE STATE COURTS, AND DENIED, STATE REMIDY IS EXHAUSTED AND THUS THIS COURT HAS JURISDICTION OF THIS MATTER.

STATEMENT OF THE CASE:

ON JULY 12, 2007, THE STATE FILED IN THE SECOND JUDICIAL DISTRICT COURT AN INFORMATION AGAINST PETITIONER DUNCKLEY. CHARGING HIM WITH, COUNT 1, SEXUAL ASSAULT ON A CHILD, COUNT 2, LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS (NRS 201.230) COUNT 3, STATATORY SEXUAL SEDUCTION, AND COUNT 4, SEXUAL ASSAULT. (AA 1-4) PETITIONER WAS BEING REPRESENTED BY A RENO JUSTICE COURT APPOINTED DEFENSE ATTORNEY, DAVID C. O'MARA ("O'MARA") FROM THE JACK ALAIN CONFLICT GROUP. AT ARRAIGNMENT/ PLEA, TRIAL/GUILTY PLEA, SENTENCING AND FINALLY FOR THE DIRECT APPEAL.

ON FEBRUARY 28, 2008, THE STATE FILED AGAINST MR. DUNCKLEY IN THE DISTRICT COURT AN AMENDED INFORMATION CHARGING WITH, COUNT 1, LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, AND COUNT 2, ATTEMPTED SEXUAL ASSAULT. (AA-5-8).

ON MARCH 6, 2008 PETITIONER- DUNCKLEY PLEADED GUILTY TO BOTH COUNTS IN THE AMENDED INFORMATION IN CASE NUMBER: CR07-1723, PURSUANT TO A GUILTY PLEA MEMORANDUM, (AA 16-31) DISTRICT COURT JUDGE CONNIE J. STEINHEIMER ACCEPTED MR. DUNCKLEY'S GUILTY PLEAS AND SET SENTENCING FOR AUGUST 5, 2008. (AA 33-89)

ON AUGUST 5, 2008, PETITIONER WAS SENTENCED, AND ON AUGUST 11, 2008, THE DISTRICT JUDGE ENTERED JUDGMENT AGAINST PETITIONER AS FOLLOWS: COUNT 1: LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS, NRS 201.230 - IMPRISONMENT IN THE NEVADA DEPARTMENT OF PRISONS FOR A MAXIMUM TERM OF **LIFE** WITH THE MINIMUM PAROLE ELIGIBILITY OF 10 YEARS (EXPECTED PAROLE ELIGIBILTY OF AUGUST 1, 2018) COUNT 2, ATTEMPTED SEXUAL ASSAULT, NRS 193.330 AND NRS 200.366 - IMPRISONMENT IN THE NEVADA DEPARTMENT OF PRISONS FOR A MAXIMUM TERM OF ONE HUNDRED TWENTY MONTHS (120) WITH THE MINIMUM PAROLE ELIGIBILITY OF 24 MONTHS AND FOR COUNT 2 TO BE SERVED CONCURRENTLY WITH SENTENCE IMPOSED IN COUNT 1. (AA 32-33)

MR. O'MARA FILED A TIMELY DIRECT APPEAL OF THE JUDGMENT (AA 90-93) AFTER FILING THE WRONG APPEAL ("FAST-TRACK") THE CORRECT APPEAL WAS FILED ON NOVEMBER 19, 2008, ON MAY 8, 2009, THE NEVADA SUPREME COURT ENTERED AN ORDER OF AFFIRMANCE OF THE JUDGMENT, AND FILED ITS REMITTITUR ON JUNE 9, 2009.

STATEMENTS OF FACT:

BY APRIL 16, 2007, THE STATE HAD CHARGED DUNCKLEY WITH FOUR SEX CRIMES THAT CARRIED LIFE SENTENCES AND THREE OF WHICH WERE TO HAVE OCCURRED SEVEN TO NINE YEARS EARLIER. (AA 1-4) AT THE TIME OF HIS APPOINTMENT ON MAY 7, 2007, MR. O'MARA HAD ONLY HANDLED "THREE TO FOUR SEX CRIMES" (AA 293) MR. O'MARA WAS PAID A "FLAT FEE" OF $500 BY THE JACK ALAIN GROUP FOR THE LEGAL WORK HE WAS APPOINTED TO DO FOR MR. DUNCKLEY.

(AA 293 & 320) ACCORDING TO MR O'MARA HE WAS TO BE PAID $500, WHETHER HE WORKED ONE HOUR OR 1,000 HOURS ON PETITIONER'S CASE (AA 319-320) MR. O'MARA HAD THE AUTHORITY TO HIRE AN INVESTIGATOR, BUT EVEN WITH HIS CLIENT FACING MULTIPLE LIFE SENTENCES, MR. O'MARA NEGLECTED TO DO SO. IN FACT HIS REASON WAS "HE WOULD INVESTIGATE THE CASE HIMSELF." (AA320) WHICH HE DID NOT DO, IN ADDITION, MR. O'MARA BY HIS OWN ADMISSION FAILED TO INTERVIEW ANYONE IN THIS CASE. (AA 320) (BANKS V. REYNOLDS, 54 F. 3d 1508 (10TH CIR. 1995).)

ON THEIR FIRST MEETING, MR. DUNCKLEY INFORMED MR. O'MARA THAT HE HAD NOT COMMITTED THE ALLEGED CRIMES. (AA 253) IN ADDITION MR. DUNCKLEY PROVIDED MR. O'MARA WITH DOCUMENTATION OF THE FACT THAT PETITIONER WAS NOT EVEN IN THE STATE OF NEVADA AT THE TIME MOST OF THE CRIMES ALLEGEDLY OCCURED (AA 252-254) MR. DUNCKLEY PROVIDED MR. O'MARA WITH DIVORCE DOCUMENTATION, SHOWING HIM TO BE IN CALIFORNIA, MR. DUNCKLEY PROVIDED MR. O'MARA WITH VEHICLE REGISTRATION DOCUMENTATION SHOWING THAT HE DID NOT EVEN OWN THE "SCENE OF THE CRIME" (AA 316) THAT ONE OF THE CRIMES WAS ALLEGED TO HAVE OCCURED IN UNTIL AFTER THE ALLEGED CRIMINAL WINDOW OF OFFENSE. MR. DUNCKLEY PROVIDED MR O'MARA TAX DOCUMENTATION, SHOWING HE LIVED IN ANOTHER STATE DURING THE ENTIRE TIME FRAME OF THE ALLEGED COUNT 1. (AA 255-56) FINALLY PETITIONER DUNCKLEY PROVIDED O'MARA WITH SCHOOL TRANSCRIPTS SHOWING DUNCKLEY WAS LIVING IN HYDE PARK, NEW YORK UNTIL FEBRUARY 23, 1999. (AA 101) IF AS THE STATE ALLEGES THE VICTIM WAS "12" (DOB 8/14/86) (AA. 10; 45; 46; 49; 50; 68; 69; 70.) THESE DOCUMENTS ALL SHOW IT WAS IMPOSSIBLE FOR THE PETITIONER TO HAVE COMMITTED THE CRIME FOR COUNT 1. MR. DUNCKLEY HAD ASKED O'MARA TO CONDUCT AND VERIFY HIS ALIBI EVIDENCE. (AA 253) HE FAILED TO DO SO, AND FAILED TO INTRODUCE IT TO THE COURTS, DIRECTLY OR IN A MOTION TO DISMISS. (AA 314-315) HE CONTINUED TO 'IGNORE' THIS EVIDENCE BY NOT INTRODUCING IT IN THE DIRECT APPEAL. (AA 90-93) (EX "3-7")

SUMMARY OF ARGUMENT:

THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL, BY HIS COUNSEL'S INEFFECTIVE ASSISTANCE AS HE 1) FAILED TO PRESENT THE ALIBI EVIDENCE TO THE COURT AT ANY STAGE A) PRIOR TO GUILTY PLEA BEING DRAFTED, B) AT ENTERANCE OF PLEA, AT "CANVASS," C) AT SENTENCING, OR D) DIRECT APPEAL. THERE IS NO RECORD OF MR. O'MARA EVER STATING (PRIOR TO THE EVIDENTARY HEARING) "MY CLIENT WAS NOT HERE FOR COUNT 1, HERE IS THE PROOF." (AA 315) WHEN HE WAS REQUIRED TO BRING TO THE COURTS ATTENTION, AS HIS CLIENT'S ADVOCATE, HE VIOLATED THE PETITIONER'S RIGHT TO COUNSEL BY NOT PUTTING THE STATE'S CASE TO ANY ADVESARIAL TESTING. HIS ACTIONS AND LACK OF ANY ACTUAL ACTION TRIGGERED HIS CONFLICT OF INTEREST. 2) COUNSEL O'MARA FAILED TO OBJECT TO THE JOINING OF TWO CHARGES ON THE SAME INFORMATION OVER SEVEN YEARS APART, CAUSING UNDO PREJUDICE AGAINST HIS CLIENT. 3) COUNSEL O'MARA AND HIS ADVESARY ADA VILORIA'S PARTNERSHIP TO COMMIT FRAUD ON THE COURT.

FOR THE DISTRICT COURT TO RENDER ITS DECISION THAT COUNSEL WAS NOT INEFFECTIVE AND THAT NO PREJUDICE OCCURED, AND AFFIRMED BY THE NEVADA SUPREME COURT IN LIGHT OF ALL THE EVIDENCE IS "CONTRARY TO... CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES" OR IN THE LEAST, "INVOLVED AN UNREASONABLE APPLICATION... OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES." (Williams v. Taylor, 529 US 362, 120 S.CT. 1495 (2000) & Perez v. Rosario, 449 F.3d 951 (9th CIR. 2006) (US CONST. AM. SIXTH & FOURTEENTH)

COUNSEL PREJUDICED HIS CLIENT BY ALLOWING COUNT 1 & COUNT 2, CURRENTLY UNDER ATTACK, TO BE PRESENTED UNDER THE SAME INFORMATION, SAME CASE NUMBER AND ULTIMATLY UNDER THE SAME GUILTY PLEA. (AA 5-8)(AA 16-31) COMPETENT COUNSEL TRULY ACTING AS AN ADVOCATE WOULD HAVE FILED A MOTION TO BIFURCATE THE CHARGES, AS THEY, A) ARE NINE YEARS APART, AND B) NOT CONNECTED BY THE SAME TRANSACTION, NOR THE SAME 'COMMON PLAN OR SCHEME'. (NRS. 173.115) (US. CONST. AM. FIFTH, SIXTH & FOURTEENTH.)

PETITIONER FURTHER ARGUES THAT HE WAS DENIED AND DEPRIVED OF HIS DUE PROCE:

RIGHTS, EQUAL PROTECTION RIGHTS, AND RIGHT TO A FAIR PROCEEDING. BY THE ACTIONS AND CONDUCT OF THE COURT OFFICERS (INCL. PROSECUTING ATTORNIES AND COUNSEL O'MARA) BY: A) HAVING INSUFFICIENT EVIDENCE TO CONVICT PETITIONER; B) HAVING DOCUMENTS THAT SHOWED DEFENDANT WAS NOT IN NEVADA, DURING THE ENTIRE TIME FRAME FOR COUNT 1; C) ARGUED FOR THE MAXIMUM CONVICTION OF A CITIZEN THE ADA'S KNEW WAS INNOCENT (OR SERIOUS REASONABLE DOUBT OF GUILT EXISTED.) AND THUS INSURED SAID CITIZEN RECEIVED THE CURRENT 10-LIFE. (AA 44-51); D) VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY NOT BRINGING TO THE COURT'S ATTENTION THAT THE PREVIOUSLY, THOUGHT TO BE EXISTING PROBABLE CAUSE, IN FACT DOES NOT EXIST; E) UNETHICALLY, FRAUDULENTLY, AND UNCONSTITUTIONALLY ALLOWED THE PETITIONER AND THE COURT TO BELIEVE THAT ALL THE ELEMENTS OF THE CRIMES CHARGED IN THE GUILTY PLEA MEMORANDUM EXIST, WHEN IN FACT, COUNT 1, HAS NO EXISTING ELEMENTS THAT A CRIME EVEN OCCURED, OR EVIDENCE OF ONE. (U.S. CONST. AM. FIFTH, SIXTH & FOURTEENTH.)

FINALLY PETITIONER ARGUES THAT AMPLE UNDISPUTED ALIBI DOCUMENTS HAVE BEEN KNOWN BY BOTH THE STATE AND BY MR. O'MARA THAT CASTS SERIOUS DOUBT THAT IF A JUROR WAS PRESENTED THIS EVIDENCE HE/SHE WOULD BE ABLE TO FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT. AS THE CLAIM OF ACTUAL INNOCENCE IS SUPPORTED BY: A) UNDISPUTED DOCUMENTS; B) SAID DOCUMENTS WERE IN THE POSSESION OF ADA VILORIA. (AA 315) NON-DISCLOSURE OF THIS ALIBI (ACTUAL INNOCENCE) EVIDENCE WAS A CLEAR, INTENTIONAL VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS, HIS EQUAL PROTECTION UNDER THE LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND IN PART, SINCE ADA VILORIA KNEW IT WAS MORE LIKELY THAN NOT PETITIONER WAS ACTUALLY INNOCENT OF COUNT 1, HER SUCCESSFUL ARGUING FOR A LIFE SENTENCE OF AN ACTUALLY INNOCENT MAN IS A VIOLATION OF CRUEL AND UNUSUAL PUNISHMENT. SUCH CONDUCT IN LIGHT OF THE EVIDENCE CAN NEVER BE VIEWED AS HARMLESS. (U.S. CONST. AM. FIFTH, SIXTH, EIGHTH & FOURTEENTH.)

