

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

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THE STATE OF NEVADA, ,

PLAINTIFF,

vs.

Sup. Ct. Case No. 83867

Case No. CR07-1728

Dept. 4

BRENDAN DUNCKLEY,

DEFENDANT.

RECORD ON APPEAL

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DOCUMENTS

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DATE: JANUARY 6, 2022

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STATE OF NEVADA vs BRENDAN DUNCKLEY
DATE: JANUARY 6, 2022

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1 CODE #3340
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4 Attorney for Respondent

5 IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA
6
7 IN AND FOR THE COUNTY OF WASHOE

8 ***

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 THE STATE OF NEVADA,

Dept. No. 4

13 Respondent.
14 _____/

15 ORDER TO PRODUCE PRISONER

16 IT APPEARING to the satisfaction of the above-entitled Court that it is necessary
17 that the Petitioner above named, BRENDAN DUNCKLEY #1023236, presently
18 incarcerated in the Lovelock Correctional Center, Lovelock, Nevada, be brought before
19 the Second Judicial District Court for a post-conviction hearing in the above-entitled
20 action.

21 NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Lovelock
22 Correctional Center, Lovelock, Nevada, bring the said BRENDAN DUNCKLEY before
23 the Second Judicial District Court on April 27, 2017, at 3:00 p.m., for a post-conviction
24 hearing in the above-entitled action, and from time to time thereafter at such time and

places as may be ordered and directed by the Court for such proceedings as thereafter
may be necessary and proper in the premises.

DATED this 17 day of February, 2017.

Connie J. Steinberg
DISTRICT JUDGE

Return Of NEF**Recipients**

DIV. OF PAROLE & PROBATION - Notification received on 2017-02-21 11:46:51.96.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-02-21 11:46:51.882.

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-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

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02-21-2017:11:45:52

Clerk Accepted:

02-21-2017:11:46:25

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord to Produce Prisoner

Filed By:

Court Clerk MTrabert

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JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

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STATE OF NEVADA for STATE OF NEVADA

BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

1 CODE #1356
CHRISTOPHER J. HICKS
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3 Reno, Nevada 89520
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4 Attorney for Respondent
5

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

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 THE STATE OF NEVADA,

Dept. No. 4

13 Respondent.
14 _____/

15 CERTIFICATE OF MAILING

16 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County
17 District Attorney's Office and that on February 22, 2017, I deposited for mailing through the
18 U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of Order to
19 Produce Prisoner, filed February 21, 2017, addressed to:

20 Brendan Dunckley #1023236
Lovelock Correctional Center
21 1200 Prison Road
22 Lovelock, NV 89419

23 AFFIRMATION PURSUANT TO NRS 239B.030

24 The undersigned does hereby affirm that the preceding document does not contain the
25 social security number of any person.

26 Destinee Allen
Washoe County District Attorney's Office

Return Of NEF**Recipients**

DIV. OF PAROLE & PROBATION - Notification received on 2017-02-22 10:18:46.105.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-02-22 10:18:45.778.

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-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

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02-22-2017:08:39:01

Clerk Accepted:

02-22-2017:10:18:13

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Certificate of Mailing

Filed By:

Joseph Plater

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JOSEPH R. PLATER, III, 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.):

STATE OF NEVADA for STATE OF NEVADA
BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

CR07-1728
STATE VS. BRENDAN DUNCKLEY
District Court
Washoe County
02/23/2017 04:22 PM
1260
MCHM TCC

FILED

2017 FEB 23 PM 4:23

JACQUELINE BRYANT
CLERK OF THE COURTBY M. [Signature]
DEPUTY

1 BRENDAN DUNCKLEY #1023236
2 LOVELOCK CORRECTIONAL CENTER
3 1200 PRISON ROAD
4 LOVELOCK, NEVADA 89419
5 PETITIONER IN PRO PER
6

7 IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF
8 NEVADA IN AND FOR THE COUNTY OF WASHOE
9

10 BRENDAN DUNCKLEY,
11 PETITIONER, CASE NO: CR07-1728
12 v. DEPT. NO: 4
13 THE STATE OF NEVADA,
14 RESPONDENT. APPLICATION FOR ORDER TO
15 PRODUCE THE PRISONER
16

17 Comes Now, THE PETITIONER, BRENDAN DUNCKLEY #1023236, IN PRO PER
18 ALLEGES AS FOLLOWS:

19 1) THAT THE ABOVE PETITIONER, BRENDAN DUNCKLEY #1023236, IS PRESENTLY
20 INCARCERATED AT THE LOVELOCK CORRECTIONAL CENTER, LOVELOCK, NEVADA.
21 (LCC).

