**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

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# EXHIBIT 1

EXHIBIT 1

# SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

Electronically Filed
Jun 25 2012 11:25 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 59958

## APPELLANT BRENDAN DUNCKLEY'S OPENING BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
Second Judicial District

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Docket 59958 Document 2012-19852

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## II. STATEMENT OF ISSUES

Whether The District Court Erred In Failing To Find That The State Breached The Plea Bargain.

Whether The District Court Erred In Failing To Find That Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

Whether The District Court Erred In Denying Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

## III. STATEMENT OF THE CASE

On July 12, 2007, the State filed in The Second Judicial District Court an Information against Mr. Dunckley charging him with Count I Sexual Assault on a Child, Count II Lewdness With a Child Under the Age of Fourteen Years, Count III Statutory Sexual Seduction, and Count IV Sexual Assault. (AA 1-4.) On February 28, 2008, the State filed against Mr. Dunckley in the District Court

an Amended Information charging with Count I Lewdness with a Child Under the Age of Fourteen Years and Count II Attempted Sexual Assault. (AA 5-8.)

On March 6, 2008, Mr. Dunckley pleaded guilty to both counts in the Amended Information, pursuant to a Guilty Plea Memorandum. (AA 16-31.) District Judge Connie J. Steinheimer accepted Mr. Dunckley's guilty pleas and set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. *Id.*

On August 11, 2008, the District Judge entered Judgment against Mr. Dunckley as follows: Count I, Lewdness with a Child Under the Age of Fourteen, NRS 200.230 – imprisonment in the Nevada Department of Prisons for the maximum term of Life with the minimum parole eligibility of 10 years; Count II, Attempted Sexual Assault, NRS 193.330 and NRS 200.366 – imprisonment in the Nevada Department of Prisons for the maximum term of One Hundred Twenty Months with the minimum parole eligibility of 24 months for Count II to be served concurrently with sentence imposed in Count I with credit for four days' time served. (AA 32-33.)

Mr. Dunckely timely appealed the judgment. (AA 90-93.) On May 8, 2009, the Nevada Supreme Court entered an Order of Affirmance of the Judgment. *Id.*

On July 21, 2009, Mr. Dunckley filed a Petition for Writ of Habeas Corpus (Post Conviction). (AA 94-170.) On March 3, 2010, Mr. Dunckely filed a Motion to Withdraw Guilty Plea. (AA 187-201.) On March 23, 2010, Mr. Dunckely filed a Supplemental Petition for Writ of Habeas Corpus. (AA 219-225.) On June 3, 2011, the District Court conducted oral argument on the Motion to Withdraw Guilty Plea and an evidentiary hearing on the Petition and Supplemental Petition for Writ of Habeas Corpus. (AA 226-346.) On December 29, 2011, the District Court entered its Order Denying Motion to Withdraw Guilty Pleas and Findings of Fact, Conclusions of Law, and Judgment. (AA 353-367.)

On December 30, 2011, Mr. Dunckely filed his Notices of Appeal. (AA 348-368.)

## IV. STATEMENT OF FACTS

By April 16, 2007, the State had charged Mr. Dunckley with four sex crimes which carried life sentences and three of which were alleged to have occurred seven to nine years earlier. (AA 1-4.) At the same time, the rape and murder of Brianna Denison had received a great deal of notoriety in Reno because her body had just been found. (AA 262 & 318.) On May 7, 2007 Reno Justice Court appointed David O'Mara from the Jack Alain conflict group to represent Mr. Dunckley. (AA 320.) At the time of his appointment, Mr. O'Mara

had only handled "three to four sex cases." (AA 293.) Mr. O'Mara was paid a "flat fee" of $500.00 by the Jack Alain group for the legal work he was appointed to do for Mr. Dunckley. (AA 293 & 320.) Accordingly, Mr. O'Mara was to be paid the same $500.00 whether he worked one hour or 1,000 hours on Mr. Dunckley'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. (AA 320.) In addition, Mr. O'Mara, by his own admission, failed to even interview the victims, two of whom were alleged to have been less than 14 years old at the time of the alleged crimes. *Id.*

On their very 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 Mr. Dunckley was not even in the State of Nevada at the time most of the crimes allegedly occurred. (AA 252-254.) Mr. Dunckley provided Mr. O'Mara with divorce documentation, showing him to be in California. *Id.* Mr. Dunckley provided Mr. O'Mara with car registration documentation, showing that he did not even own the automobile that one of the crimes was alleged to have occurred in until after the alleged crime occurred. *Id.* If the alleged crime were to have occurred in Mr. Dunckley's automobile, the documentation demonstrated that the alleged victim was over the age of 14 at the time of the crime, and the statute of

limitations had long ago run. (AA 255-256.) Mr. Dunckley provided tax documentation, showing he lived in another state at the time of some of the alleged crimes. (AA 254.) Finally, Mr. Dunckley provided Mr. O'Mara with school transcripts, showing Mr. Dunckley to be living in New York State at the time of some of the alleged crimes. (AA-101.) Mr. Dunckley then asked Mr. O'Mara to conduct an investigation into his alibi evidence. (AA-253.)