ALL OF THE FOLLOWING CLAIMS HAVE BEEN SUBMITTED TO THE NEVADA STATE

COURTS, AND DENIED, STATE REMIDY HAS BEEN EXHAUSTED. THUS THIS PETITIONER FILES AND SUBMITS THIS ORIGINAL PETITION FOR A WRIT OF HABERS CORPUS, PURSUANT TO 28 U.S.C. § 2254, BY A PERSON IN STATE CUSTODY.

NO OTHER PETITIONS, APPLICATIONS, MOTIONS OR APPEALS ARE CURRENTLY PENDING IN THIS MATTER UNDER NEVADA CASE NUMBERS, CR07P1729, CR07-1728 OR 59958.

THIS PETITION WAS PLACED INTO THE HANDS OF NEVADA DEPARTMENT OF CORRECTIONS STAFF, THROUGH THE LEGAL MAIL SYSTEM IN THE LAW LIBRARY AT LOVELOCK CORRECTIONAL CENTER ("L.C.C.") 1200 PRISON ROAD, LOVELOCK, NEVADA, 89419, ON May 31st 2013.

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GROUNDS FOR RELIEF:

GROUND ONE:

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. STATEMENT OF EXHAUSTION:

THIS CLAIM WAS PRESENTED TO THE NEVADA SUPREME COURT IN PETITIONER'S APPEA of THE DENIAL OF HIS STATE POST-CONVICTION PROCEEDINGS. (EX 1) IT WAS REVIEWED BY BOTH THE SECOND JUDICIAL DISTRICT COURT AND THE NEVADA SUPREME COURT ON ITS MERITS.

B. STATEMENT IN SUPPORT OF CLAIM:

THE SIXTH AMENDMENT PROVIDES THAT "IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL." IN STRICKLAND V. WASHINGTON, 466 US 688, 685, (1984), THE SUPREME COURT HELD THAT IN ORDER FOR A DEFENDANT TO PREVAIL ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, HE OR SHE MUST 1) SHOW DEFICIENT PREFORMANCE BY COUNSEL, SUCH PREFORMANCE MUST FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS THAT ATTORNIES HOLD THEMSELVES TO, AND 2) PREJUDICE TO THE DEFENDANT. SINCE THIS INSTANT PETITION DEALS WITH A GUILTY PLEA THE STANDARD "PRONG" OF PREJUDICE IS SLIGHTLY DIFFERENT FROM STRICKLAND, IN THIS CASE HILL V. LOCKHART, 474 US 52, 106 S.CT. 366 (1985) IS THE STANDARD. "TO ESTABLISH THE ELEMENT OF PREJUDICE, PETITIONER MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, HE WOULD HAVE NOT PLEAD GUILTY AND WOULD HAVE INSISTED ON GOING TO TRIAL. (AA 260, 284-85).

AS STATED PRIOR, PETITIONER WAS REPRESENTED BY CONFLICT COUNSEL DAVID C. O'MARA THROUGH ALL STAGES OF HIS PROCEEDINGS, UP TO AND INCLUDING HIS DIRECT APPEAL. PETITIONER HAS A CONSTITUTIONAL RIGHT TO COMPETENT COUNSEL. COUNSEL'S LACK OF EFFECTIVE REPRESENTATION SUBSTANTIALLY AND INJURIOUSLY AFFECTED THE PROCESS TO SUCH AN EXTENT AS TO RENDER PETITIONER'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNCONSTITUTIONAL. NO STRATEGIC OR TACTICAL REASON EXISTED FOR COUNSEL'S FAILURE TO

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ADDRESS, INVESTIGATE OR STATE ON THE RELORD THESE SIGNIFICANT AND OBVIOUS ISSUES DURING PETITIONER'S PROCEEDINGS. TO STAND BY SILENT, TO DISREGARD HIS DUTY AS HIS CLIENT'S ADVOCATE IS A BLATENT VIOLATION OF THE RIGHT PETITIONER IS ENTITLED TO.

COUNSEL'S REPRESENTATION OF THE PETITIONER FELL BELOW EVEN THE BARE MINIMUM STANDARD OF REASONABLE REPRESENTATION BY COMPETENT COUNSEL ON THE BASIS OF THE FOLLOWING GROUNDS:

A) <u>TRIAL COUNSEL WAS REPRESENTING PETITIONER UNDER A CONFLICT OF INTEREST</u>

THROUGHOUT THE DISTRICT COURT AND NEVADA SUPREME COURTS DENIAL OF THE ORIGINAL WRIT OF HABEAS CORPUS A FEW ISSUES OF DENIAL WERE RAISED. ONE SUCH REASON WAS THE COURT BELIEVED THAT COUNSEL O'MARA HAD TESTIFIED CREDIBLY THAT HE ADVISED HIS CLIENT NOT TO ACCEPT THE GUILTY PLEA, BUT HAD INSISTED HE INTENDED ON GOING TO TRIAL SECOND IS THAT THE PETITIONER HAD TESTIFIED TO THE EXACT OPPOSITE, BUT THE COURT DEEMED O'MARA'S ENTIRE TESTIMONY TO BE MORE CREDIBLE, AND THE PETITIONER'S NOT CREDIBLE. (AA 363-365.) IN THE DECISION THE COURT STATED: "GIVEN THE TESTIMONY PRESENTED AT THE EVIDENTARY HEARING, THE COURT FINDS MR. O'MARA'S TESTIMONY TO BE CREDIBLE" (AA 363)

WHILE BEING QUESTIONED BY ADA HATLESTAD, DOCUMENTS WERE DISCUSSED THAT PLACED PETITIONER IN NEW YORK AND CALIFORNIA DURING THE ENTIRE "WINDOW OF OFFENSE." FOR COUNT 1. THIS IS THAT "CREDIBLE TESTIMONY,":

"Q: DID YOU CONDUCT ANY KIND OF INVESTIGATION TO AUTHENTICATE THE DOCUMENTS THAT MR. DUNCKLEY EVENTUALLY GAVE YOU?

"A: THE DOCUMENTS WERE PROVIDED TO THE DISTRICT ATTORNEY'S OFFICE ... AND THIS WAS ALSO -- THOSE DOCUMENTS WERE PROVIDED TO MS. VILORIA, WHICH I THINK NECESSITATED ANOTHER -- BECAUSE **MY DISCUSSION WITH HER WAS: LOOK, YOU HAVE NOTHING ON COUNT 1. MY CLIENT WASN'T HERE. HERE IS THE PROOF.**" (AA 314-15)(EMPHASIS ADDED)

EVEN IF AS COUNSEL HAD TESTIFIED "CREDIBLY" PETITIONER HAD INSISTED ON PLEADING GUILTY, "A TRUE ADVOCATE WOULD HAVE ATTEMPTED TO CONVINCE THE STATE TO ALLOW

[PETITIONER] TO WITHDRAW HIS PLEA BEFORE SENTENCING." OSBORN V. SHILLINGER, 861 F.2d 612 (10th CIR. 1988)(NRS. 176.165) BY COUNSEL'S 'CREDIBLE TESTIMONY' CITED ABOVE, MR. O'MARA HERE SHOWED A KEY EXAMPLE HOW HE FAILED TO ACT AS HIS CLIENT'S ADVOCATE. HE TESTIFIED THAT HE PUT THE STATE ON NOTICE THAT IT "HAD NOTHING ON COUNT 1. MY CLIENT WASN'T HERE." NECESSITATING IF NOT WARRENTING THE DISMISAL OF THE COUNT, IF NOT BY THE STATE, THEN CERTAINLY A COMPETENT ADVOCATE WOULD HAVE FILED THE PROPER MOTION.

COUNSEL NOT ONLY FAILED TO FILE A MOTION TO DISMISS ONCE HE SAW THAT THE STATE INTENDED ON VIOLATING HIS CLIENT'S CONSTITUTIONAL RIGHTS, BUT TOOK ABSOLUTELY NO ACTION. (SEE US V. BAGLEY, 473 US 667, 105 S.CT. 3375 (1985).) NOT ONLY DID COUNSEL TAKE NO ACTION, BUT FAILED TO BRING TO THE COURTS ATTENTION ON THE RECORD THAT A MISCARRIAGE OF JUSTICE WILL OCCUR IF THE COURT ACCEPTS A GUILTY PLEA THAT IS NOT SUPPORTED BY ANY EVIDENCE OF GUILT, BUT EVIDENCE SUPPORTING INNOCENCE. HE HAD A CONSTITUTIONAL DUTY AS HIS CLIENT'S ADVOCATE, "GUIDING HAND". A CONSTITUTIONAL DUTY TO BRING TO THE COURTS ATTENTION THE EXISTANCE OF ALIBI EVIDENCE. EXCEPT THE RECORD SHOWS NO SUCH ACTION WAS TAKEN HE STOOD SILENT ON THIS MATTER. TO STAND SILENT OR "STAND-BY" AND ALLOW HIS CLIENT TO ADMIT GUILT, HE SHIFTED HIS LOYALTY. THE ACTIONS OF COUNSEL ALLOWED A DUE PROCESS VIOLATION TO BLOSSOM INTO A MISCARRIAGE OF JUSTICE.

A DEFENSE ATTORNEY WHO ABANDONS HIS DUTY OF LOYALTY TO HIS CLIENT AND EFFECTIVELY JOINS THE STATE IN AN EFFORT TO OBTAIN A CONVICTION SUFFERS FROM AN OBVIOUS CONFLICT OF INTEREST. "THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS THUS THE RIGHT OF THE ACCUSED TO REQUIRE THE PROSECUTION'S CASE TO SURVIVE THE CRUCIBLE OF MEANIFUL ADVESARIAL TESTING... IF THE PROCESS LOSES ITS CHARICTER AS A CONFRONTATION BETWEEN ADVESARIES, THE CONSTITUTIONAL GUARANTEE IS VIOLATED" US V. CRONIC, 466 US 657, 104 S.CT. 2039 (1984).

IT CAN BE SAID THAT PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL ON CLEAR EVIDENCE (AND O'MARA'S 'CREDIBLE TESTIMONY') THAT THE PROCESS BY WHICH HE PLEAD

GUILTY AND WAS SENTENCED TO A LIFE SENTENCE WAS NOT ADVESARIAL, AND THEREFORE UNRELIABLE. COUNSEL DID NOT SIMPLY MAKE POOR STRATEGIC CHOICES. (ALCALA V. WOODFORD, 334 F.3d 862 (9th 2003).) HE ACTED WITH RECKLESS DISREGARD FOR HIS CLIENT'S BEST INTEREST. IN STRICKLAND, THE COURT HELD THAT A NEW TRIAL MUST BE GRANTED WHEN EVIDENCE IS NOT INTRODUCED BECAUSE OF THE INCOMPETENCE OF COUNSEL ONLY IF "THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULTS OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT." IN PARTICULAR, THE COURT EXPLAINED: "WHEN A DEFENDANT CHALLENGES A CONVICTION, THE QUESTION IS WHETHER THERE IS A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS OF COUNSEL, THE FACTFINDER WOULD HAVE HAD A REASONABLE DOUBT AS TO GUILT." (ID 466 US AT 695) (SEE ALSO: PEREZ V. ROSARIO, 449 F.3d 956 (9th CIR. 2006); CHERRIX V. BRAXTON, 258 F.3d 250 (4th CIR. 2001).) PETITIONER WAS PREJUDICED WHEN HIS ATTORNEY WHOLLY FAILED TO INVESTIGATE, VERIFY OR TO PRESENT TO THE COURT EVIDENCE THAT HE WAS NOT IN THE STATE FOR THE TIME FRAME OF COUNT 1. HABEAS RELIEF IS WARRENTED. (LUNA V. CAMBRA, 306 F.3d 954 (9th CIR. 2002); TUCKER V. RENICO, 317 F. SUPP. 2d 766 (2006).) FAILURE TO ARGUE ON THE RECORD THE EXISTANCE OF THE ALIBI EVIDENCE CONSTITUTES A CLEAR VIOLATION OF BOTH PRONGS OF THE CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. (SEE: GROOMS V. SOLEM, 923 F.2d 88 (8th CIR. 1991.))