22 2) THAT THE ABOVE PETITIONER, BRENDAN DUNCKLEY IS SCHEDULED FOR A
23 POST-CONVICTION HEARING BEFORE THE SECOND JUDICIAL DISTRICT COURT ON APRIL
24 27, 2017, AT 3:00 PM.

25 WHEREFORE, APPLICANT PRAYS THAT AN ORDER BE MADE ORDERING THE APPEARANCE
26 OF SAID, BRENDAN DUNCKLEY BEFORE THE SECOND JUDICIAL DISTRICT COURT.

27 FURTHERMORE, APPLICANT PRAYS THAT THE ORDER TO PRODUCE PRISONER BE A
28 SPECIFIC ORDER OF DAY OF COURT TRANSPORT AND RETURN. NDOC POLICY A **V9. 926**

1 THE SAME DAY TRANSPORT OF A PRISONER TO COURT AND RETURN TO "CLASSIFIED
2 YARD", IF SO ORDERED BY THE JURISDICTIONAL COURT.

3 THIS APPLICANT IS RESPECTFULLY REQUESTING THIS SPECIFIC NON-TRANSFER
4 ORDER, FOR THE FOLLOWING "IMPORTANT" REASONS:

5 THE PREVIOUS APPLICATION FOR ORDER TO PRODUCE PRISONER WAS OCTOBER
6 12, 2010, AND THE EVIDENTIARY HEARING WAS RESCHEDULED THREE TIMES. IT
7 TOOK UNTIL FEBRUARY 12, 2012 FOR PETITIONER TO RETURN TO LOVELOCK
8 CORRECTIONAL CENTER (LCC). DUE TO NOT BEING CLASSIFIED FOR THE
9 TRANSFERRED YARD, PETITIONER WAITED EIGHT MONTHS IN SEGREGATED HOUSING TO
10 GO BACK TO LCC. THIS EXCESSIVE DELAY CAUSED THE PETITIONER TO LOSE HIS
11 PHASE I PRIVILEGES (AS PETITIONER CURRENTLY ENJOYS). SOME PRIVILEGES A
12 TRANSFER WOULD EFFECT ARE EMPLOYMENT, EDUCATION, YARD ACCESS, GYM
13 ACCESS, NOT TO MENTION WHAT IS VIEWED AS MOST IMPORTANT TO THIS PETITIONER,
14 THE OPPORTUNITY TO ATTEND ALL HIS RELIGIOUS SERVICES AS AN ORDAINED MINISTER
15 OF JEHOVAH'S WITNESSES. (PHASE II AND III HAVE VERY LIMITED ACCESS TO CHAPEL)

16 ON THAT SPECIFIC TOPIC OF RELIGIOUS IMPORTANCE, THE PETITIONER'S TRANSFER
17 (AS OPPOSED TO TRANSPORT) WOULD HAVE A DETRIMENTAL EFFECT ON HIS CURRENT
18 MINISTRIES; CURRENT STUDIES ON THE BIBLE HE IS CONDUCTING (TO THE BETTERMENT
19 AND REHABILITATION OF NUMEROUS MEN). IN ADDITION THE TRANSFER TO ANOTHER
20 INSTITUTION (NO MATTER HOW BRIEF) WOULD RESULT IN THE LOSS OF THIS PETITIONER'S
21 PERSONAL AND EXTENSIVE THEOCRATIC LIBRARY, THE LOSS OF WHICH COULD EFFECT
22 AND DEPRIVE HIS ENTIRE CONGREGATION OF THIS VALUABLE SPIRITUAL FOOD.