One of the crimes charged that Mr. Dunckley forced one of the alleged victims to perform oral sex on him. (AA 3.) The victim of that alleged crime had a blood-alcohol content of .226% at the time of the alleged crime. (AA 67.) The victim claimed she bit Mr. Dunckley's penis forcefully four times. (AA 67 & 281.) Yet, an examination of Mr. Dunckley's penis immediately after the alleged crime showed no bit marks; and a DNA test of Mr. Dunckley's penis taken immediately after the alleged crime showed no DNA from the alleged victim. *Id.* Unfortunately for Mr. Dunckley, although Mr. O'Mara claims he did, Mr. O'Mara failed to share the DNA results with Mr. Dunckely until after Mr. Dunckely had pleaded guilty and had been sentenced. (AA 256 & 297.)

Mr. Dunckely had an alibi defense to the three older sex crimes because he was not even in the State at the time they had allegedly been committed. (AA 252-254.) In addition, the charge by the alleged victim of the forced oral sex was without merit – she had a .226% BA at the time and her allegations of

forceful bites and oral sex were contradicted by lack of bite marks and lack of her DNA. (AA 67 & 281.) Indeed, Mr. Dunckely testified that had he seen the DNA report before he pleaded to this crime, he would not have pleaded. (AA 257-258.) Mr. O'Mara had the DNA report on February 7, 2008, but Mr. Dunckely did not plead guilty to this crime until March 6, 2008. (AA 258-259.)

On February 28, 2008, the State filed against Mr. Dunckley in the District Court an Amended Information charging him with Count I Lewdness with a Child Under the Age of Fourteen Years and Count II Attempted Sexual Assault. (AA 5-8.)

On March 6, 2008, Mr. Dunckley pleaded guilty to both counts in the Amended Information. (AA 16-31.) The District Court accepted Mr. Dunckley's guilty pleas. *Id.* Both Mr. O'Mara and the State informed the District Court as follows:

> **Mr. O'Mara**: Your honor, there's been negotiations with the district attorney's office to set this out five to six months so that Mr. Dunckley can get sexual offender therapy during that period of time. And basically the D.A. is giving him every opportunity to try to qualify for probation and to do the things that will be beneficial for him to present to you at sentencing. So she's allowed for a five- to six-month extension so that he can get those type of therapy classes, and so we'd ask for that type of time before sentencing.
>
> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-27-28.) The District Court set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. (AA 29.)

Mr. Dunckely complied in all respects with his end of the plea agreement – he attended all counseling sessions and obtained the Psychosexual Evaluation/Risk Assessment which found that Mr. Dunckely "DOES NOT REPRESENT A HIGH RISK TO REOFFEND SEXUALLY...." (AA 75-89; *capitalization in original* at p. 85.) Moreover, during the many months that he was on bail, Mr. Dunckely complied with all conditions of his bail and followed the law. (AA 33-89.)

Despite her placing her agreement on the record that

> Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

and despite the fact that Mr. Dunckely had complied in all respects with the plea agreement, the conditions of his bail, and all laws, Ms. Viloria vigorously, inappropriately, and in violation of the spirit of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. (AA 44-51.) The District Court accepted Ms. Viloria's arguments and sentenced Mr. Dunckely to imprisonment in the

Nevada Department of Prisons for Life with the minimum parole eligibility of 10 years and a concurrent 120 to 24 months.

## V. SUMMARY OF ARGUMENT

The State deprived Mr. Dunckely of both due process and equal protection under the law when the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation after Mr. Dunckely had complied in all respects with the Guilty Plea Memorandum, the conditions of bail, and all laws.

Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.

The District Court Denied Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

## VI. ARGUMENT

### A. The State Breached The Plea Bargain.

#### *1. Standard of Review:*

This Court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State,* 102 Nev.

241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.*

*2. Argument:*

The State knowingly and intentionally offered Mr. Dunckley an illusory Guilty Plea Memorandum which required Mr. Dunckley to spend months obtaining a psychosexual evaluation in accordance with NRS 176.139. Indeed, during the guilty plea hearing counsel for both the defense and the State informed the District Court as follows:

> **Mr. O'Mara**: Your honor, there's been negotiations with the district attorney's office to set this out five to six months so that Mr. Dunckley can get sexual offender therapy during that period of time. And basically the D.A. is giving him every opportunity to try to qualify for probation and to do the things that will be beneficial for him to present to you at sentencing. So she's allowed for a five- to six-month extension so that he can get those type of therapy classes, and so we'd ask for that type of time before sentencing.
>
> **Ms. Viloria**:Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-27-28; *underlining added.*)

Mr. Dunckley complied in all respects with the terms of the Guilty Plea Memorandum – Mr. Dunckley attended all required classes and appointments and obtained the appropriate psychosexual evaluation in accordance with NRS

176.139 that would have allowed him probation. (AA-75-89.) Moreover, Mr. Dunckely complied in all respects with the conditions of his bail and complied with all laws. (AA 33-89.)