SUCH LACK OF ANY ADVESARIAL TESTING, BLATENT CONFLICT OF INTEREST, DUE PROCESS VIOLATION, ESTABLISHES THAT THE PREJUDICE IS PRESUMED. COUNSEL'S CONDUCT WAS FAR BELOW EVEN THE LOWEST BAR ATTORNIES HOLD THEMSELVES TO, NO COMPETENT ATTORNEY WOULD EVER "IGNORE" EVIDENCE EXONERATING HIS CLIENT. THERE IS ABSOLUTELY NO COUNTER-ARGUMENT TO THE FACT THAT PETITIONER WAS DEPRIVED THE RIGHT TO COUNSEL AND DENIED A FAIR PROCEEDING. U.S. V. SWANSON, 943 F.2d 1070 (9th CIR. 1991); U.S. V. TUCKER, 716 F.2d 576 (9th CIR 1983). IN TOOMEY V. BUNELL, 898 F.2d 741 (9th CIR. 1990) "LACK OF ADVESARIAL TESTING GIVES RISE TO PER SE PRESUMPTION OF PREJUDICE." (EX. "3-7" - ALIBI DOCUMENTS. NOTE: THE ALTENATE NUMBERS COINSIDE WITH NUMBERING OF PAGES FILED IN JULY 21, 2009 WRIT.)

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B) COUNSEL PREJUDICED PETITIONER BY ALLOWING TWO CHARGES (NINE YEARS APART) TO REMAIN ON THE SAME INFORMATION, GUILTY PLEA MEMORANDUM, SENTENCE. (AA107)

NEVADA REVISED STATUTE (NRS 173.115) STATES: "TWO OR MORE OFFENSES MAY BE CHARGED IN THE SAME INDICTMENT OR INFORMATION IN A SEPERATE COUNT FOR EACH OFFENSE IF THE OFFENSES CHARGED, WHETHER FELONIES OR MISDEMEANORS OR BOTH ARE: 1) BASED ON THE SAME ACT OR TRANSACTION; OR 2) BASED ON TWO OR MORE ACTS OR TRANSACTIONS CONNECTED TOGETHER OR CONSTITUTING PARTS OF A COMMON SCHEME OR PLAN."

IN NESTER V. STATE, 75 NEV. 41, 334 P.2d 524, "TAKING TWO WOMAN DANCING AND LATER ATTEMPTING INTERCOURSE [45 DAYS APART] CANNOT BE CONSIDERED PART OF A COMMON PLAN JUST BECAUSE THE WOMAN WERE TAKEN INPART TO THE SAME BAR."

NRS 173.115 DOES NOT ALLOW AN INFORMATION TO BE FILED FOR CHARGES BEING 45 DAYS APART, AS THE SEPERATE INCIDENTS WERE NOT PART OF THE SAME TRANSACTION, NOR PART OF A COMMON SCHEME OR PLAN. YET PETITIONER WAS CHARGED ON A SINGLE INFORMATION (AA1-8) UNDER CR07-1728 FOR CRIMES BETWEEN AUGUST 14, 1998 AND MARCH 16, 2007, FOR COUNTS 1 & 2. RESPECTFULLY, IF 45 DAYS IS NOT ACCEPTABLE, HOW CAN 3,128 DAYS BE ACCEPTABLE

IT WAS A CONSTITUTIONAL VIOLATION OF EFFECTIVE ASSISTANCE SINCE A COMPETENT ADVOCATE WOULD HAVE KNOWN THE LAW AND WOULD HAVE FILED A MOTION TO SEVER. TRUE, A DEFENSE ATTORNEY'S CONDUCT MUST BE VIEWED AS IT WAS AT THE TIME OF THE ALLEGATION OF 'MISREPRESENTATION' NOT IN HINDSIGHT. AS IS ANOTHER GROUND (ISSUE) IN THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THIS ISSUE STRADDLES BOTH THE ACTIONS OF O'MARA AND THE PROSECUTORS. SO IT CAN BE SAID ALL OFFICERS OF THE COURT ASSISTED IN THIS INACCURATE ENACTMENT OF A CLEARLY ESTABLISHED LAW. FOR THE STATE TO FILE AN ORIGINAL SINGLE INFORMATION FOR TWO COUNTS SEPERATED BY NINE YEARS (3,128 DAYS) WITH NO CONNECTION, NOT PART OF A COMMON PLAN OR SCHEME, NOR THE SAME TRANSACTION, VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS, FOR O'MARA THE "GUIDING HAND" TO TAKE NO ACTION BUT ALLOW IT TO STAND, VIOLATED THE PETITIONER'S RIGHT TO COUNSEL.

COMBINING TWO WEAK, NON-EXISTING CHARGES IN ORDER TO COMPENSATE FOR

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THE LACK OF ANY EVIDENCE IS A CLEAR VIOLATION OF THE RIGHT TO DUE PROCESS AND THE RIGHT TO A FAIR PROCEEDING. (US. CONST. AM. FIFTH, SIXTH AND FOURTEENTH.) A COURT OF LAW IS NO PLACE FOR A DISPLAY OF PRESTADIGITATION. TO ALLOW THESE CHARGES TO REMAIN BOUND WOULD BE RENDERING AN OBVIOUSLY AND FUNDAMENTALLY UNFAIR RESULT. (TIBBITT V. WAINWRIGHT, 430 US 910, 97 S.CT. 1184 (1977))

AS THIS IS A CONTINUAL ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL'S TOTAL FAILURE TO ACT AS PETITIONER'S ADVOCATE, AND THE OBVIOUS DUE PROCESS VIOLATION, RELIEF IS WARRENTED AND HUMBLY REQUESTED TO ALLOW PETITIONER TO WITHDRAW HIS GUILTY PLEA.

C) COUNSEL DENIED EFFECTIVE ASSISTANCE TO HIS CLIENT BY NOT INTENDING ON GOING TO TRIAL, FAILING TO CONDUCT ANY INVESTIGATION, AND HAVING NO DEFENSE STRATAGY.

SINCE ALL THE NEVADA COURTS USED O'MARA'S "CREDIBLE TESTIMONY" TO RENDER THEIR DECISIONS, AND ONLY THE TESTIMONY. THIS GROUND IS SUPPORTED BY O'MARA'S OWN WORDS. TO BEGIN AT THE EVIDENTARY HEARING WHILE UNDER OATH O'MARA TESTIFIED THAT "THEIR WAS NO QUESTION IN MY MIND WE WERE GOING TO TRIAL" (AA 298) IN HIS ENTIRE TESTIMONY HIS "INVESTIGATION" CONSISTED OF SIMPLY REVIEWING THE STATES DOCUMENTS AND TRANSCRIPTS OF THE PRELIMINARY HEARING. (AA 320) AS A MATTER OF FACT THE ADA QUESTIONING O'MARA WAS LEADING AND TESTIFYING AS TO O'MARA'S INVESTIGATION. (AA 298, 313) TO O'MARA HE WAS OBLIGATED TO GIVE HIS CLIENT THE OFFER, BUT INSISTS HE ADVISED HIM NOT TO TAKE IT. VASQUEZ V. HILLERY, 474 US 254, 260, 106 S.CT. 617 (1986) SAYS "ALTHOUGH A HABEAS PETITIONER WILL BE ALLOWED TO PRESENT 'BITS OF EVIDENCE,' TO A FEDERAL COURT THAT WERE NOT PRESENTED TO THE STATE COURT, PROVIDED THE NEW BITS OF EVIDENCE DOES NOT PLACE THE CLAIMS IN A SIGNIFICANTLY DIFFERENT LEGAL POSTURE." WITH THIS IN MIND, SINCE HIS TESTIMONY IS VIEWED AS "CREDIBLE", HE SHOWED HE DID NO INVESTIGATION WHATSOEVER, CONDUCTED NO INTERVIEWS, ESTABLISHED ABSOLUTELY NO DEFENSE STRATAGY, NOR DID HE TESTIFY TO ANY TACTICS, NOR DID HE PROVIDE A SOUND REASONABLE EXPLINATION FOR HIS LACK OF ANY EFFORT. SUCH LACK OF ANY

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EFFECTIVE ASSISTANCE CAN LEAD TO ONLY ONE PLAN, TO OBTAIN A DEAL AND FACILITATE THE CONVICTION OF HIS CLIENT. A LETTER DATED JANUARY 2, 2008 FROM O'MARA TO HIS CUENT GOES INTO HIS MINDSET AND CONTRADICTS HIS "STRATAGY TO GO TO TRIAL." THIS LETTER WAS REFERED TO BY O'MARA AT AA315, IT SAYS IN PART:"

"FURTHER, I WILL CONTACT THE DISTRICT ATTORNEY AND OPEN UP INFORMAL DISCUSSION REGARDING A PLEA DEAL IN THIS CASE. IF THE DISTRICT ATTORNEY MAKES AN OFFER, I WILL NOTIFY YOU OF THE TERMS." (EMPHASIS ADDED) (EX."8")

THE "CREDIBILITY" IS SERIOUSLY SHAKEN BY THIS LETTER, ESPERIALLY IN CONTENT OF THE RECORD. AT AA323-324 WHILE BEING QUESTIONED BY ROBERT STORY, O'MARA STATED:

"Q: DID YOU APPROACH KELLI ANN VILORIA, OR DID SHE APPROACH YOU ABOUT A PLEA DEAL?

"A: SHE APPROACHED ME ABOUT THE PLEA DEALS, BOTH OF THEM. IT WAS MY UNDERSTANDING THAT WE WERE GOING TO TRIAL. THE ONLY WAY -- THE ONLY WAY I WOULD APPROACH A DA FOR A PLEA DEAL IS IF MY CLIENT SAID: "GET ME PROBATION."

COUNSEL O'MARA MAY TESTIFY HE INTENDED ON GOING TO TRIAL, BUT HIS OBVIOUS LACK OF EFFECTIVE ASSISTANCE, AND THE EVIDENCE CLEARLY SHOWS HE HAD NO INTENTION ON GOING TO TRIAL. IN ALL ACTUALITY HAD HE MOVED HIS CHAIR TO THE OTHER SIDE OF THE AISLE, IT WOULD HAVE BEEN A MORE HONEST REFLECTION OF HOW ALONE THE PETITIONER TRULY WAS. AS A MATTER OF FACT THE GUILTY PLEA MEMORANDUM'S ACCEPTANCE WAS AN UNINTENTIONAL "GODSEND", BECAUSE HAD HE 'GONE TO TRIAL' FOURTEEN DAYS LATER, IT WOULD HAVE BEEN AN EVEN BIGGER MOCKERY OF JUSTICE AND FARCE. MR. O'MARA HAD THE CASE FOR SEVENTEEN MONTHS AND AS PREPARED AS HE WAS A TRIAL WITH NO INTERVIEWS, NO INVESTIGATION, NO DEFENSE WHATSOEVER, WOULD HAVE BEEN MORE OF A SHOW OF THE CONSCIENCE OF THIS COURT, THAN HIS SHAM OF "REPRESENTATION" ALREADY SHOWS.

D) PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL BEING MISTAKEN AS TO THE LAW AND RIGHT TO ALLOW DEFENDANT TO WITHDRAW HIS GUILTY PLEA.

"Q: Now, once he pleaded guilty and you talked to him about withdrawal of the pleas, did you have an assessment as whether or not the Judge would allow you to withdraw his pleas?

"A: Yeah, I felt the Judge would not allow him to." (AA 328)

If Counsel did not feel the Defendant could withdraw his plea, then the client had but one choice, to be sentenced to crimes he was innocent of. Counsel stated "My client wasn't here, here is the proof" (AA 315) what better reason to allow withdrawal than innocence or jurisdictional issues. O'Mara continued to show his inexperience and ineptitude when he did not object to the comments made by Her Honor on March 6, 2008, the State had a duty to speak also

"Court: Do you understand this is a permanent entry of plea?

"Defendant: I do Your Honor.

"Court: You can't tell me in a week or two that you don't understand what is happening, you have to tell me now.

"Defendant: I do Your Honor

"Court: And you won't be able to change your mind with regard to these pleas of guilt.

"Defendant: I do". (AA 26-27)

Counsel was misinformed, or uninformed that NRS 176.165 allows the withdrawal of a guilty plea prior to sentencing for any fair and just reason (innocence). O'Mara did nothing, the State stood silent, so how could the Defendant know he was being denied a federal right. Such error of the canvass (and court officers) was serious enough that it violated Petitioners constitutional right to a fair proceeding. It removed his choice, which he had the right to up until sentencing. This can not be deemed harmless, violating Fifth, Sixth and Fourteenth Amendments (Fed. Rules Crim. Proc. 11(d)(1); 11(d)(2)(b) & 11(h)(2).)

This misunderstanding of O'Mara continues to show his ongoing incompetence, or infedelity or ineffectiveness or all three." Williams v. Bird, 354 F.2d 689.

E) PETITIONER'S DUE PROCESS RIGHTS OF THE U.S. CONSTITUTIONAL AMENDMENTS OF THE SIXTH AND FOURTEENTH BY BOTH COUNSEL O'MARA AND ADA VILORIA'S FRAUD ON THE COURT

THIS IS A 'BRIDGE' CLAIM BETWEEN GROUNDS 1 AND 2 AS IT DEALS WITH A CONSTITUTIONAL VIOLATION OF BOTH O'MARA AND ADA VILORIA. THIS CLAIM WAS PRESENTED TO THE STATE COURTS AS A GROUND TO WITHDRAW GUILTY PLEA. (AA 212-214) IT IS THE SAME LEGAL PREMISE, JUST PRESENTED IN A DIFFERENT APPROACH. (US. DONN., 564 F.2d 348 (9th CIR. 1977).)