23 THIS PETITIONER UNDERSTANDS THAT HER HONOR, MAY ALSO NEED A CERTAIN
24 AMOUNT OF ADDITIONAL TIME TO DECIDE ON THIS MATTER, SO UNTIL SUCH TIME
25 THE PETITIONER WOULD REMAIN IN CUSTODY OF THE NDOC. TO BE TRANSFERRED TO
26 ANOTHER INSTITUTION WOULD ALSO EFFECT HIS FAMILY. AS PETITIONER'S PARENTS
27 HAVE RELOCATED TO LOVELOCK, NEVADA FROM NEW YORK, TO FULLY SUPPORT THEIR SON,
28 TO TRANSFER PETITIONER AND NOT ORDER A TRANSPORT FOR THE SAME DAY

1 PUTTING UNDO HARDSHIP ON THEM AS WELL. IN ADDITION IF HER HONOR DEEMS
2 IT APPROPRIATE TO GRANT THIS PETITIONER THE RELIEF HE SEEKS, IMMEDIATELY,
3 HE WOULD STILL NEED TO BE "PROCESSED OUT" OF THE NDOC, WHICH COULD
4 TAKE 24-48 HOURS. AS SUCH MR. & MRS. DUNKLEY WOULD HAVE TO TRAVEL FROM
5 LOVELOCK TO RENO (FOR THE APRIL 27TH HEARING), BACK TO LOVELOCK. THEN AGAIN FROM
6 LOVELOCK TO CARSON CITY (EITHER FOR VISITATION OR RELEASE PICK-UP).
7 WHEREAS, THE PETITIONER BEING MERELY TRANSPORTED TO RENO AND RETURNED
8 TO LCC (TO AWAIT DECISION OR RELEASE PROCESSING) WOULD NOT CAUSE ANY
9 UNDO HARDSHIP ON THE PETITIONER'S PARENTS.

10 UNFORSEEN DELAYS OCCUR, AND MATTERS ON THE COURT'S CALENDAR
11 MAY, AT TIMES, NEED TO BE RESCHEDULED. SO ALL THIS PETITIONER IS ASKING
12 IS THAT HIS DAILY ROUTINE OF MINISTERING (OVER 120+ HOURS P/MONTH), FREQUENT
13 VISITS OF HIS PARENTS (FOR BOTH EMOTIONAL AND SPIRITUAL SUPPORT TO PERSEVERE
14 AND ENDURE THIS UNFORTUNATE INJUSTICE), AND ALL THE PHASE I PRIVILEGES
15 HE HAS WORKED SO HARD TO EARN. (ESPECIALLY HIS EVENING ATTENDANCE AT HIS
16 CONGREGATIONAL MEETINGS) NOT TO BE AFFECTED, THIS PETITIONER, THEREFORE
17 HUMBL Y PRAYS:

18 THEREFORE, THIS COURT HEREBY ORDERS AND DIRECTS THAT THE WARDEN
19 OF LOVELOCK CORRECTIONAL CENTER, LOVELOCK, NEVADA, OFFENDER MANAGEMENT
20 DIVISION (OMD), NDOC TRANSPORTATION OFFICERS FOR LOVELOCK CORRECTIONAL
21 CENTER, TRANSPORT PRISONER, BRENDAN DUNKLEY #1023236 FROM THE LOVELOCK
22 CORRECTIONAL CENTER, LOVELOCK, NEVADA, DIRECTLY TO THIS SECOND JUDICIAL
23 DISTRICT COURT, ON APRIL 27, 2017, BY 3:00 PM, AND UPON THE CONCLUSION OF
24 ABOVE REFERENCED POST-CONVICTION HEARING, RETURN PRISONER TO THE WARDEN
25 OF LOVELOCK CORRECTIONAL CENTER, LOVELOCK, NEVADA. (PENDING ANY ORDER /OR/
26 DENIAL OF RELIEF SOUGHT.)