Yet the State deprived Mr. Dunckely of the benefit of his bargain. The State vigorously, inappropriately, and in violation of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. The State used charges it could not prove during a time of heightened anxiety because of the Brianna Dennison rape and murder investigation to con an inexperienced, ineffective, and inadequately paid attorney with a plea offer the State had no intention of fulfilling. The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation. Indeed, the State expressly stated on the record as an officer of the court:

> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.

(AA- 28.) However, the State deprived Mr. Dunckley of the benefit of probation by acting in bad faith thereby depriving Mr. Dunckley of the sole benefit to him of the Guilty Plea Memorandum. The State had no intention of allowing Mr. Dunckley probation and proved its intention to deprive Mr. Dunckley of the benefit of his bargain through its inappropriate sentencing

arguments. Mr. Dunckely's conduct for the entire time he was on bail was exemplary – he complied in all respects with the guilty plea memorandum, the conditions of his bail and all laws. Despite her representations to the District Court that "I want to see what he does between now and then," Ms. Viloria vigorously argued, not only for no probation, but argued for a sentence well in excess of that recommended by the Division of Parole and Probation in the Presentence Investigation Report. A plea agreement includes an implied obligation of good faith and fair dealing. *U.S. v. Jones,* 58 F.3$^{d}$ 688 (D.C. Cir. 1995); and the State breached the Guilty Plea Memorandum by acting in bad faith. Notwithstanding the State's bad faith, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. *Santobello v. New York*, 404 U.S. 257 (1971).

As this Court held in *Citti v. State*, 107 Nev. 89, 91, 807 P.2$^{d}$ 724, 726 (1991) (*quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2$^{d}$ 1215, 1216 (1986)).

> When the State enters a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' ... The violation of the terms or 'the spirit' of the plea bargain requires reversal."

The Due Process and Equal Protection Clauses of the Fourteenth Amendment mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady,* 312 U.S. 329, 334 (1941); *accord, Bryant v. Smith,* 102 Nev.

268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State,* 110 Nev. 1009, 879 P.2d 60 (1994).

Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation. Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

**B. Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.**

***1. Standard of Review:***

This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

***2. Argument:***

The State charged Mr. Dunckley with counts of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. To defend himself, Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, divorce records, and IRS records,

to corroborate his alibi that he was not in the State of Nevada at the time some of the crimes were alleged to have occurred and provided his attorney with alibi witnesses that could corroborate his whereabouts. Mr. Dunckley's attorney failed to seek funds to conduct an investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

In addition, there was no corroborating evidence in support of the alleged crimes of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. In fact, there was a stunning lack of evidence – there was no DNA; there were no bite marks, as the victim alleged; and there were no physical or psychological examinations conducted on any of the victims. Moreover, there was no police report for the lewdness charges, and therefore, a plausible, if not meritorious statute of limitations argument because both women were over 21 years old. To make matters worse, one of the victims had a blood alcohol content of 0.226% at the time of one of the alleged crimes. Finally, some of the crimes were alleged to have occurred years prior to the State bringing charges against Mr. Dunckley. Accordingly, the evidence in support of the alleged crimes consisted of the testimony of the alleged victims; and that testimony was highly suspect, but crucial for a conviction at trial. Mr. Dunckley's attorney failed to independently

interview any of the victims.

In *Warner v. State of Nevada,* 102 Nev. 635, 729 P.2d 1359 (1986), this Court held that trial counsel who failed to conduct a pretrial investigation and failed to interview victims in a case involving charges of lewdness with a child under the age of fourteen years and sexual assault denied his client his Sixth Amendment right to the effective assistance of counsel, left his client without a defense, and was so deficient as to render the trial result unreliable – exactly the case here.

Significantly, Mr. O'Mara failed to provide Mr. Dunckely with the DNA results until after Mr. Dunckely had pleaded guilty and had been sentenced. Mr. Dunckely discovered the DNA results in the file he received from Mr. O'Mara while in the Lovelock Correctional Center. (AA 255-256.) In comparing the time Mr. O'Mara received the plea offer from the State and the time Mr. O'Mara received the DNA results from the State, Mr. Dunckely discovered for the first time that Mr. O'Mara received the DNA results after he received the plea offer, but before Mr. Dunckely entered into the Guilty Plea Memorandum. *Id.* Mr. Dunckely believed that the DNA exonerated him from the crimes of sexual assault and attempted sexual assault. *Id.* Had Mr. Dunckely known of the DNA results, Mr. Dunckely would not have entered into the Guilty Plea Memorandum. *Id.*

For his part, Mr. O'Mara does not recall whether or not actually showed the DNA test to Mr. Dunckely, but states that he discussed the DNA results with Mr. Dunckely. (AA 297.) However, Mr. O'Mara is not credible. First, Mr. O'Mara testified that "Mr. Dunckely was moving me towards that position of trial." (AA 298.) If Mr. Dunckely was attempting to persuade Mr. O'Mara to try his case, it makes no sense whatsoever that Mr. Dunckely would decide to plead guilty after receiving evidence that he believed would exonerate him. Second, Mr. O'Mara had every incentive not to try the case – he had little experience in sexual assault cases and he was being paid a flat fee of $500.00. He had already conducted a preliminary hearing and numerous court appearances in this case. Mr. O'Mara had zero incentive to try Mr. Dunckely's case and failed to inform Mr. Dunckely of the DNA results.