AS THE RECORD AND THIS PETITION HAS SHOWN, O'MARA HAD TESTIFIED AS TO A CONVERSATION WITH ADA VILORIA ABOUT HIS CLIENT NOT BEING IN NEVADA. (AA 315) BUT IN ADDITION THE RECORD SHOWS O'MARA 1) FAILED TO FILE A MOTION TO DISMISS THE CHARGE HE HAD PRESENTED ALIBI EVIDENCE TO VILORIA FOR; 2) MADE NO STATEMENTS OR EFFORTS TO BRING TO THE COURT'S ATTENTION THIS EVIDENCE. IT WAS NOT UNTIL THE EVIDENTARY HEARING WHEN HIS CONDUCT AS "AN OFFICER OF THE COURT" WAS UNDER CHALLENGE, HE DID SO.

FOR ADA VILORIA TO FIGHT FOR AND BE "FREE TO ARGUE" FOR THE CONVICTION OF A CITIZEN SHE KNEW COULD MORE LIKELY THAN NOT BE ACTUALLY INNOCENT CAN **NEVER** BE VIEWED AS A HARMLESS ERROR. HER STATEMENTS AT SENTENCING IN REGARDS TO COUNT 1, WERE NOT SUPPORTED BY ANY EVIDENCE BUT WERE A BLATENT ATTEMPT TO BOLSTER HER WEAK, NON-EXISTING CASE IN THE EYES OF HER HONOR. AN AGGREVATING, EGREGIOUS CONSTITUTIONAL ERROR. JUDGE STEINHEIMER HAD A RIGHT TO KNOW THAT THE PROBABLE CAUSE NO LONGER EXISTED OR THAT THE DEFENDANT WAS NOT IN HER JURISDICTION AT ANY TIME DURING COUNT 1'S TIME FRAME. HAVING THE DEFENDANT ALLEGATE TO THE "FACTUAL BASIS" OF THE FAULTY, FRAUDULENT UNSUPPORTED CHARGES DOES NOT MAKE THE PLEA VALID OR CONSTITUTIONAL.

BY O'MARA NOT OBJECTING TO HER COMMENTS, HE CONFIRMED HIS CONFLICT OF INTEREST. ADA VILORIA'S ACTIONS (WITH O'MARA'S BLESSING) CAN NOT BE VIEWED AS "ACCIDENTAL". TOGETHER THEY ALLOWED THE COURT TO BELIEVE A MATERIAL FACT, THAT DID NOT EXIST. THEY MADE A CONSCIENCE EFFORT TO ACCOMPLISH THE DESIRED UNLAWFUL OBJECTIVE, THIS PETITIONER'S INCARCERATION. TO DRAW A CONNECTION OR PARALEL BETWEEN THESE "OFFICERS OF THE COURT" MAY BE INFERRED BY CIRCUMSTANTIAL EVIDENCE, AND THIER RECORDED CONDUCT.

GROUND TWO:

PETITIONER WAS DENIED HIS RIGHT TO A FAIR PROCEEDING IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BY THE CONDUCT AND ACTIONS OF THE PROSECUTING ATTORNIES.

A. STATEMENT OF EXHAUSTION:

THIS CLAIM WAS PRESENTED AS PART OF THE ENTIRE RECORD TO BOTH THE DISTRICT COURT AND NEVADA SUPREME COURT. AS PART I & V OF THE JULY 21, 2008 FILING IN CR07P 1728. (AA 187-201) IT WAS REVIEWED ON ITS MERITS BY THE NEVADA SUPREME COURT, IN PART, (AA 121-128).

B. STATEMENT IN SUPPORT OF CLAIM:

"A PROSECUTOR HAS A DUTY TO BRING TO THE ATTENTION OF THE COURTS OR OF THE PROPER OFFICIALS ALL SIGNIFICANT EVIDENCE SUGGESTIVE OF INNOCENCE OR MITIGATION. AT TRIAL THIS DUTY IS ENFORCED BY THE REQUIREMENT OF DUE PROCESS, BUT AFTER A CONVICTION THE PROSECUTOR IS ALSO BOUND BY THE ETHICS OF HIS OFFICE TO INFORM THE APPROPRIATE AUTHORITY OF AFTER-AQUIRED OR OTHER INFORMATION THAT CASTS DOUBT UPON THE CONFIDENCE, CORRECTNESS OR VALIDITY OF A CONVICTION." (STATE V. BENNETT, 81 P.3d 1, 119 NEV. 589 (2003 QUOTING: IMBLER V. PACHTMAN, 424 US 667, 105 S.CT. 3375 (1985)

AS PART OF THE RECORD, D.A. GAMMICK, BY WAY OF ADA KELLI ANN VILORIA, WAS CLEARLY IN POSSESSION OF DOCUMENTS THAT PUT THE PETITIONER IN NEW YORK STATE UNTIL FEBRUARY 23, 1999, AND IN CALIFORNIA AS A RESIDENT UP TO AT LEAST AUGUST 16, 1999 (AA 314-315). IN ADDITION, AS PART OF THE ORIGINAL WRIT, TWO LETTERS WERE SENT, TO RICHARD GAMMICK ON APRIL 19, 2009, AND ADA HATLESTAD ON JUNE 15, 2009, THESE LETTERS WENT INTO DETAIL THE ALIBI EVIDENCE, COMPARED TO THE STATE'S CASE FOR COUNT 1. THE DOCUMENTS WERE ATTACHED TO EACH LETTER. (EX. "2.") SINCE MS. VILORIA HAD THE DOCUMENTS PRIOR TO SENTENCING, IN FACT EVEN PRIOR TO DRAFTING THE GUILTY PLEA MEMORANDUM IT TRIGGERED THE DUE PROCESS REQUIREMENTS OF PART ONE IN BENNETT & IMBLER, TO BRING THIS EVIDENCE TO THE COURTS ATTENTION. FURTHER, THE LETTERS, SENT PRIOR TO THE FILING OF THE PETITIONER'S ORIGINAL

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WAIT OF HABEAS CORPUS, FILED ON JULY 21, 2009, TRIGGERED PART TWO OF BENNETT & IMBLER, TO BRING TO THE COURT'S ATTENTION THAT A REASONABLE DOUBT MAY HAVE COME TO LIGHT, THAT DID NOT PREVIOUSLY EXIST ON THE RECORD. SINCE SUCH A DECISION TO ACCEPT OR DENY A GUILTY PLEA IS ULTIMATELY THE COURTS POWER, JUDGE STEINHEIMER HAD AND CONTINUES TO HAVE THE RIGHT TO KNOW OF THIS EVIDENCE. BECAUSE A GUILTY PLEA WAIVES NUMEROUS CONSTITUTIONAL RIGHTS, THE RECORD MUST BE CLEAR OF ANY IMPROPRIETIES.

NOW FOR THE PURPOSE OF RULES REQUIRING THAT THERE BE A FACTUAL BASIS FOR A GUILTY PLEA, ALTHOUGH THE FACTS NEED NOT SHOW GUILT BEYOND A REASONABLE DOUBT, THERE MUST BE STRONG EVIDENCE OF GUILT. (SEE: STATE V. McVAY, 641 P.2d 857 (ARIZ. 1982)) "FACTUAL BASIS EXISTS FOR A PLEA, WHERE THE PROSECUTOR PRESENTS EVIDENCE TO THE COURT AND SUCH EVIDENCE SHOWS THAT ALL THE ELEMENTS OF THE CRIME ARE PRESENT." STATE V. REED, 809 P.2d 553.

THE ALLEGATION FOR COUNT 1, AS THE STATE CLAIMS IS: THAT WHILE THE "VICTIM WAS 12 YEARS OLD" (DOB. 8/14/86) (AA;10; AA45, AA46, AA,49, AA.50, AA.68, AA.69, AA.70,) SHE SPENT THE NIGHT AT THE PETITIONER'S HOME IN RENO, NEVADA, A NUMBER OF TIMES, AND ONE MORNING WHILE DRIVING HER HOME, THEY STOPPED ON THE SIDE OF LONGLEY LANE, AND PROCEEDED TO HAVE SEXUAL INTERCOURSE IN THE BACK SEAT OF THE PETITIONER'S FORD TAURUS.

SO A PROPER ANALYSIS OF THE ALLEGATIONS IN COUNT 1, CURRENTLY UNDER ATTACK WOULD BE 1) THE AGE OF THE VICTIM IS A CRUCIAL ELEMENT IN THIS CHARGE. "IN A CASE WHERE AGE OF VICTIM OF CRIME IS AN ISSUE (ELEMENT) COMPETENT PROOF OF AGE IS ESSENTIAL." GAY V. SHERIFF, CLARK COUNTY, 508 P.2d 1, 89 NEV. 118 (NEV. 1973)

BECAUSE THE "VICTIM" TESTIFIED AT THE PRELIMINARY HEARING THAT SHE WAS POSITIVE SHE WAS 12 YEARS OLD, PETITIONER CONCEEDS AS TO THIS ELEMENT. AGE CONFIRMED AND ARGUED BY ADA VILORIA AS BEING "12 YEARS OLD". THAT PUTS THE TIME OF OFFENSE OR "WINDOW" TO BE BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999.

ELEMENT 2) THAT A CRIME OCCURED IN RENO, NEVADA IN A FORD TAURUS OWNED BY THE PETITIONER ON LONGLEY LANE, BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999. WITH THE TAURUS

BEING DESCRIBED AS FOLLOWS BY ADA GARY HATLESTAD: "THE TAURUS IS A CRIME SCENE FOR ASHLEY." (AA 316)

THE "DOCUMENTED ALIBI EVIDENCE" DISCUSSED AT THE EVIDENTARY HEARING HAVE BEEN A PART OF THE OFFICIAL RECORD SINCE JULY 21, 2009. DATES ON SOME OF THE DOCUMENTS SHOW THE STATE KNEW AS EARLY AS APRIL 19, 2007, THREE MONTHS BEFORE EVEN THE PRELIMINARY HEARING, ON JULY 2, 2007. AT NO TIME HAVE THESE DOCUMENTS AUTHENTICITY BEEN QUESTIONED OR CHALLENGED. BUT ALL THE LOWER COURTS HAVE MADE THEIR DECISIONS AS IF THESE DOCUMENTS DON'T EXIST. SUCH EVIDENCE VIEWED IN LIGHT MOST FAVORABLE TO THE PROSECUTION CAN STILL NOT OVERCOME THE LACK OF A CRIME. THE FOLLOWING DETAILING OF THESE DOCUMENTS ONCE AGAIN SHOW HOW BOTH ELEMENTS OF THE CRIME UNDER ATTACK ARE DESTROYED. FOR THE PURPOSE OF THIS GROUND THIS EVIDENCE ATTACKS ALL THE CRIMES ORIGINALLY ALLEGED/CHARGED IN REGARDS ASHLEY BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999. (ALTERNATE NUMBERING COINCIDES WITH PART V OF ORIGINAL WRIT OF HABEAS CORPUS)

1) DMV DOCUMENTS REFERED TO ON THE STAND BY O'MARA (AA316) AND LETTER (EX"8") STATES THAT THE FORD TAURUS AKA: "CRIME SCENE FOR ASHLEY.":

"THE RECORDS OF THE DEPARTMENT OF MOTOR VEHICLES INDICATE THAT THE ABOVE REFERENCED [VIN: 1FALP52449G247860, YEAR/MAKE 1993 FORD TAURUS, GL, 4DR, SEDAN] WAS REGISTERED IN NEVADA STATE. WE SHOW THIS VEHICLE HAS BEEN REGISTERED FROM 06-06-00 TO 06-05-01 UNDER THE NAME OF BRENDAN DUNCKLEY." (EX "3")

2) TRANSCRIPTS OF ENROLLMENT AT THE CULINARY INSTITUTE OF AMERICA LOCATED AT "1946 CAMPUS DRIVE, HYDE PARK, NY. 12538-1499", WHICH HAS PETITIONER IN COLLEGE BETWEEN "11/11/96 - 2/23/99" THIS DOCUMENT WAS "INTRODUCED" AS EXISTING, AS PART OF THE RECORD, BUT NEVER REVIEWED FOR ITS MERIT. (AA 314) (EX. "4")

3) IRS HISTORY REPORT: PLACING THE PETITIONER IN NEW YORK STATE AND CALIFORNIA UNTIL 2000 WHEN PETITIONER MOVED TO RENO, NEVADA. (NOTE: P.S.I. HAVE PETITIONER MOVING TO RENO, NV. IN 2000 (AA 65)) THIS REPORT CONFIRMS RESIDENCY OF PETITIONER BETWEEN 1997-2000, AND CONTAIN SPECIFIC DATA THAT CAN ONLY COME FROM THE I.R.S. (TAX ID NUMBERS FOR EMPLOYERS) (EX. "5").