27 //

28 //

1 AS THE RESPONDENT HAS FILED AN APPLICATION FOR ORDER TO PRODUCE
 2 PRISONER ON FEBRUARY 16, 2017, THIS PETITIONER PRAYS THAT THIS INSTANT
 3 APPLICATION TAKE PRECEDENT AND BECOME THE ENACTED ORDER OF THIS
 4 HONORABLE COURT

5 6 AFFIRMATION

7 THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEEDING DOCUMENT DOES NOT
 8 CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

9 **DATE:** FEBRUARY 20, 2017

10 

11 BRENDAN DUNCKLEY # 1023236

12 PETITIONER IN PRO PER

13 14 CERTIFICATE OF SERVICE

15 PURSUANT TO NRCP 5 (b) THE UNDERSIGNED DOES HEREBY CERTIFY, BEING THE
 16 PETITIONER /APPLICANT, THAT A TRUE COPY OF THE FOREGOING DOCUMENT WAS DEPOSITED
 17 FOR MAILING THROUGH U.S. MAIL SERVICE, BY MEANS OF NDOC LAW LIBRARY PERSONEL,
 18 TO THE FOLLOWING ADDRESSES:

19 JOSEPH R. PLATER

CLERK OF THE COURT

20 WASHOE COUNTY DISTRICT ATTORNEY

SECOND JUDICIAL DISTRICT

21 APPELLATE DIVISION

% DEPT 4

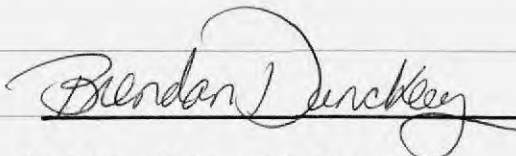
22 P.O. Box 11130

P.O. Box 11130

23 RENO, NEVADA 89520

RENO, NEVADA 89520

24
25 **DATE:** FEBRUARY 20, 2017

26 

27 BRENDAN DUNCKLEY #1023236

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P. O. Box 11130
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5

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

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 THE STATE OF NEVADA, ROBERT
LEGRAND,

Dept. No. 4

13 Respondent.
14 _____/

15 MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

16 On August 5, 2008, this Court convicted petitioner, pursuant to his guilty plea, of
17 lewdness with a child under the age of fourteen years and attempted sexual assault. On May 8,
18 2009, the Nevada Supreme Court affirmed the judgment of conviction on direct appeal. On
19 July 8, 2009, petitioner filed a motion in this Court to modify his sentence, arguing he was
20 innocent. This Court denied the motion, and on September 9, 2010, the Nevada Supreme
21 Court affirmed this Court's order. On July 21, 2009, petitioner filed a post-conviction petition
22 for a writ of habeas corpus. The Court denied the petition after an evidentiary hearing, and on
23 January 16, 2013, the Nevada Supreme Court affirmed this Court's order denying habeas relief.
24 On November 7, 2016, petitioner filed a second post-conviction petition for a writ of habeas
25 corpus. The State moves this Court to dismiss the petition because it is untimely and
26 successive.

1 A petitioner must file a post-conviction petition for a writ of habeas corpus within one
 2 year after entry of the judgment of conviction, or one year after the Supreme Court issues its
 3 remittitur, if an appeal is taken. NRS 34.726(1).¹ An untimely or successive petition is
 4 procedurally barred and must be dismissed absent a demonstration of good cause for the delay
 5 and undue prejudice. *Id.*; NRS 34.810(1)(b)(2)²; *State v. Haberstroh*, 119 Nev. 173, 180, 69

6
 7 ¹NRS 34.726 provides, in part, that

8 1. Unless there is good cause shown for delay, a petition that challenges the validity of a
 9 judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if
 10 an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its
 remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner
 demonstrates to the satisfaction of the court:

- 11 (a) That the delay is not the fault of the petitioner; and
- 12 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

13 ²NRS 34.810 provides for dismissal based on waiver and abusive filing of successive
 petitions. It states, in relevant part:

14 1. The court shall dismiss a petition if the court determines that:

15

16 (b) The petitioner's conviction was the result of a trial and the grounds for the petition
 could have been:

- 17 (1) Presented to the trial court;
- 18 (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or
 post-conviction relief; or
- 19 (3) Raised in any other proceeding that the petitioner has taken to secure relief
 from his conviction and sentence, unless the court finds both cause for the failure
 to present the grounds and actual prejudice to the petitioner.

20 2. A second or successive petition must be dismissed if the judge or justice determines that it
 fails to allege new or different grounds for relief and that the prior determination was on the
 merits or, if new and different grounds are alleged, the judge or justice finds that the failure of
 21 the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

22 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving
 specific facts that demonstrate:

- 23 (a) Good cause for the petitioner's failure to present the claim or for presenting the
 claim again; and
- 24 (b) Actual prejudice to the petitioner.