Mr. Dunckley's attorney failed to conduct a pretrial investigation into the alleged underlying crimes or into any potential mitigating circumstances or defenses, failed to interview any of the victims whose credibility was crucial for a conviction, and failed to inform Mr. Dunckely of the DNA evidence. Mr. Dunckley's attorney's performance was deficient to the point that he deprived Mr. Dunckley of any defense and provided the District Court and Mr. Dunckley with a completely unreliable outcome and that deficient performance prejudiced Mr. Dunckley. Competent counsel would have sought a court-ordered

investigator, had that investigator explore with his client the facts surrounding the underlying crime and any mitigating circumstances and Mr. Dunckley's alibi defense. Competent counsel would have interviewed the witnesses. After all, that is a requirement that this Court felt so strongly about this Court embodied that requirement into published case law. *Warner, supra.* Finally, competent counsel would have provided Mr. Dunckely with the DNA evidence.

There is no reasonable trial and/or sentencing strategy designed to effectuate Mr. Dunckley's best interest that would have justified his attorney's failures in this regard. Moreover, the independent investigation would have shown Mr. Dunckley's alibi defense was true and that Mr. Dunckley was innocent. The independent investigation and interview of the victims would have also shown that the alleged victims lacked sufficient credibility because of alcohol impairment, age, and/or the length of time between the alleged crime and the trial to support a conviction. Any decision that Mr. Dunckley's attorney may have made not to conduct a pretrial investigation could not have been informed and could not have constituted a reasonable professional judgment. Had Mr. Dunckley's attorney conducted a pretrial investigation and interview of the victims, Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault.

Accordingly, this Court should allow Mr. Dunckely to withdraw his

guilty plea.

### C. The District Court Denied Probation to Mr. Dunckely Through An Ex Post Facto Application Of NRS 176A.110.

#### *1. Standard of Review:*

This Court evaluates claims of improper sentencing by the abuse of discretion standard. *Martinez v. State,* 114 Nev. 735, 961 P.2d 143 (1998)

#### *2. Argument:*

During sentencing, District Court made the following statement about Mr. Dunckley's request for probation as provided in his Guilty Plea Memorandum:

> The Court: .... I know you plead to something that allows for a lesser offense, but it does not allow for probation.

(AA 60.) The District Court deprived Mr. Dunckley of the benefit of the Guilty Plea Memorandum through an ex post facto application of NRS 176A.110. According to the terms of the Amended Information, Mr. Dunckley allegedly committed Count I, Lewdness with a Child under the Age of Fourteen Years, a violation of NRS 201.230, "on or between the 14th day of August A.D. A.D., 1998, and the 13th day of August A.D. A.D., 2000, or thereabout...." (AA 5, lines 23 – 25.)

At the time the alleged crime occurred, NRS 176A.110(1) and (3)(j) permitted probation for a person convicted of "Lewdness with a child pursuant

to NRS 201.230." At the time of sentencing, however, the Nevada Legislature had amended NRS 176A.110 to eliminate probation for a person who had committed lewdness with a child pursuant to NRS 201.230. The District Court applied the later version of NRS 176A.110 ex post facto to Mr. Dunckley. The Ex Post Facto Clause of the United States Constitution prohibits laws which make more burdensome the punishment for a crime, after its commission. The Ex Post Facto Clause prohibits, inter alia, laws which "make more burdensome the punishment for a crime, after its commission." *Collins v. Youngblood*, 497 U.S. 37, 52 (1990); *Flemming v. Oregon Board of Parole*, 998 F.2$^{d}$ 721, 723 (9$^{th}$ Cir. 1993). "[T]o fall within the ex post facto prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. 423, 430 (1987) (*quoting Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

Mr. Dunckley was deprived of both due process and equal protection under the law and subjected to improperly harsher sentencing because the District Court applied the later version of NRS 176A.110 ex post facto to Mr. Dunckley. Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

## VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request for post-conviction habeas relief and remand with instruction to allow him to withdraw his guilty plea.

## VIII. 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 this brief has been prepared in a proportionally spaced typeface in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify that pursuant to NRS 239B.030, no social security numbers are contained within this document.

DATED: June 25, 2012.

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## IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 25, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Deputy District Attorney
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I declare under penalty of perjury that the foregoing is true and correct

/s/Barbara A. Ancina
BARBARA A. ANCINA
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IN THE SUPREME COURT OF THE STATE OF NEVADA



BRENDAN DUNCKLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 59958

_____/

RESPONDENT'S ANSWERING BRIEF

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ATTORNEYS FOR RESPONDENT

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## TABLE OF AUTHORITIES



**Statutes**

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY, No. 59958

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

# RESPONDENT'S ANSWERING BRIEF

## I. Statement of the Issue

Did the district court err in denying Dunckley's post-conviction habeas claim that his counsel was ineffective for failing to develop certain defenses, which forced him to plead guilty, where Dunckley did not present evidence of his defenses at the habeas hearing, and where Dunckley's counsel testified he investigated all of Dunckley's defenses and counseled Dunckley to go to trial, but Dunckley rejected that advice and pleaded guilty?