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4) A FAX WAS SENT FROM THE MADERA COUNTY SHERIFF DEPARTMENT ON APRIL 18, 2007, TO RENO POLICE DEPARTMENT DETECTIVE TOM BRIGHT (LEAD/ONLY 'INVESTIGATOR TO ALL OF THE' CHARGES UNDER ATTACK) THE 'SUBJECT': "1999-10667, BRENDAN DUNCKLEY, DOB. 7/4/76;" "DATE OF REPORT: 07-19-99, DISPATCHED TO: 44782 SILVER SPUR TRAIL IN AHWAHNEE" (MADERA COUNTY CALIFORNIA) AND: "I TRANSPORTED BRENDAN TO THE OAKHURST SUB-STATION." (DISPATCH ADDRESS IS THE SAME LISTED ON IRS FORMS AS PETITIONER'S RESIDENCY.) (EX."6")

5) ON AUGUST 16, 1999 PETITIONER WAS SERVED IN PERSON A "SUMMONS OF FAMILY LAW" FILED IN THE MADERA SUPERIOR COURT IN CASE NUMBER: CV03749: AT "HOME: 1) DATE: 8/16/99; 2) TIME: 2:45 PM; 3) ADDRESS: 455 E. NEES, #257, FRESNO, CA.;" (EX "7.")

THE IMPORTANCE OF THESE DOCUMENTS IS CLEAR THAT THEY ALL SHOW THAT EVIDENCE EXISTED THAT NEGATED BOTH THE ELEMENTS TO COUNT 1. AS THIS PETITIONER HAS ALREADY ESTABLISHED THE ELEMENTS ARE: 1) OCCURED BETWEEN AUGUST 14, 1998 AND AUGUST 13, 1999; AND 2) "SCENE OF THE CRIME" WAS PETITIONER'S FORD TAURUS.

BUT THE COLLEGE TRANSCRIPTS (AND PSI) PUT PETITIONER IN NEW YORK ATTENDING THE CULINARY INSTITUTE OF AMERICA UNTIL FEBRUARY 23, 1999. (SO THE "WINDOW" WOULD BE FEBRUARY 23, 1999 TO AUGUST 13, 1999.)

THEN WE HAVE THE MADERA COUNTY SHERIFF REPORT FAXED TO RENO POLICE DEPARTMENT, ON APRIL 18, 2007, THAT PLACES PETITIONER'S RESIDENCY TO BE "44782 SILVER SPUR TRAIL, AHWAHNEE, CALIFORNIA" AS OF THE ORIGINAL RESPONSE REPORT DATED: "7-19-1999". (THAT WOULD PLACE THE "WINDOW" BETWEEN JULY 19, 1999 AND AUGUST 13, 1999)

EXCEPT THIS COURT CAN NOT OVERLOOK THE MADERA SUPERIOR COURT FILING OF THE "SUMMONS OF FAMILY LAW." IN THE "SUMMONS OF SERVICE" IT SHOWS PERSONAL SERVICE TO BRENDAN DUNCKLEY AT HIS HOME, LOCATED: 455 E. NEES, #257, FRESNO, CALIFORNIA, AT 2:45 PM. ON AUGUST 16, 1999. (SO THIS COURT DOCUMENT HAS PETITIONER IN FRESNO, CA. PAST THE CLOSING DATE OF AUGUST 13, 1999, SO THE PROVERBIAL "WINDOW" IS SHUT) IRS DOCUMENTS ALSO EXIST TO CONFIRM THE PETITIONER'S RESIDENCY AND DO NOT PLACE HIM IN RENO, NEVADA (WASHOE COUNTY DISTRICT ATTORNEY JURISDICTION) UNTIL 2000.

THESE ALIBI DOCUMENTS HAVE BEEN PROPERLY PRESENTED TO ALL STATE COURTS, BUT THEY WERE ERRONEOUSLY IGNORED. FOR THE STATE TO HAVE THESE DOCUMENTS AND NOT INTRODUCE THEM WHEN THEY HAD A CONSTITUTIONAL DUTY TO DO SO IS INEXCUSABLE. THE STATE KNEW THROUGH "DILIGENT" POLICE WORK THAT DEFENDANT WAS NOT IN NEVADA. HOW ELSE WOULD THE R.P.D. KNOW TO CONTACT MADERA COUNTY SHERIFF DEPARTMENT. THIS IS RELEVANT SINCE IT PROVES THE ELEMENT(S) FOR COUNT 1 (AGE) IS NOT PRESENT. HOW CAN THE PETITIONER DRIVE THE "VICTIM" HOME WHEN HE WAS NOT EVEN IN NEVADA DMV REGISTRATION HISTORY DOCUMENTS SHOW THAT THE "SCENE OF THE CRIME" WAS NOT EVEN OWNED/REGISTERED BY THE PETITIONER UNTIL 06-05-00. SO IF PETITIONER DID NOT HAVE "SCENE OF THE CRIME" UNTIL JUNE 5, 2000, HOW COULD HE AND THE "VICTIM" HAVE HAD SEX IN IT BETWEEN THE TIME FRAME ALLEGED BY THE "VICTIM", AND ADA VICORIA. THE STATE HAD ALL THESE DOCUMENTS, THERE IS ABSOLUTLY NO DISAGREEMENT WITH THIS FACT. NOR IS THE FACT THAT THEY CONTINUED TO ALLOW AN INDIVIDUAL (PETITIONER) TO 1) BE CHARGED; 2) BE CONVICTED; AND 3) FIGHT FOR THE INDIVIDUAL TO REMAIN CONVICTED FOR A CHARGE THAT IS DEVOID OF ANY EVIDENCE; SUCH CONDUCT, BEHAVIOR, AND ACTIONS CONSTITUTE A MISCARRIAGE OF JUSTICE.

"A PROSECUTOR, WHETHER HE BE STATE, COUNTY OR FEDERAL, IS A REPRESENTATIVE OF NOT AN ORDINARY PARTY TO THE CONTROVERSY, BUT TO A SOVEREIGNTY WHOSE OBLIGATION TO GOVERN IMPARTIALLY IS AS COMPELLING AS ITS OBLIGATION TO GOVERN ALL, AND WHOSE INTERESTS, THEREFORE IN A CRIMINAL PROCEEDING IS NOT THAT IT SHOULD WIN A CASE, BUT THAT JUSTICE SHALL BE DONE. AS SUCH HE IS IN A PECULIAR AND VERY DEFINITE STATE, SINCE AS THE SERVENT OF THE LAW, THE TWO-FOLD AIM OF WHICH IS THAT THE GUILTY SHOULD NOT ESCAPE, OR INNOCENT SUFFER. HE MAY PROSECUTE WITH EARNESTNESS AND VIGOR - INDEED HE SHOULD DO SO. BUT WHILE HE MAY STRIKE HARD BLOWS, HE IS NOT AT LIBERTY TO STRIKE FOUL ONES, TO OBTAIN A CONVICTION AT ALL COSTS." Berger v. U.S., 295 US 78, 55 S.Ct. 629 (1935) & U.S. v. Agurs, 427 US 97 AT 111, 96 S.Ct. 2392 (1976).

SINCE THE STATE CAN PRODUCE ABSOLUTLY NO EVIDENCE THAT A CRIME EVEN OCCURED IN CONNECTION TO COUNT 1, AND THE DOCUMENTED EVIDENCE HAS SHOWN THE "VICTIM'S" TESTIMONY TO BE IMPOSSIBLE, THE STATE NEVER HAD 'JURISDICTION', AND AS SUCH THE CONVICTION IS A VIOLATION OF NUMEROUS CONSTITUTIONAL RIGHTS. IN FACT THE STATES ENTIRE CASE FOR ASHLEY, ITS ENTIRE "INVESTIGATION" IS A SINGLE PARAGRAPH OF A CONVERSATION BETWEEN DETECTIVE TOM BROOME AND THE 'VICTIM' ASHLEY WHILE SHE WAS INCARCERATED FOR DRUG CHARGES. AN INTERESTING NOTE IS THE TESTIMONY OF O'MARA AT AA330:

"Q: HAVE YOU EVER SEEN A WRITTEN REPORT OF THE ALLEGATIONS FOR ASHLEY?

"A: I HAVE NO IDEA. IS THERE A REPORT IN THE DISCOVERY?

"Q: APPARENTLY NOT."

SO THE QUESTION OF FACT AND LAW ARISES, IF NO 'WRITTEN REPORT' WAS FILED BY THE 'VICTIM' (NRS 171.083) AND NO EVIDENCE EXISTS THAT ANY INVESTIGATION WAS DONE BY DETECTIVE BROOME, DID THE STATE EVER RECEIVE JURISDICTION IF NO ACTUAL POLICE REPORT (INVESTIGATION) EVER OCCURED BEFORE THE STATUTE OF LIMITATION EXPIRED. (NRS 171.095) THE ONLY REPORT IS A SUPPLEMENTAL ("DRAFT") FOR 05-34027 (A DISMISSED CASE) NUMBER '6', WITH A SINGLE PARAGRAPH OF A CONVERSATION BETWEEN BROOME AND ASHLEY. THIS NARRATIVE IS ALL THE STATE HAS, NO PHYSICAL RECORDING OF THE CONVERSATION, NO TRANSCRIPTS, NO PROOF IT HAPPENED EXCEPT THIS "NARRATIVE". ASHLEY IS NOT EVEN LISTED AS A VICTIM, AND NO POLICE REPORT INVESTIGATION WAS EVER GENERATED. AT THE BEST THE CASE IS HEARSAY WHICH CAN NOT OVERCOME THE ALIBI EVIDENCE, ESPECIALLY WITH NO ACTUAL PHYSICAL EVIDENCE OF ANY CRIME. (EX"9")

2) PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS BY THE STATE PRESENTING A CONTRACT UNDER FALSE PRETENSE WITH THE INTENT TO DECEIVE AND DEFRAUD

A GUILTY PLEA STANDS AND FALLS AS A WHOLE, IF A PART IS DEFECTIVE THE WHOLE IS DEFECTIVE, AND IS CONSTITUTIONALLY VALID ONLY TO THE EXTENT THAT IT IS 'VOLUNTARY AND INTELLIGENT.' BRADY V. US, 427 US 742, 748, 90 S.CT. 1463 (1970). A GUILTY PLEA THAT IS CONTRARY TO THIS WOULD VIOLATE A DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENTS OF

THE UNITED STATES CONSTITUTION.

THE COURTS HAVE LONG HELD THAT A PLEA DOES NOT QUALIFY AS INTELLIGENT UNLESS A CRIMINAL DEFENDANT FIRST RECEIVES "REAL NOTICE OF THE TRUE NATURE OF THE CHARGES AGAINST HIM, THE FIRST AND MOST UNIVERSALLY RECOGNIZED REQUIREMENT OF DUE PROCESS." SMITH V. O'GRADY, 312 US 329, 334, 61 S.CT. 572 (1941)(EMPHASIS ADDED). THE STATE WILL CLAIM AS ADA HATLESTAD'S ARGUMENT AT THE EVEDENTARY HEDRING WAS, THE PETITIONER WAS CANVASSED, PRESENTED WITH THE INFORMATION OR CHARGING DOCUMENT, PRIOR TO PLEADING GUILTY. ALSO THAT HIS ATTORNEY HAD ADVISED HIM EFFECTIVELY, (THAT HAS BEEN SHOWN TO BE INACCURATE) WITH THIS "ARGUMENT" THE STATE COULD ARGUE THAT THI GUILTY PLEA WAS ALLECUTED TO BY THE DEFENDANT AND IS THEREFORE INTELLIGENTLY AND VOLUNTARILY ENTERED INTO.

SUCH CIRCUMSTANCES, STANDING ALONE WOULD HOLD MERIT, IF IN FACT THE ASSUMED FACTUAL BASIS EXISTED TO 1) PROVE STATE HAD SUBJECT MATTER JURISDICTION OVER PETITIONER; 2) CONSTITUTIONALLY CHARGE THE DEFENDANT TO COUNT 1; AND 3) FOR THE STATE TO HAVE THE CONSTITUTIONALLY SUPPORTED FACTUAL BASIS TO PREDENT THE GUILTY PLEA MEMORANDUM. (SEE: HENDERSON V. MORGAN, 426 US 637, 647, 96 S.CT. 2253 (1976). (AA.09-15)

PETITIONER NONETHELESS MAINTAINS THAT HIS GUILTY PLEA WAS UNINTELLIGENTLY ENTERED BECAUSE THE DISTRICT ATTORNEY FRAUDULENTLY AND INTENTIONALLY FAILED TO INFORM THE DEFENDANT AND THE COURT THAT THE ESSENTIAL ELEMENTS OF THE CRIME(S) FOR WHICH HE WAS CHARGED DOES NOT ACTUALLY EXIST. TO BE MORE SPEZIFIC UNDER CONTRACT LAW SUCH CONDUCT COULD BE 'GENERATING/DRAFTING A CONTRACT UNDER FALSE PRETENSE WITH THE INTENT TO DECEIVE OR DEFRAUD.'