25 NRS 34.726(1) and NRS 34.810(3) both require a petitioner to demonstrate a valid basis
 26 exists to excuse the procedural bars. Otherwise, the district court must dismiss the petition
 without an evidentiary hearing. See NRS 34.745(4) (providing for summary dismissal of

P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction petitions for writs of habeas corpus is mandatory); *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519, 530 (2001) (the Nevada Legislature “never intended for petitioners to have multiple opportunities to obtain post-conviction relief absent extraordinary circumstances.”).

The statement of good cause must appear on the face of the petition. NRS 34.735 (requiring the petitioner to state reasons for filing an untimely petition in the petition itself). Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition. *See Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials,’ made compliance impracticable.’ ” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (*quoting Murray*, 477 U.S. at 488 (1986) (citations omitted)).

“[A]ctual prejudice” requires a showing “ ‘not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.’ ” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (*quoting United States v. Frady*, 456 U.S. 152, 170 (1982)). A claim of ineffective assistance of

///

///

successive petitions); NRS 34.770(1)-(2) (providing that where a judge determines upon review of the pleadings and supporting documents “that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing”); *Dickerson v. State*, 114 Nev. 1084, 1088, 967 P.2d 1132, 1134 (1998) (discussing dismissal for failure to allege sufficient basis to overcome time bar at NRS 34.726); *Bejarano v. Warden*, 112 Nev. 1466, 1471, 929 P.2d 922, 925–26 (1996) (discussing dismissal for failure to allege sufficient basis to overcome procedural bars at NRS 34.810).

1 post-conviction counsel may provide good cause for filing a successive petition, *Crump v.*
 2 *Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997); *see also McKague v. Warden*, 112
 3 Nev. 159, 164–65 & n. 5, 912 P.2d 255, 258 & n. 5 (1996), but such a claim is still subject to
 4 other procedural bars, including timeliness under NRS 34.726, *State v. Dist. Ct. (Riker)*, 121
 5 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); *see also Hathaway v. State*, 119 Nev. 248, 252–53,
 6 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective
 7 assistance of counsel claim itself must not be procedurally defaulted”).

8 The failure to show good cause may be excused where the prejudice from a failure to
 9 consider the claim amounts to a “fundamental miscarriage of justice.” *Mazzan v. Warden*, 112
 10 Nev. 838, 842, 921 P.2d 920, 922 (1996); *Hogan*, 109 Nev. at 959, 860 P.2d at 715–16; cf. NRS
 11 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is
 12 actually innocent of the crime or is ineligible for the death penalty. *See Mazzan*, 112 Nev. at
 13 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16. A claim of
 14 actual innocence requires a petitioner to show that it is more likely than not that no reasonable
 15 juror would have convicted him absent a constitutional violation. *Schlup v. Delo*, 513 U.S. 298,
 16 327 (1995) (*quoting Carrier*, 477 U.S. at 496). “‘[A]ctual innocence’ means factual innocence,
 17 not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623–24 (1998) (*citing*
 18 *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)); *see also, Rozzelle v. Sec’y, Florida Dep’t of*
 19 *Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012) (explaining that the actual innocence exception
 20 contemplates the “extremely rare” cases where the State convicted an innocent man, not “run
 21 of the mill” cases where the petitioner argues that he is guilty of a lesser offense than that for
 22 which he was convicted). “‘To be credible,’ a claim of actual innocence must be based on
 23 reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)
 24 (*quoting Schulp*, 513 U.S. at 324 (1995)).

25 Here, petitioner filed his second post-conviction habeas petition on November 7, 2016.
 26 The Nevada Supreme Court affirmed the judgment of conviction on May 8, 2009, and issued

1 the remittitur on June 2, 2009. Thus, the present petition is untimely and successive. It is
2 barred absent a demonstration of good cause and prejudice or actual innocence to overcome
3 the procedural bars. NRS 34.726(1); NRS 34.810(1)(b)(2).