Did the prosecutor breach the plea agreement by arguing for a prison sentence where the plea agreement provided that the State retained the right to argue for an appropriate sentence?

Does this Court's ruling on direct appeal that the district court used the correct sentencing statute bar Dunckley's argument that the district court sentenced him under the incorrect sentencing statute?

## II. Summary of the Argument

This is an appeal from the district court's order denying Dunckley's post-conviction petition for a writ of habeas corpus. Dunckley alleges that because

his counsel failed to investigate certain defenses, he lost faith in his counsel and consequently pleaded guilty to lewdness with a child under the age of 14 years and attempted sexual assault. Absent his counsel's deficient representation, Dunckley maintains he would have proceeded to trial. Dunckley also asserts the State breached the plea agreement because the State offered him the opportunity of probation through a plea agreement, but then argued against probation at the sentencing hearing. Dunckley finally argues the district court improperly applied the sentencing scheme that existed at the time of sentencing, which did not permit probation, as opposed to the sentencing statute that existed at the time Dunckley committed his crimes, which permitted probation.

At the habeas hearing, Dunckley's counsel testified he investigated all of Dunckley's defenses, and counseled Dunckley that he should go to trial. Dunckley rejected his counsel's advice, and pleaded guilty because he believed he would receive probation. The district court ruled that counsel was credible and Dunckley was not.

Dunckley failed to present the evidence at the habeas hearing he claims his counsel should have acquired and used at a trial. Thus, Dunckley failed to establish that his counsel was deficient or that Dunckley was prejudiced by the alleged deficiency. Accordingly, the district court correctly denied the petition.

Dunckley's claim that the prosecutor breached the plea agreement is barred because it could have been, but was not, raised on direct appeal, and because it is not based on an allegation that his plea was unknowing or involuntary or entered without the effective assistance of counsel. The district court also properly denied the claim because the State and Dunckley never

agreed that the State would recommend probation or not object to it.

Dunckley's argument that the district court erroneously used the sentencing statute that existed at the time of sentencing as opposed to the one that existed at the time of the offense is barred by the law of the case where this Court held on direct appeal that the district court applied the statute that existed at the time of the offense.

III. Argument

A. The District Court's Ruling That Dunckley Failed to Prove His Counsel Did Not Investigate Certain Defenses, Which Forced Dunckley to Plead Guilty, Is Supported by Substantial Evidence Where Counsel Testified He Investigated All of Dunckley's Defenses, Found Them to Be Meritorious, and Counseled Dunckley to Proceed to Trial, but Dunckley Rejected That Advice and Pleaded Guilty Because He Believed He Would Receive Probation.

1. Standard of Review

When reviewing the district court's resolution of ineffective-assistance claims, the Court gives deference to the district court's factual findings if they are supported by substantial evidence and not clearly erroneous but reviews the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

2. Discussion

To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102,

1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Here, Dunckley testified he provided his counsel with certain defenses, but that his counsel failed to investigate those defenses and told Dunckley he would be convicted if he went to trial (Appellant's Appendix, Volume 2, 252-54, 265). He also testified his counsel failed to give him a DNA report that exculpated him. *Id.* at 254-59. As a result, Dunckley lost faith in his counsel and simply pleaded guilty. *Id.* at 265.

Dunckley's counsel, on the other hand, testified he investigated all of Dunckley's defenses, believed that some of them had merit, and told Dunckley about the favorable DNA report. *Id.* at 296-98, 300-01, 306-16. Accordingly, counsel advised Dunckley that he should proceed to trial. *Id.* at 297-98. Dunckley, however, rejected counsel's advice, because he believed he would receive probation if he pleaded guilty. *Id.* at 297, 306. Counsel did not believe Dunckley would receive probation if he pleaded guilty; accordingly, he advised Dunckley not to accept the State's plea offer. *Id.* at 304.

The district court found Dunckley's counsel credible, and thus rejected Dunckley's contrary testimony. *Id.* at 363, 364. Since the district court's finding is based on substantial evidence and is not clearly wrong, this Court should affirm the district court's finding that Dunckley's counsel provided effective assistance of counsel.

Dunckley also failed to present the evidence he claims his counsel should have acquired and used at a trial. Thus, Dunckley failed to establish that his counsel was deficient or that Dunckley was prejudiced by the alleged deficiency. Accordingly, the district court correctly denied the petition for this additional reason as well.

B. The State Did Not Breach the Plea Agreement by Asking the District Court to Sentence Dunckley to Prison Where the Plea Agreement Permitted the State to Argue for an Appropriate Sentence.

1. Standard of Review

Courts generally review the failure to object to the breach of a plea bargain for plain error. *See In re Sealed Case*, 356 F.3d 313, 316-17 (C.A.D.C. 2004)("we join the substantial majority of circuits holding that when a defendant raises a claim of breached plea bargain for the first time on appeal, the reviewing court should apply a plain error standard of review consistent with Fed.R.Crim.P. 52(b).").