BY DRAFTING THE "DEAL" KNOWING IT TO BE FALSE IS FRAUDULENT CONDUCT. THE FOLLOWING EXERT WAS WRITTEN BY ADA VILORIA, AROUND THE TIME OF HER CONVERSATION WITH O'MARA:

> "4. I UNDERSTAND THE CHARGE(S) AGAINST ME AND THE ELEMENTS OF THE OFFENSE(S) WHICH THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT AT TRIAL." (AA10) (EMPHASIS ADDED)

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"5. I UNDERSTAND THAT I ADMIT TO THE FACTS WHICH SUPPORT ALL THE ELEMENTS OF THE OFFENSE(S) BY PLEADING GUILTY. I ADMIT THAT THE STATE POSSESSES SUFFICIENT EVIDENCE THAT WOULD RESULT IN MY CONVICTION." (AA 11) (EMPHASIS ADDED)

BY THE STATE DRAFTING THE DOCUMENT CITED ABOVE, KNOWING IT 1) WOULD NOT BE ABLE TO OBTAIN A CONVICTION OF GUILTY BEYOND A REASONABLE DOUBT, AT TRIAL, AND 2) NONE OF THE "ELEMENTS" EXISTED, IT CREATED A FRAUDULENT CONTRACT. HAVING THE PETITIONER READ INTO THE RECORD A FALSE STATEMENT, DOES NOT MAKE IT TRUE. SIMULAR TO WRITING "THE SKY IS PURPLE" DOES NOT MAKE IT SO.

IN CORPUS JURIS SECUNDUM ("CJS") UNDER 'CONTRACTS' § 160 A RELEVANT FACT COMES TO LIGHT: "AS A GENERAL RULE, ANY FALSE REPRESENTATION OF A MATERIAL FACT, MADE WITH KNOWLEDGE OF ITS FALSITY AND WITH THE INTENT THAT IT SHALL BE ACTED ON BY ANOTHER IN ENTERING INTO A CONTRACT, AND WHICH IS ACTED ON, CONSTITUTES FRAUD AND WILL ENTITLE THE PARTY DECEIVED THEREBY TO AVOID THE CONTRACT."

"HE WHO SIGNS A DOCUMENT REASONABLY BELEIVING IT TO BE SOMETHING QUITE DIFFERENT THAN IT IS CANNOT BE BOUND BY THE TERMS OF THE DOCUMENT." Operating Eng. Pension Trust v. Gallagher, 737 F.2d 1501, 1504 (9th Cir. 1984). THE STATE HAD NO EVIDENCE AND NO 'ELEMENTS' FOR COUNT 1, SO THEIR "SUPPRESSION OF THE TRUTH BY ONE OR TWO CONTRACTING PARTIES IS AS AFFIRMATIVE A FRAUD AS A FALSE STATEMENT OF FACT, SINCE IT PREVENTS THE MINDS OF THE PARTIES FROM MEETING ON THE ACTUAL TERMS OF THE CONTRACT." Morris v. McGough, 230 S.W. 1092 (CJS §161). SUPPRESSION OF TRUTH OR SILENCE TO THE TRUTH IS AN ACTIONABLE FRAUD WHEN THERE IS A DUTY TO SPEAK. SUCH AS DUE PROCESS. (SEE Bennett & Imbler.)

TO SATISFY CONSTITUTIONAL STANDARDS, PROSECUTORS (VILORIA) MUST CREATE A GUILTY PLEA DESIGNED TO NOT ONLY BE VOLUNTARY, BUT IT MUST NOT BE THE PRODUCT OF MISREPRESENTATION OR OTHER IMPERMISSIBLE CONDUCT BY STATE AGENTS. WHERE MISCONDUCT BY THE STATE KEEPS THE DEFENDANT AND [COURT] UNAWARE OF CIRCUMSTANCES TENDING TO NEGATE DEFENDANT'S GUILT GUILTY PLEAS IN IGNORANCE OF THOSE FACTS MAY NOT BE KNOWING AND INTELLIGENT THOUGH IT IS

OTHERWISE VOLUNTARY. (SEE: STATE V. GARDNER, 885 P.2d 1144 (IDAHO 1994).)

UNDER BOTH NEVADA AND FEDERAL LAW, LAWYERS, AS OFFICERS OF THE COURT, MUST CONDUCT THEMSELVES IN WAYS THAT DO NOT IMPEDE WORK (DESCRETION) OF THE COURTS AND GIVE GENUINE, AND NOT FALSE SERVICE TO THEIR CLIENTS. THE PETITIONER WAS ENTITLED TO SUCH CONDUCT AS THE STATE'S "CLIENT." SPECIFICALLY ADA VILORIA VIOLATED NEVADA RULES OF PROFESSIONAL CONDUCT RULE 3.8 (ABA MODEL RULE 3.8; SUP. CT. RULES, RULE 181, SUB. 3): SPECIAL RESPONSIBILITY OF A PROSECUTOR: THE PROSECUTOR IN A CRIMINAL CASE SHALL: (A) REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE." IN ADDITION TO RULE 3.3 (ABA MODEL RULE 3.3; SUP. CT. RULES RULE 172, 172(1)(A,D)) "CANDOR TOWARD THE TRIBUNAL. (A) A LAWYER SHALL NOT KNOWINGLY: 1) MAKE A FALSE STATEMENT OF FACT OR LAW TO A TRIBUNAL OR FAIL TO CORRECT A FALSE STATEMENT OF MATERIAL FACT OR LAW PREVIOUSLY MADE TO THE TRIBUNAL BY A LAWYER.

THE FRAUDULENT CONDUCT OF ADA VILORIA DRAFTING THIS FAULTY, FRAUDULENT "CONTRACT" AND HER FALSE STATEMENTS AT SENTENCING, CERTAINLY CONSTITUTES THAT THIS PETITIONER'S PLEA WOULD BE VIEWED AS CONSTITUTIONALLY INVALID. AS STATED PRIOR IF PART OF THE 'DEAL' IS A VOIDABLE ISSUE THE ENTIRE DOCUMENT IS VOIDABLE.

THERE CAN BE NO DOUBT, THAT SUCH CIRCUMSTANCES INHERENTLY RESULTED IN A COMPLETE MISCARRIAGE OF JUSTICE, AND PRESENTS EXCEPTIONAL CIRCUMSTANCES THAT JUSTIFY COLLATERAL RELIEF UNDER 28 U.S.C. §2254.

AS THE RECORD IN THIS CASE HAS ALREADY UNAMBIGUOUSLY DEMONSTRATED THAT PETITIONER'S PLEA TO THESE CHARGES ARE INVALID AS A MATTER OF CONSTITUTIONAL LAW, PETITIONER HUMBLY REQUESTS THAT HIS CONVICTION BE VACATED, AND ALLOW HIM TO PLEAD ANEW. "GIVEN THE FACT THAT THE RECORD [REVIEWING ALIBI DOCUMENTS, FINALLY] NOW ESTABLISHES THAT THE PLEA OF GUILTY TO THE CHARGE(S) WAS CONSTITUTIONALLY INVALID, THE PETITIONER [SHOULD BE] VIEWED AS PRESUMPTIVELY INNOCENT OF THOSE OFFENSES, ACCORDINGLY UNLESS HE AGAIN PLEADS GUILTY [HOWEVER UNLIKELY] THE BURDEN IS ON THE GOVERNMENT TO PROVE GUILT BEYOND A REASONABLE DOUBT." BOUSLEY V. US, 523 US 614, 118 S.CT. 1604.

GROUND THREE:

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE CLAIM OF ACTUAL INNOCENCE AS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. STATEMENT OF EXHAUSTION:

THIS CLAIM WAS ORIGINALLY PRESENTED TO HER HONOR CONNIE J. STEINHEIMER IN THE PETITIONER'S ORIGINAL WRIT OF HABEAS CORPUS, AND AS PART OF THE RECORD ON APPEAL TO THE NEVADA SUPREME COURT. (AA 159-164.)

B. STATEMENT IN SUPPORT OF CLAIM:

THE CASES THE COURTS USE PRIMARILY ARE THE SAME 'STANDARD' THIS PETITIONER USES TO BUILD AND PRESENT HIS CLAIM OF ACTUAL (FACTUAL) INNOCENCE. "TO ESTABLISH ACTUAL INNOCENCE PETITIONER MUST DEMONSTRATE THAT IN LIGHT OF ALL THE EVIDENCE, IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM." SCHLUP V. DELO, 513 US 298, 327-328, 115 S.CT. 851, 867, 868 (1995) (EMPHASIS ADDED). AS THIS PETITIONER HAS ESTABLISHED, THIS ENTIRE PETITION HAS SHOWN, AND AS THE ACTUAL EVIDENCE PROVES, HIS PLEA OF GUILTY, HIS PLEA CANVASS, AND HIS PLEA COLLOQUY "HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." MURRAY V. CARRIER, 477 US 496, 106 S. CT. 2639 (1986) & BOUSLEY.

UNDER AN ACTUAL INNOCENCE CLAIM THE PETITIONER MUST PRESENT EVIDENCE TO SUPPORT THE CLAIM. TO SUPPORT THE CONSTITUTIONAL ERROR ALLEGATION THE "NEW EVIDENCE" CAN BE EXCULPATORY SCIENTIFIC EVIDENCE, CREDIBLE DOCUMENTS, TRUSTWORTHY EYEWITNESS ACCOUNTS, OR CRITICAL PHYSICAL EVIDENCE, THAT WAS NOT PRESENTED AT TRIAL. "NEW EVIDENCE DOES NOT NECESSARILY MEAN NEWLY DISCOVERED EVIDENCE. ALSO INCLUDED IS EVIDENCE AVAILABLE BUT NOT PRESENTED AT TRIAL, OR IMPROPERLY EXCLUDED FROM THE RECORD. "WHERE AN ITEM CONSTITUTES RELIABLE NEW EVIDENCE, IT MUST BE VIEWED [REVIEWED] IN THE CONTEXT OF THE ENTIRE RECORD AS A WHOLE." LEE V. LAMBERT, 607 F. SUPP. 2d 1204 (2009) (EMPHASIS ADDED).

A MISCARRIAGE OF JUSTICE HAS BEEN DEFINED AS A CONSTITUTIONAL VIOLATION THAT HAS

PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY-INNOCENT. (HORTON V. ALLEN, 370 F.3d 75, 81 (1st CIR. 2004.)

NUMEROUS COURTS HAVE STAYED CLEAR AND FOCUSED WITH PRECIDENTS THAT WOULD MAKE THE PETITIONER'S CONVICTION AND CONTINUED INCARCERATION ON THESE CHARGES A VIOLATION OF DUE PROCESS. AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FORBIDS THE STATE TO CONVICT A PERSON OF A CRIME WITHOUT PROVING THAT THE ELEMENTS OF THE CRIME EXIST. FIORE V. WHITE, 531 US 225, 121 S.CT. 712 (2001); JACKSON V. VIRGINIA, 443 US 311 99 S.CT. 2781 (1979) & IN RE WINSHIP, 397 US 358, 364, 90 S.CT. 1068 (1970.)

AS THE INSTANT CASE AT BAR HAS SHOWN SUBSTANTIAL DOCUMENTATION HAS BEEN PROVIDED TO SUPPORT THIS CLAIM OF ACTUAL INNOCENCE TO COUNT 1: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (NRS 201.230), AS WELL AS THE ORIGINAL CHARGE OF SEXUAL ASSAULT ON A CHILD UNDER FOURTEEN YEARS OLD. (NRS 200.366) A SPECIAL NOTE SHOULDS BE GIVEN THAT IN REGARDS TO COUNT 2 THERE EXISTS A DOCUMENT, TO BE SPECIFIC EXCULPATORY SCIENTIFIC EVIDENCE, CRITICAL "PHYSICAL" EVIDENCE, THAT WAS NOT PRESENTED TO THE DISTRICT COURT PRIOR TO THE ACCEPTANCE OF THE GUILTY PLEA. UNFORTUNATLY THERE IS A DISAGREEMENT AS TO THE TIME FRAME THIS PETITIONER BECAME AWARE OF ITS EXISTANCE, BUT THERE IS NO QUESTION THAT THIS MATERIAL FACT WAS WITHHELD FROM HER HONOR JUDGE STEINHEIMER. SHE CERTAINLY HAD A RIGHT TO KNOW OF A DNA TEST THAT CLEARED THE DEFENDANT OF THE CHARGE OF SEXUAL ASSAULT.

THIS SCIENTIFIC TEST RESULT SHOWS A FEW UNDISPUTED ITEMS: 1) THE DNA TEST (WHICH WAS CONDUCTED WITHIN TEN MINUTES OF THE ALLEGED "ATTACK") SHOWED "NO FOREIGN DNA TO SOURCE, BRENDAN DUNCKLEY, WAS OBTAINED FROM GENITAL SWABS". 2) DNA TEST RESULT WAS COMPLETED ON MAY 21, 2007 (PRELIMINARY HEARING WAS JULY 2, 2007) BUT THE RECORD SHOWS THAT THE STATE DID NOT PRESENT THIS EVIDENCE (COLLECTED ON SCENE) TO THE JUSTICE COURT, DURING THE 'VICTIMS' TESTIMONY THAT SOMEONE ATTACKED HER BY HAVING HER PREFORM ORAL SEX ON HIM, SHE STATES SHE BIT HIM HARD ENOUGH TO DRAW BLOOD. 3) THE D.A BY WAY OF VICORIA, FINALLY GAVE THIS REPORT TO O'MARA ON FEBRUARY 7, 2008. (EX. "10") (AA 255-258)

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THE STATE HAS ARGUED THAT PETITIONER KNEW AND HAD THE REPORT, BUT STILL INSISTED ON PLEADING GUILTY, TO A CHARGE THE SCIENTIFIC EVIDENCE CLEARED HIM OF. THE DNA REPORT WAS INCLUDED IN THE ORIGINAL WRIT. AS THE PETITIONER TESTIFIED AT THE EVIDENTARY HEDRING HE FIRST SAW THE REPORT WHEN O'MARA TRANSFERED HIS FILE IN JULY 2009. SINCE THERE IS NO MENTION OF THIS EXONERATING EVIDENCE IN EITHER OF THE LETTERS SENT TO D.A. GAMMICK OR ADA HATLESTAD (EX."2") AND SELF-PRESERVATION WOULD DICTATE NO 'SANE' PERSON WOULD IGNORE DNA THAT CLEARS HIM. COMMON SENCE WOULD BE THAT IT IS MORE LIKELY THAN NOT THAT THE PETITIONER DID NOT KNOW OF THE ACTUAL TEST RESULT.