4 Petitioner claims he is actually innocent and provides exhibits that purportedly show he
5 was in other cities when he committed his crimes.³ The exhibits, however, do not show
6 petitioner was never in Reno during the time the State alleged he committed his crimes,
7 although they do tend to show he may have also been in other places during the time frame. In
8 other words, petitioner may have been in other cities and in Reno during the relevant time
9 alleged in the information. In short, petitioner's exhibits do not show he is actually innocent.
10 Nor is the alibi evidence new. According to petitioner's allegations in his petition (pp.28-29),
11 both his lawyer and the prosecutor knew of the evidence. And petitioner pursued his alibi
12 defense at his first habeas proceeding. There, as the Nevada Supreme Court noted, "[t]he
13 district court denied Dunckley relief on this ground because it found credible counsel's
14 testimony that he investigated Dunckley's alibi defense yet Dunckley insisted on pleading guilty
15 in an attempt to receive probation." *Dunckley v. State*, Docket No. 59958 (Order of Affirmance,
16 January 16, 2013). Because this Court's findings were supported by substantial evidence, the
17 Nevada Supreme Court found Dunckley had failed to demonstrate his counsel's performance
18 was deficient. *Id.* Thus, Dunckley failed to prove that even if he had an alibi defense, he would
19 not have pleaded guilty and would have insisted on proceeding to trial. *See Hill v. Lockhart*,
20 474 U.S. 52, 58-59 (1985) (To state a claim of ineffective assistance of counsel sufficient to
21 invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that
22 his counsel's performance was deficient in that it fell below an objective standard of
23

24 ³Petitioner appears to assert actual innocence more as a substantive claim for habeas
25 relief rather than a procedural claim to overcome the procedural bars. *See Berry v. State*, 131
26 Nev. Adv. Op. 96, 363 P.3d 1148, 1154-55 (2015) (explaining that actual innocence provides a
gateway to have procedurally defaulted claims heard on the merits). The State addresses the
actual innocence claim procedurally and substantively.

1 reasonableness, and that there is a reasonable probability that, but for counsel's errors,
2 petitioner would not have pleaded guilty and would have insisted on going to trial); *Kirksey v.*
3 *State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The Nevada Supreme Court's ruling is law
4 of the case and may not be litigated again, absent new and unforeseen evidence of actual
5 innocence. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first
6 appeal is the law of the case on all subsequent appeals in which the facts are substantially the
7 same." (quoting *Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969))). Thus, petitioner's
8 actual innocence claim, as a substantive claim, fails to show he is entitled to relief. As a
9 procedural claim it has no legal force since this Court and the Nevada Supreme Court
10 determined it had no effect on petitioner's plea.

11 Petitioner also asserts he is actually innocent because DNA results show the absence of
12 his DNA. This, however, is not evidence of actual innocence. There are any number of reasons
13 why there was no DNA evidence. The absence of DNA does not show petitioner did not assault
14 the victim. It is also not new evidence. Petitioner litigated the effect of the DNA results on his
15 guilty plea, this Court rejected the claim, and the Nevada Supreme Court affirmed this Court's
16 ruling. *Dunkley v. State, supra*. Thus, the DNA evidence is irrelevant both as a substantive
17 claim and as a procedural device to overcome defaulted claims, where petitioner decided to
18 plead guilty regardless of the results of the DNA testing.

19 The State also moves to dismiss the petition because "[a] period exceeding 5 years
20 between the filing of a . . . decision on direct appeal of a judgment of conviction and the filing of
21 a petition challenging the validity of a judgment of conviction creates a rebuttable presumption
22 of prejudice to the State." NRS 34.800(2).

23 For the foregoing reasons, the Court should dismiss the post-conviction petition for a
24 writ of habeas corpus.

25 / / /

26 / / /

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: March 1, 2017

CHRISTOPHER J. HICKS
District Attorney

By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on March 1, 2017, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Brendan Dunckley #1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ DESTINEE ALLEN
DESTINEE ALLEN

Return Of NEF**Recipients**

DIV. OF PAROLE & PROBATION - Notification received on 2017-03-01 09:51:03.382.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-03-01 09:51:02.15.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

03-01-2017:08:46:16

Clerk Accepted:

03-01-2017:09:50:07

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Mtn to Dismiss Pet

Filed By:

Joseph Plater

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-

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

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JOSEPH R. PLATER, III, 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.):