2. Discussion

Dunckley argues the State breached the plea agreement by arguing for a prison sentence, because the State stated at the plea hearing it did not object to continuing the sentencing hearing to permit Dunckley to obtain favorable evidence in support of an argument for probation.

Dunckley waived this issue by pleading guilty and failing to raise it on direct appeal, and it falls outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. *See* NRS 34.810(1)(a); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999).

Furthermore, there was no breach of the plea agreement. In exchange for Dunckley's guilty pleas, the State did not agree to any particular sentence. Dunckley and the State only agreed that the State would "be free to argue for

an appropriate sentence." (Appellant's Appendix, Volume 1, 12, 20).

Dunckley's argument is premised on the idea that the prosecutor "held out the hope of probation" by her comments *after* Dunckley pleaded guilty, because she stated she did not object to a continued sentencing hearing to see if Dunckley might marshal some evidence in support of probation (Opening Brief, 12). Since the prosecutor made her comment after Dunckley pleaded guilty, it could not form the basis of an agreement to plead guilty between the parties. Further, the prosecutor's comment was merely an explanation as to why she did not object to continuing the sentencing hearing out for a longer time than usual. The prosecutor never told Dunckley or the district court anything related to the entry of the guilty plea that would lead a reasonable person to believe the prosecutor would not object to probation. Dunckley fails to show clear error; thus, this Court should affirm the district court order denying the claim.

C. The District Court Did Not Mistakenly Believe Probation Was Not an Available Sentence.

Finally, Dunckley argues the district court erroneously believed probation was not an available sentencing option because the district court applied the version of NRS 176A.110 as it existed at the sentencing hearing, and the statute did not permit probation at that time. This Court addressed that issue on direct appeal, and held that "[t]he record is therefore clear that not only was the district court aware that probation was a sentencing option for Dunckley, but that it properly exercised its discretion by imposing prison terms for the offenses." *Dunckley v. State*, No. 52383 (Order of Affirmance, May 8, 2009). The Court's ruling is the law of the case and prevents further litigation of this issue. *See Hall v. State*, 91 Nev. 314, 315–16, 535 P.2d 797,

798-99 (1975).

IV. Conclusion

For the foregoing reasons, the State respectfully requests the Court to affirm the district court order denying the post-conviction petition for a writ of habeas.

DATED: August 24, 2012.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

## 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 this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font.

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DATED: August 24, 2012.

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 24, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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**SUPREME COURT OF THE STATE OF NEVADA**

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

Electronically Filed
Oct 24 2012 03:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 59958

# APPELLANT BRENDAN DUNCKLEY'S REPLY BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
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Docket 59958 Document 2012-33770

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## TABLE OF AUTHORITIES

## I. ARGUMENT

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> **Ms. Viloria**: Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-28; *underlining added.*)

Mr. Dunckley complied in all respects with the terms of the Guilty Plea Memorandum – Mr. Dunckley attended all required classes and appointments and obtained the appropriate psychosexual evaluation in accordance with NRS 176.139 that would have allowed him probation. (AA-75-89.) Moreover, Mr.

Dunckely complied in all respects with the conditions of his bail and complied with all laws. (AA 33-89.)

Yet the State deprived Mr. Dunckely of the benefit of his bargain. The State vigorously, inappropriately, and in violation of the Guilty Plea Memorandum argued for a prison sentence that exceeded even the recommendation of the Division of Parole and Probation. The State used charges it could not prove during a time of heightened anxiety because of the Brianna Dennison rape and murder investigation to con an inexperienced, ineffective, and inadequately paid attorney with a plea offer the State had no intention of fulfilling. The State offered Mr. Dunckley a Guilty Plea Memorandum which allowed him an opportunity of probation. However, the State deprived Mr. Dunckley of the benefit of probation by acting in bad faith thereby depriving Mr. Dunckley of the sole benefit to him of the Guilty Plea Memorandum. The State had no intention of allowing Mr. Dunckley probation and proved its intention to deprive Mr. Dunckley of the benefit of his bargain through its inappropriate sentencing arguments. Mr. Dunckely's conduct for the entire time he was on bail was exemplary – he complied in all respects with the guilty plea memorandum, the conditions of his bail and all laws. Despite her representations to the District Court that "I want to see what he does between now and then," Ms. Viloria vigorously argued, not only for no probation, but

argued for a sentence well in excess of that recommended by the Division of Parole and Probation in the Presentence Investigation Report. Her assertion that Mr. Dunckely constituted a risk to public safety is specious, if not frivolous. If Mr. Dunckely constituted a risk to public safety, the State would not have agreed to a many month extension of time for him to remain on bail while fulfilling his end of the plea agreement. Rather, it would have been against public policy for the State to agree to stipulate to leaving a risk to public safety on bail. *May v. Mulligan*, 36 F.Supp. 596 (W.D. Mich., 1939). Of course, Mr. Dunckely is and was no risk to public safety. A plea agreement includes an implied obligation of good faith and fair dealing. *U.S. v. Jones,* 58 F.3$^{d}$ 688 (D.C. Cir. 1995); and the State breached the Guilty Plea Memorandum by acting in bad faith. Notwithstanding the State's bad faith, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. *Santobello v. New York*, 404 U.S. 257 (1971).