THE DNA TEST RESULT IN COMPARISON TO THE "TESTIMONY" (WHICH IS THE ONLY EVIDENCE) IS FOR A JURY TO DECIDE. BUT IT DOES RAISE THE QUESTION IF THE STATE COULD NOT PROVE SEXUAL ASSAULT, BECAUSE EVIDENCE ELIMINATES PENETRATION (NO GENETIC TRANSFER), HOW DID THE PETITIONER BENEFIT BY THE STATE SHIFTING ITS BURDEN OF PROVING GUILT, TO A CHARGE IT KNEW IT HAD EVIDENCE TO THE CONTRARY TO. (BONNER & AMBLER). IT GIVES RISE TO A MISCARRIAGE OF JUSTICE OR MANIFEST INJUSTICE.

FOR THIS REPORT TO NOT BE 'ON THE RECORD' UNTIL JUNE 3, 2011, AND TECHNICALLY NOT EVEN THEN, AS THIS REPORT WAS DISCUSSED, BUT NEVER REVIEWED BY ANY STATE COURT IN THEIR DECISIONS, EVEN THOUGH IT WAS A PART OF THE RECORD SINCE JULY 21, 2009. ALL THE DOCUMENTS REFERED TO, THOUGH NEVER REVIEWED, IN THE EVIDENTARY PROCEEDINGS HAVE CLEARLY ESTABLISHED A MANIFEST INJUSTICE AND MISCARRIAGE OF JUSTICE. IN THE LEAST THEY SHOW THAT DURING THE ENTIRE TIME OF THE OFFENSE OR "WINDOW" (AUGUST 14, 1998 - AUGUST 13, 1999) THAT THE PETITIONER WAS AT ANOTHER PLACE SO FAR AWAY, THAT UNDER SUCH CIRCUMSTANCES THAT HE COULD NOT, WITH NORMAL EXERTION, HAVE REACHED THE PLACE WHERE THE CRIME WAS ALLEGED TO HAVE BEEN COMMITTED, SO AS TO HAVE PARTICIPATED IN THE COMMISSION OF THE CRIME. ASHLEY CLAIMS TO HAVE SPENT THE NIGHT AT THE PETITIONER'S HOME NUMEROU TIMES IN RENO, WHEN SHE WAS TWELVE (12). BUT THE DOCUMENTS HAVE HIM RESIDING IN HYDE PARK, NY. UNTIL FEBRUARY 23, 1999 (EX."4") AND AHWAHNEE, CALIFORNIA UNTIL JULY 19, 1999 (EX."6"), FRESNO, CALIFORNIA AS OF AUGUST 16, 1999 (EX."7"). SO HE DID NOT LIVE IN RENO UNTIL 2000. (EX."5") ALSO HE DID NOT EVEN PURCHASE THE "SCENE OF THE CRIME" UNTIL JUNE 5, 2000. (EX."3")

THE STATE HAS ABSOLUTLEY NO EVIDENCE THAT A CRIME EVEN OCCURED. THE TESTIMONY OF ASHLEY IS QUESTIONABLE AT BEST. SHE COULD GIVE NO SPECIFIC DATES, EXCEPT "I WAS 12", THERE IS NO WRITTEN REPORT BY ASHLEY TO LAW ENFORCEMENT. (NRS 171.083(1) NRS 171.095) THERE ARE NO WITNESSES TO THIS CRIME, THE STATE HAS NEVER PRESENTED EVEN A SCINTILLA OF PHYSICAL EVIDENCE OF ANY CRIME. LET ALONE SEXUAL ASSAULT ON A CHILD OR LEWDNESS WITH A CHILD UNDER FOURTEEN YEARS OF AGE. AS STATED PRIOR ON PAGE 21 OF THIS INSTANT PETITION, THE FACT THAT NO ACTUAL POLICE REPORT WAS GENERATED OR INVESTIGATION (CASE) NUMBER OPENED FOR THIS ALLEGATION CAN NOT BE OVERLOOKED.

IN FACT AS THE EXHIBIT "9" SHOWS, WHILE DETECTIVE BROOME WAS INVESTIGATING 07-9446 (COUNT 2) HE NOTICED PETITIONERS NAME AND CONNECTED IT TO 05-34027 (DISMISSED BY JUSTICE COURT) AND THE 2005 "VICTIM" LURA, WHO MENTIONED HE SHOULD SPEAK TO MICHELLE (DISMISSED CHARGE BY JUSTICE COURT) WHO SUGGESTED ASHLEY AS A POSSIBLE 'VICTIM.' SO THIS ENTIRE CONVICTION OF LIFE IS BASED ON A FOURTH PAGE PARAGRAPH OF THE SIXTH SUPPLEMENTAL, WHICH WAS NOT EVEN A FINAL REPORT BUT A "DRAFT". SHE (ASHLEY) IS NOT EVEN LISTED AS A VICTIM ON THE "DRAFT". AS STATED PRIOR, THERE IS NO COLLABERATING EVIDENCE TO CONFIRM THIS IS NOT SIMPLY THE CREATION OF AN OVERLY ZEALOUS, VINDICTIVE DETECTIVE. HE WAS AFTER ALL THE ONLY INVESTIGATOR, AND HE HAD ALL THE EVIDENCE INCLUDING THE DNA REPORT. (EX "9") (EX '6") (EX '10').

IN THIS CLAIM OF ACTUAL EVIDENCE, O'MARA'S TESTIMONY IS ONCE AGAIN RELEVANT, WHEN HE TESTIFIED THAT HE PROVIDED THE ALIBI DOCUMENTS TO ADA VILORIA, AND AS THE "STATE AGENCIES (EX "3","5","6","7","9","10") (DMV, MADERA COUNTY, IRS, MADERA SHERIFF, R.P.D., DNA) DOCUMENTS SHOW THAT AN EXPERIENCED DETECTIVE CERTAINLY KNEW OF ALL THESE DOCUMENTS, AND IN MOST CASES, THE RECORD SHOWS HE HAD THEM. BUT INSTEAD OF THE PROPER COURSE OF ACTION, DISMISSAL (NOT ARREST) SINCE THE DOCUMENTS SHOWED 1) PETITIONER DID NOT LIVE IN RENO UNTIL 2000, 2) PETITIONER DID NOT OWN FORD TAURUS UNTIL JUNE 5, 2000, AND 3) DNA SHOWED NO DNA TRANSFER FROM JESSICA ON PETITIONER'S PENIS, DETECTIVE BROOME FAILED TO DO ANYTHING WITH THIS EVIDENCE, AND ASSISTED THE STATE IN CONVICTING A MAN WHO IS MOST

LIKELY INNOCENT.

CERTAINLY ENOUGH EVIDENCE EXISTED, EVEN BEFORE THE PRELIMINARY HEARING, TO RAISE SERIOUS DOUBT TO WHETHER THE STATE HAD EVEN THE SLIGHTEST CHANCE OF HAVING THESE CHARGES BOUND OVER, HAD ALL THIS EVIDENCE BEEN INTRODUCED TO THE COURT, AS IT LEGALLY SHOULD HAVE BEEN. BECAUSE THERE IS NO QUESTION THAT THE STATE HAD THIS ACTUAL INNOCENCE, ALIBI EVIDENCE PRIOR TO THE PRELIMINARY HEARING, AND NEVER BROUGHT IT TO THE COURTS ATTENTION, THEY CERTAINLY VIOLATED THIS PETITIONER'S DUE PROCESS RIGHTS. SINCE ALL THIS EVIDENCE WAS 1) KNOWN AND 2) CREDIBLE, THERE IS A STRONG REASONABLE POSSIBILITY THAT AN INNOCENT MAN MAY HAVE BEEN CONVICTED. DEFINETLY ENOUGH EVIDENCE EXISTED, THAT HAD THIS BEEN PRESENTED TO THE COURTS, AT ANY STAGE, OR IF THIS WENT TO TRIAL A REASONABLE JUROR WOULD HAVE REASONABLE DOUBT AS TO GUILT. (Bennett & Imbler)

IN THE LEAST, AS MULTIPLE DUE PROCESS VIOLATIONS HAVE MORE THAN LIKELY OCCURED, THERE CAN BE NO DOUBT THAT THE EVIDENCE VIEWED IN FAVOR OF THE STATE CAN NOT OVERCOME THE SERIOUS LACK OF CONFIDENCE THIS CONVICTION SHOWS. THIS PETITIONER COULD ASK FOR ALL CHARGES IN CONNECTION TO ASHLEY TO BE DISMISSED, AS IT IS CLEAR BY THE OVERWHELMING EVIDENCE THAT THE STATE SHOULD HAVE DONE THIS BACK IN 2007, SINCE IT IS IMPOSSIBLE FOR HIM TO HAVE COMMITTED THIS CRIME, AS ALLEGED. BUT SUCH A DECISION IS IN THIS COURT'S DISCRETION.

IT IS HOWEVER REQUESTED AND FULLY WARRENTED TO ALLOW THIS PETITIONER TO WITHDRAW HIS GUILTY PLEA. AS THIS ACTUAL INNOCENCE CLAIM IS SUPPORTED BY EVIDENCE THAT SHOW ALL THE CONSTITUTIONAL ERRORS (CUMULATIVELY) "HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." (Schlup, Murray & Bousley, supra) TO ALLOW THE PETITIONER TO BE SENT BACK TO THE SECOND JUDICIAL DISTRICT COURT, WITH THE INSTRUCTIONS TO ALLOW THE WITHDRAWAL OF GUILTY PLEA, AND BE ALLOWED TO PLEAD ANEW, AND IF DEEMED PROVEN AND WARRENTED, DISMISSAL OF COUNT 1 (ALL RELATED TO ASHLEY) ON GROUD OF STRONG EVIDENCE PROVING ACTUAL INNOCENCE.

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CONCLUSION!

SINCE THE CONVICTION UNDER ATTACK IS BASED ON A GUILTY PLEA MEMORANDUM THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS REVIEWED UNDER A SIMULAR TWO PRONG TEST OF STRICKLAND, AS TO THE PREFORMANCE PRONG WHICH IS THE SAME, UNDER HILL Vs. LOCKHART, 474 US 52, 57, 106 S.CT. 366 (1985) THE PREJUDICE PRONG IS SLIGHTLY DIFFERENT: TO ESTABLISH THE ELEMENT OF PREJUDICE, THE PETITIONER MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, HE WOULD HAVE NOT PLEAD GUILTY, AND WOULD HAVE INSISTED ON GOING TO TRIAL. PETITIONER STATED SPECIFICALLY THAT AT THE EVIDENTARY HEARING. (AA 260; 284; 285)

FOR THE VARIOUS "REASONS" AND CLAIMS SET FORTH ABOVE, IN FULL LIGHT OF ALL THE EVIDENCE UNDER A 'DEFERENDAL' STANDARD OF REVIEW, THIS PETITIONER HAS SHOWN THAT HIS COUNSEL'S PREFORMANCE FELL BELOW AND OUTSIDE THE WIDE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE, AND THAT THERE IS "A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE PETITIONER WOULD HAVE INSISTED ON GOING TO TRIAL." (STRICKLAND & HILL)

MOREOVER PETITIONER HAS SHOWN BY THE RECORD, DEFENSE ATTORNEY O'MARA WAS GIVEN AMPLE OPPORTUNITY TO 1) PRESENT ANY TRIAL STRATAGY OR TACTIC, 2) STATE ON THE RECORD THAT EVIDENCE EXISTS THAT THE STATE IS AWARE OF, THAT SHOWS HIS CLIENT WAS NOT IN THE STATE FOR. BUT HE TESTIFIED TO NO STRATAGY, NO INVESTIGATION, NO SOUND REASON TO NOT INVESTIGATE, BUT INSISTS HIS CLIENT ADEMATLY INSISTED ON PLEADING GUILTY TO GET PROBATION. (AA 328) BUT AS CITED PRIOR IN CRONIC, (SUPRA) HE STILL HAD A DUTY TO SET THE RECORD STRAIGHT. A TRUE ADVOCATE MIGHT HAVE SAID SOMETHING ALONG THESE LINES AT THE ENTRANCE OF THE PLEA:

"YOUR HONOR, EVIDENCE EXISTS THAT PROVES MY CLIENT TO BE OUT OF THE STATE FOR THE ENTIRE TIME FRAME FOR COUNT 1, IN ADDITION DOCUMENTS EXIST TO SHOW MY CLIENT DID NOT EVEN OWN THE TAURUS, THE ALLEGED SCENE OF THE CRIME FOR COUNT 1, UNTIL WELL AFTER THE SAME TIME FRAME EXPIRED. I HAD BROUGHT THIS TO THE STATE'S ATTENTION, BUT

THEY HAVE CONTINUED TO ACT IN BAD FAITH. I HAVE INSISTED THAT MY CLIENT NOT TAKE THIS DEAL, BUT HE IS UNDER THE BELIEF HE WILL GET PROBATION, I CAN NOT AS HIS ADVOCATE ALLOW THIS OBSERVATION TO NOT BE MADE. THIS PLEA OF GUILTY IS BEING ENTERED AGAINST THE ADVICE OF COUNSEL. FURTHER, I WOULD ASK THE COURT TO DISMISS COUNT 1, AS THE STATE IS AWARE, MY CLIENT WAS NOT EVEN IN THE STATE OF NEVADA, AND THEREFORE NOT IN THIS COURT'S JURISDICTION, DURING THE ENTIRE WINDOW OF OFFENSE."