STATE OF NEVADA for STATE OF NEVADA
BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

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JACQUELINE BRYANT
CLERK OF THE COURT
BY M. Cholet
DEPUTY

1 BRENDAN DUNCKLEY #1023236

2 LOVELOCK CORRECTIONAL CENTER

3 1200 PRISON ROAD

4 LOVELOCK, NEVADA 89419

5 PETITIONER IN PRO SE

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
8 NEVADA, IN AND FOR THE COUNTY OF WASHOE

9
10 BRENDAN DUNCKLEY,

11 PETITIONER,

CASE NO: CRO7-1728

12 V.

DEPT. NO:

4

13 THE STATE OF NEVADA,

14 RESPONDENT,

RESPONSE TO STATE'S MOTION TO DISMISS

15
16 THE STATE FILED A MOTION TO DISMISS ON MARCH 1, 2017. THE FOLLOWING IS
17 THE PETITIONER'S RESPONSE TO SAID MOTION.

18 SETTING ASIDE THE OBVIOUS ISSUE FOR THE MOMENT THAT THE MOTION TO DISMISS
19 ACTUALLY ARGUES THE MERITS OF THE PETITION AND IS THEREFORE A "REPLY BRIEF"
20 MASKED AS A 'MOTION TO DISMISS', AND AS SUCH ITS SUBMISSION IS FIFTY-FOUR (54) DAYS
21 PAST THIS COURT'S ORDERED FORTY-FIVE (45) DAY LIMIT. THAT WOULD BE THE PROPER
22 USE OF "UNTIMELY."

23 NOW THERE SEEMS TO BE A RUNNING THREAD ON HOW TO PRESENT INFORMATION
24 TO THIS COURT ON BEHALF OF THE WASHOE COUNTY DISTRICT ATTORNEY OFFICE, TO ONLY
25 GIVE PARTIAL INFORMATION PERTAINENT TO BENEFITTING THEIR AGENDA, AND TO
26 CONTINUALLY WITHHOLD, MISREPRESENT, IGNORE, OR 'FORGET' TO PRESENT ANY TYPE
27 OF EVIDENCE, DOCUMENTATION, RECORD, TEST RESULT, REPORT THAT COULD POSSIBLY DAMAGE
28 THEIR CASE. AN EXCELLENT EXAMPLE IS THIS MOTION TO DISMISS, FILED AS V9. 940

1 TO CAST A FAULTY LIGHT IN THE EYES OF THE COURT. TO PRESENT 'ARGUMENTS' THAT
 2 ARE FULLY CONTRARY TO THE ACTUAL RECORD, EXHIBITS AND EVIDENCE. ONE OF
 3 THE ARGUMENTS IS THAT THE PETITIONER'S CASE HAS BEEN INACTIVE SINCE JANU-
 4 ARY 16, 2013 (Pg.1;23) OR IS IT SINCE JUNE 2, 2009 (Pg.5;1) BUT CERTAINLY 'A PERIOD
 5 EXCEEDING 5 YEARS...' (Pg.6;19). INTERESTING THAT THERE IS NO MENTION OF THE FACTS
 6 THAT 1] THE PETITIONER'S CASE HAS BEEN CONTINUOUSLY 'ACTIVE' SINCE 2013 IT HAS
 7 BEEN IN THE U.S. DISTRICT COURT. 2] WAS GRANTED A STAY AND ABAYANCE BY THE U.S.
 8 DISTRICT COURT ON SEPTEMBER 22, 2016, INSTRUCTING THE PETITIONER TO RETURN TO
 9 THE STATE COURTS TO EXHAUST HIS UNEXHAUSTED CLAIMS. ERGO THE FULL AND PROPER
 10 TITLE OF THE PETITION (PETITION FOR WRIT OF HABEAS CORPUS TO EXHAUST STATE CLAIMS).
 11 SEPTEMBER 22, 2016 ORDER WAS ATTACHED TO NOVEMBER 7, 2016 FILING WITH THIS
 12 COURT. 3] AN ACTUAL REVIEW OF THE "TOLLING TIME" OF 1 YEAR AS DEFINED BY NRS
 13 34.726 IN THIS PETITIONER'S CASE WILL SHOW THAT HE HAS NOT EXCEEDED THE 1 YEAR
 14 OF 'INACTIVITY', PRIOR TO THE PETITIONER'S FILING WITH THE FEDERAL COURTS. SINCE
 15 2009 THE PETITIONER HAS BEEN CONTINUOUSLY FIGHTING TO CORRECT THE INJUSTICES
 16 PERPETRATED UPON HIM BY THE UNETHICAL, UNCONSTITUTIONAL BEHAVIOUR AND CONDUCT
 17 OF THE PROSECUTION. EVERYTIME THE STATE FILES A MOTION, NO MATTER HOW
 18 DESPERATE AND FRIVOLOUS THEY MAY BE, THIS PETITIONER HAS ALWAYS RESPONDED IN
 19 THE PROCEDURALLY ALLOTTED TIME FRAME.