As this Court held in *Citti v. State*, 107 Nev. 89, 91, 807 P.2$^{d}$ 724, 726 (1991) (*quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2$^{d}$ 1215, 1216 (1986)):

> When the State enters a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' ... The violation of the terms or 'the spirit' of the plea bargain requires reversal."

The Due Process and Equal Protection Clauses of the Fourteenth

Amendment mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady,* 312 U.S. 329, 334 (1941); *accord, Bryant v. Smith,* 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State,* 110 Nev. 1009, 879 P.2d 60 (1994). Mr. Dunckley was deprived of both due process and equal protection under the law because the State extracted an illusory Guilty Plea Memorandum from him which held out the hope of probation, and then argued in bad faith against probation.

In its Answering Brief, the State argues first that Mr. Dunckley failed to raise this issue on direct appeal and second that the State was free to argue for "any particular sentence" and therefore did not breach the plea agreement. (Answering Brief, page 5.) The State is incorrect on both counts. As this court held in *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995), this court will consider in a habeas corpus matter issues not raised on appeal where "cause for doing so is related to his ineffective assistance of counsel allegations." This issue was not raised on appeal because of the ineffective assistance of his trial/appellate counsel. Mr. Dunckely specifically raised this very issue in his original Petition for Writ of Habeas Corpus: "Counsel failed to raise any issues on appeal that Petitioner had voiced a concern for in a letter to counsel dated February 5, 2008." (AA000115-116.) Since his trial/appellate attorney was ineffective for not raising this issue on appeal which is part of the

very habeas corpus matter before this court, Mr. Dunckely is entitled to litigate this issue through his Petition for Writ of Habeas Corpus. Second, the fact that the State used the term "free to argue" did not entitle the State to entice Mr. Dunckely into an illusory plea agreement.

This court holds the State in a plea agreement to "the most meticulous standards of both promise and performance." *Van Buskirk v. State,* 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (citation omitted). The violation of the terms or the spirit of the plea bargain requires reversal. *Id.* This court should allow Mr. Dunckely to withdraw his guilty plea.

**B. Mr. Dunckley Received Ineffective Assistance Of Counsel Because His Defense Attorney (1) Failed To Conduct An Investigation Into His Alibi Defense, (2) Failed To Interview The Victims, And (3) Failed To Provide Mr. Dunckely With The DNA Results Until After Sentencing.**

***1. Standard of Review:***

This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

***2. Argument:***

In its Answering Brief, the State argues that the district court was correct in believing Mr. Dunckely's attorney and rejecting "Dunckely's contrary testimony." (Answering Brief, page 4.) The State is again incorrect. To defend

himself against the charges, Mr. Dunckley provided his attorney with physical evidence, including school enrollment and attendance documentation and DMV records, divorce records, and IRS records, to corroborate his alibi that he was not in the State of Nevada at the time some of the crimes were alleged to have occurred and provided his attorney with alibi witnesses that could corroborate his whereabouts. Mr. Dunckley's attorney failed to seek funds to conduct an investigation about the alleged underlying crimes or his alibi defense and failed to interview any witnesses in support of his alibi defense.

In addition, there was no corroborating evidence in support of the alleged crimes of Sexual Assault on a Child, Lewdness with a Child under the Age of Fourteen Years, Statutory Sexual Seduction, and Sexual Assault. In fact, there was a stunning lack of evidence – there was no DNA; there were no bite marks, as the victim alleged; and there were no physical or psychological examinations conducted of any of the victims. Moreover, there was never any police report for the lewdness charges, and therefore, a meritorious statute of limitations argument because both women were over 21 years old. NRS 171.083 (Statute of limitations tolled where police report timely filed.) To make matters worse, one of the victims had a blood alcohol content of 0.226% at the time of one of the alleged crimes. Finally, some of the crimes were alleged to have occurred years prior to the State bringing charges against Mr. Dunckley. Accordingly,

the evidence in support of the alleged crimes consisted of the testimony of the alleged victims; and that testimony was highly suspect, but crucial for a conviction at trial. Mr. Dunckley's attorney failed to independently interview any of the victims.

Given the fact that Mr. Dunckely consistently insisted that he had not committed the alleged crimes and had provided his attorney with proof that he was not even in Nevada at the time most of the alleged crimes occurred, it is impossible to believe that he would now plead guilty after the lack of DNA evidence exonerated him. Mr. Dunckely was and is actually innocent of these alleged crimes; and no reasonable juror would have found him guilty. *Schlup v. Delo*, 513 U.S. 298 (1995).

There is no reasonable trial and/or sentencing strategy designed to effectuate Mr. Dunckley's best interest that would have justified his attorney's failures in this regard. Moreover, that the independent investigation would have shown Mr. Dunckley's alibi defense was true and that Mr. Dunckley was innocent. The independent investigation and interview of the victims would have also shown that the alleged victims lacked sufficient credibility because of alcohol impairment, age, and/or the length of time between the alleged crime and the trial to support a conviction. Any decision that Mr. Dunckley's attorney may have made not to conduct a pretrial investigation could not have been

informed and could not have constituted a reasonable professional judgment. Had Mr. Dunckley's attorney conducted a pretrial investigation and interview of the victims, Mr. Dunckley would not have been convicted of Lewdness with a Child under the Age of Fourteen Years and Attempted Sexual Assault.