NOWHERE ON THE RECORD IS ANYTHING LIKE THIS STATED. NOR STRATAGY, OR TACTICS, OR ANY CLEAR EXAMPLE OF ANY "GUIDING HAND" (POWELL V. ALABAMA, 287 US 45, 69, 53 S.CT. 55) O'MARA'S WHOLESALE ABANDONMENT OF THE PETITIONER'S ALIBI DOCUMENTED EVIDENCE, FAILURE TO PREFORM EVEN A PREFUNCTORY INVESTIGATION WITHOUT AN ADEQUATE EXPLINATION CONSTITUTED A CONSTITUTIONAL DEFICIENCY IN HIS REPRESENTATION. HIS FAILURE TO 1) TAKE OBVIOUS STEPS TO GET THIS EVIDENCE ADMITTED, 2) FAILURE TO SUBJECT THE STATE'S CASE TO ANY ADVESARIAL TESTING, (CRONIC, SUPRA) 3) TO RAISE THE INSUFFICIENCY OF EVIDENCE TO CONVICT (LET ALONE EVEN TO CHARGE) KNOWING NO REASONABLE JUROR COULD FIND GUILT BEYOND A REASONABLE DOUBT. (JACKSON V. VIRGINIA, 433 US 307, 99 S.CT. 2781 (1979)) CONSTITUTES DEFICIENT ASSISTANCE OF COUNSEL. SINCE AS THE RECORD CLEARLY SHOWS, THE ALIBI DOCUMENTS WERE KNOWN BY VILORIA AND O'MARA, BUT AT NO POINT WAS THIS EVIDENCE ADMITTED PRIOR TO THE ORIGINAL PETITION FILED JULY 21, 2009.

GIVEN THE FACTS OF THIS CASE, THE STATE COURT'S DECISION TO DENY PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WITHOUT CONSIDERING THE RELEVANT ALIBI EVIDENCE, IN COMPARISON TO THE STATE'S CASE AND THE RECORD WAS ERRONEOUS, AS JACKSON WOULD BE RELEVANT. TO STATE THAT COUNSEL WAS EFFECTIVE AND THAT NO PREJUDICE WAS SHOWN, WAS AN 'UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES' (28 U.S.C. § 2254 (d)(1)) (STRICKLAND & HILL) THE DECISION TO DENY WAS UNCONSTITUTIONAL BECAUSE IT STATED THE PETITIONER FAILED TO SHOW HOW HE WAS PREJUDICED.

AS THIS COURT IS AWARE THE PETITIONER HAS THE BURDEN TO SHOW WHAT THE FAILED INVESTIGATION, AND FAILED INTRODUCTION OF THE DOCUMENTED EVIDENCE WOULD HAVE YIELDED. ONE WAY TO VIEW

THE CONDUCT OF O'MARA IN VIEW OF PREJUDICE OF HIS CLIENT, IS THIS: IS THERE A LIKELIHOOD THAT HER HONOR WOULD NOT HAVE ACCEPTED THE ENTERANCE OF THE PLEA, HAD THE COURT KNOWN OF OR BEEN AWARE OF THE EXISTANCE OF THE HIDDEN ALIBI EVIDENCE KNOWN BY BOTH O'MARA AND VILORIA? IF THERE IS A REMOTE POSSIBILITY THAT SHE WOULD NOT HAVE ACCEPTED THE PLEA, THEN PETITIONER HAS SHOWN "REASONABLE PROBABILITY" CLEAR PREJUDICE, DUE TO COUNSEL'S CONSTITUTIONAL DEFICIENCIES, BUT ALSO PREJUDICE OCCURED BY ADA VILORIA.

VILORIA SEEMS TO HAVE FORGOTTEN A BASIC FUNDAMENTAL CONSTITUTIONAL RIGHT, THAT THE STATE MAY NOT BRING CRIMINAL CHARGES AGAINST AN INDIVIDUAL UNLESS SUPPORTED BY PROBABLE CAUSE, AND ONCE CHARGES ARE INSTITUTED, MUST REVEAL TO THE COURT ANY INFORMATION WHICH NEGATES THE EXISTANCE OF PROBABLE CAUSE. BERGER V. US., 295 US 78, 79, 55 S.CT. 629 (1935) & PEOPLE V. TREVINO, 704 P.2d 719, 39 CAL. 3d 667 (1985) (EMPHASIS ADDED) "THE PROSECUTOR MUST EXECUTE THE DUTIES OF THIS REPRESENTATIVE OFFICE DILIGENTLY AND FAIRLY, AVOIDING EVEN THE APPEARANCE OF IMPROPRIETY THAT MIGHT REFLECT POORLY ON THE STATE." (TREVINO, SUPRA AT 682)

DOCUMENTED, UNDISPUTED ALIBI EVIDENCE WAS KNOWN TO THE STATE, AND THE COURT AT THE EVIDENTARY HEARING, BUT IN ITS DECISION JUDGE STEINHEIMER STATED:

> "THERE WAS AN EVIDENTARY HEARING, BUT, DESPITE HAVING A FULL AND FAIR OPPORTUNITY TO DO SO, DUNCKLEY DID NOT PRESENT ANY EVIDENCE IN SUPPORT OF THE VAST MAJORITY OF THE PLEADED CLAIMS." (AA 362).

RELYING ONLY ON TESTIMONY (AA 363, 364, 364) "IF OMITTED EVIDENCE CREATES A REASONABLE DOUBT, THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED. THIS MEANS THE OMISSION MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD." US V. AGURS, 427 US 97 AT 112, 96 S.CT. 2392 (1976) (28 U.S.C. §2254 (d)(1).). NUNES V. MUELLER, 350 F. 3d 1045 (9th CIR)

FURTHER DELAY AND THE CONTINUED MISCARRIAGE OF JUSTICE, CAN ULTIMATLY RESULT IN THE INCREASE OF PREJUDICE OF A FAIR HEARING FOR BOTH THE STATE AND PETITIONER. AS THE RELIEF

SOUGHT BY THIS PETITIONER IS IN THE LEAST TO ALLOW THE WITHDRAWAL OF THE GUILTY PLEA MEMORANDUM, ALLOWING THE PETITIONER TO PROCEED TO TRIAL, AWARDING THE STATE THE OPPORTUNITY TO PRESENT ITS "CASE".

FOR THE STATE TO RESPOND TO THIS PETITION WITH AN ANSWER OTHER THAN SOMETHING ALONG THE LINES OF:

"SINCE WE CAN NOT SAY WITH ABSOLUTE CERTAINTY THAT NO CONSTITUTIONAL VIOLATIONS HAVE RESULTED IN THESE PROCEEDINGS, AND AS THE DOCUMENTED EVIDENCE 1) CREATES A REASONABLE DOUBT THAT DID NOT PREVIOUSLY EXIST, 2) HAS GONE BEYOND DEMONSTRATING DOUBT ABOUT HIS GUILT, AND SHOWN HE IS PROBABLY INNOCENT, AND 3) BRINGS TO LIGHT THAT THERE IS NO STRONG EVIDENCE OF ACTUAL GUILT. (STATE V. McVAY, 641 P.2d 857) IT WOULD BE APPROPRIATE TO ALLOW PETITIONER THE RIGHT TO WITHDRAW HIS GUILTY PLEA, AND TO REMAND THIS CASE BACK TO THE DISTRICT COURT. FURTHER THE STATE REQUESTS THAT IT BE ALLOWED A REASONABLE AMOUNT OF TIME, NOT TO EXCEED FOURTY-FIVE (45) DAYS, TO GATHER NEW EVIDENCE TO PLACE PETITIONER AS A RESIDENT IN RENO, NEVADA DURING THE WINDOW OF OFFENSE FOR COUNT 1, OR THE STATE WILL FILE TO DISMISS WITH PREJUDICE!

WOULD BE TO CONTINUE THE FARSE OF CONSTITUTIONAL VIOLATIONS OF THE MOCKERY OF JUSTICE! AS THE CUMULATIVE ERRORS ARE CLEAR AND PREJUDICIAL ENOUGH TO REQUIRE OR IN THE LEAST WARRENT REVERSAL. (KILLIAN V. PEOPLE, 282 F.3d 1204, 1211 (9th CIR. 2002).)

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PRAYER FOR RELIEF:

ACCORDINGLY, PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT:

1) ISSUE A WRIT OF HABEAS CORPUS TO HAVE PETITIONER TO BE ABLE TO WITHDRAW HIS GUILTY PLEA, AND BE DISCHARGED FROM HIS UNCONSTITUTIONAL CONFINEMENT;

2) REVIEW THE ALIBI DOCUMENTS THAT HAVE BEEN OVERLOOKED IN ALL THE STATE COURTS EVEN THOUGH ALL THE DOCUMENTS WERE A PART OF THE ORIGINAL RECORD, REVIEWING THESE DOCUMENTS TO DETERMINE THE DECISION FOR THIS PETITION; (28 U.S.C. § 2254(d)(1).) (EX. "3-8, 10") (EX. 9 -- NOT PART OF THE ORIGINAL RECORD)

3) RENDER A DECISION AS TO THE EVIDENCE TO DETERMINE IF IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, IF A MISCARRIAGE OF JUSTICE HAS OCCURED;

4) GRANT SUCH OTHER AND FURTHER RELIEF AS IN THE INTEREST OF JUSTICE, THAT THIS HONORABLE COURT MAY DEEM TO BE APPROPRIATE.

DATED THIS 31st DAY OF May, 2013

Brendan Dunckley #1023236

BRENDAN DUNCKLEY #1023236
PETITIONER IN PRO PER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

DATED THIS 28th DAY OF OCTOBER, 2016.

Brendan Dunckley

CERTIFICATE OF SERVICE

THE UNDERSIGNED DOES HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THIS PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST STATE CLAIMS, HAS BEEN SERVED UPON THE BELOW ADDRESSES BY WAY OF U.S. MAIL ON THIS THE 28th DAY OF OCTOBER, 2016, BY PLACING THIS PETITION INTO THE HANDS OF PRISON STAFF, NDOC L.C.C. LEGAL (MAIL) LIBRARY SUPERVISOR.

WASHOE COUNTY DISTRICT ATTORNEY
CHRIS HICKS
P.O. BOX 30083
RENO, NEVADA 89520-3083

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT COURT
P.O. BOX 30083
RENO, NEVADA 89520-3083

Brendan L Dunckley

BRENDAN DUNCKLEY (#1023236)

PETITIONER IN PRO SE

AFFIRMATION IN PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEEDING PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST STATE CLAIMS, DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON, IN RELATION TO DISTRICT COURT CASE NO: CR07-1728

DATED THIS 28th DAY OF OCTOBER, 2016

Brendan L Dunckley

BRENDAN DUNCKLEY (#1023236)

PETITIONER IN PRO SE

EXHIBIT NAME	PAGES
EXHIBIT 1	
NEVADA SUPREME COURT (59458) FILE	58 PAGES
EXHIBIT 2	
LETTERS TO DISTRICT ATTORNEY GAMMICK & ADA HASTINGS	18 PAGES
EXHIBIT 3	
DEPT. OF MOTOR VEHICLE REGISTRATION DOCUMENTS	3 PAGES
EXHIBIT 4	
CULINARY INSTITUTE OF AMERICA	1 PAGE
EXHIBIT 5	
INTERNAL REVENUE RECORDS	9 PAGES
EXHIBIT 6	
MADERA COUNTY SHERIFF REPORT TO RENO POLICE DETECTIVE T. BROOME	2 PAGES
EXHIBIT 7	
SUMMONS OF FAMILY LAW & PROOF OF SERVICE	2 PAGES
EXHIBIT 8	
LETTER TO BRENDAN DUNKLEY FROM DAVID C. O'MARA	1 PAGE
EXHIBIT 9	
R.P.D. "DRAFT" 05-03427, SUPP. NO. 6.	5 PAGES
EXHIBIT 10	
DNA LAB RESULT (FAX FROM: ADA VILORIA TO: DAVID O'MARA	2 PAGES