Accordingly, this Court should allow Mr. Dunckely to withdraw his guilty plea.

## VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request for post-conviction habeas relief and remand with instruction to allow him to withdraw his guilty plea.

## VIII. 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 this brief has been prepared in a proportionally spaced typeface in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify that pursuant to NRS 239B.030, no social security numbers are contained within this document.

DATED: October 24, 2012.

STORY LAW GROUP

By: /s/ Robert W. Story .

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## IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 24, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph R. Plater
Deputy District Attorney
Counsel for the State of Nevada.

Attorney General
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I declare under penalty of perjury that the foregoing is true and correct

/s/Barbara A. Ancina
BARBARA A. ANCINA
Story Law Group

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 59958

FILED

JAN 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

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## ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Brendan Dunckley raises multiple arguments on appeal, including claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to conduct an investigation into his alibi defense and that, but for counsel's errors, he would not have pleaded guilty. Dunckley asserts that he was not in the state at the time of the alleged acts and that he provided counsel with evidence supporting this claim. The district court denied Dunckley relief on this ground because it found credible counsel's testimony that he investigated Dunckley's alibi defense yet Dunckley insisted on pleading guilty in an attempt to receive probation. Because the district court's factual findings are supported by substantial evidence and are not clearly wrong, Dunckley failed to demonstrate that counsel's performance was deficient. In addition, because Dunckley did not demonstrate what an investigation could have revealed that would have caused him to insist on going to trial rather than plead guilty, especially considering that Dunckley informed counsel of his alibi defense, he also failed to demonstrate prejudice. Accordingly, we conclude that he is not entitled to relief on this claim. Kirksey, 112 Nev. at 994, 923 P.2d at 1111.

Second, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to fully investigate his case, including interviewing the sexual assault victims. We disagree. The district court concluded that Dunckley had not presented any evidence that the victims would have spoken to counsel or what, if anything, they would have said that would have made Dunckley to insist on going to trial rather than pleading guilty. In addition,

Dunckley did not demonstrate what an investigation would have revealed. Thus, Dunckley failed to establish that counsel's performance fell below objective standards of reasonableness and that he would have otherwise not pleaded guilty. Id.

Third, Dunckley argues that counsel was ineffective for failing to provide him with the results of a DNA test until after sentencing. Counsel testified that although he did not physically turn over the results of the DNA test to Dunckley, they did discuss it and its implications. The district court found that Dunckley's testimony to the contrary was not credible and denied his claim. Because the district court's factual findings are not clearly wrong, we conclude that Dunckley has failed to demonstrate that counsel's performance fell below objective standards of reasonableness and therefore he was not entitled to relief on this claim. Id.

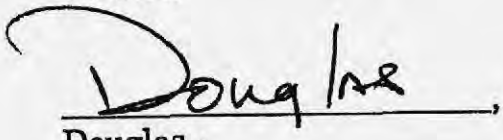
Dunckley also argues that the district court mistakenly believed that probation was not an available sentence through an ex-post-facto application of NRS 176A.110. Because we have previously considered and rejected this claim on direct appeal, Dunckley v. State, No. 52383 (Order of Affirmance, May 8, 2009), and the record demonstrates that the district court applied the correct version of the statute, we

conclude that the law of the case bars further consideration of this claim. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).[1]

Having considered Dunckley's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons



_____, J.
Douglas

_____, J.
Saitta

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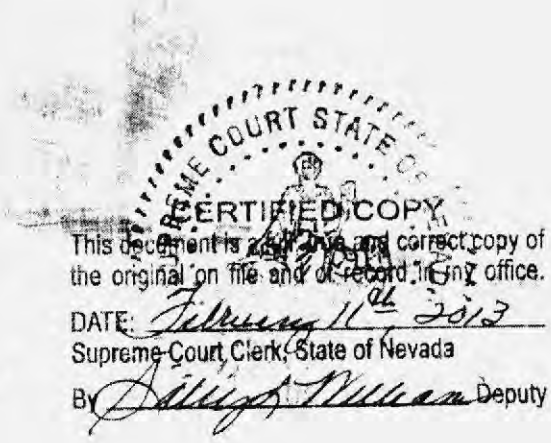
[1]Dunckley also argues that the State breached the spirit of the guilty plea agreement by allowing him to posture himself for probation and then arguing for incarceration. However, because this argument falls outside the scope of permissible claims related to a guilty plea that can be raised in a post-conviction petition, he is not entitled to relief. NRS 34.810(1)(a). To the extent that Dunckley now argues that counsel was ineffective for failing to raise this claim on direct appeal, he did not specifically raise the issue below and raises it for the first time in his reply brief. This is inappropriate, and therefore we do not consider the merits of this claim. NRAP 28(c).

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


SUPREME COURT STATE OF NEVADA
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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