20 IN ALL THE STATE'S MOTION TO DISMISS SHOULD BE STRICKEN AS IT IS
 21 CLEARLY A 'REPLY BRIEF' DISGUISED AS A MOTION TO DISMISS. IF THE STATE WANTED TO RAISE
 22 THESE PREPOSTEROUS ARGUMENTS, THEN THE PROPER TIME WAS BEFORE THE ORDERED 45
 23 DAYS EXPIRED. THIS COURT HAS SEEN IT FITTING TO ORDER AN EVIDENTIARY HEARING
 24 FOR APRIL 27, 2017, AND IT IS AT THAT HEARING THE STATE CAN MAKE THESE ABSURD
 25 ARGUMENTS. (IF HER HONOR DOES NOT CHOSE TO DENY THIS MOTION EARLIER)

26 BUT ALAS, PROCEDURE DEMANDS THAT THE PETITIONER RESPOND TO THE STATE'S MOTION
 27 TO DISMISS, LESS HIS SILENCE BE GROUNDS TO GRANT SAID MOTION. TO OVERCOME A
 28 MOTION TO DISMISS THE NON-MOVING PARTY (PETITIONER) MUST SHOW THAT 'THAT V9. 941'S'

OR MATERIAL FACTS AND ISSUES STILL EXIST AND NEED TO BE PRESENTED FURTHER TO THE COURT (TRIER OF FACTS). SO BECAUSE THIS IS THE LINE OF ARGUMENT THAT THIS 'NEW' DA'S OFFICE WISHED TO BASE THEIR STRATEGY ON, LET US 'EXAMINE' THE STATE'S STAND ON THE DNA EVIDENCE.

"PETITIONER ALSO ASSERTS THAT HE IS ACTUALLY INNOCENT BECAUSE DNA RESULTS SHOW THE ABSENCE OF HIS DNA. THIS, HOWEVER, IS NOT EVIDENCE OF ACTUAL INNOCENCE. THERE ARE ANY NUMBER OF REASONS WHY THERE IS NO DNA EVIDENCE. THE ABSENCE OF DNA DOES NOT SHOW PETITIONER DID NOT ASSAULT THE VICTIM" (Pg 6; 11-14).

BEFORE WE 'EXAMINE' THIS ARGUMENT, IT WOULD BE PROPER TO REVIEW EXACTLY WHAT THE ALLEGATION WAS AND COMPARE THAT SUMMATION WITH THE ACTUAL EVIDENCE AND RECORD. - JESSICA H. (THE ALLEGED VICTIM) STATED THAT AN UNKNOWN ASSAILANT CONFRONTED HER AND DEMANDED THAT SHE PERFORM ORAL (FELATIO) ON HIM. SHE PROCEEDED TO BITE HER ASSAILANT'S ERECT PENIS FOUR TIMES, HARD ENOUGH TO DRAW BLOOD FROM HIM, CAUSING HIM TO LOSE HIS ERECTION WHILE SHE CONTINUED BITING HIM. - THE ACTUAL RECORD OF THE NIGHT IN QUESTION FROM THE ORIGINAL R.P.D. REPORT (AND TRANSCRIPTS OF OFFICER'S RECORDINGS) CONFIRM:

- 1) THE PETITIONER WAS THE PERSON WHO CONTACTED THE RENO POLICE DEPARTMENT (R.P.D.)
- 2) R.P.D. ARRIVED ON SCENE IN ABOUT FOUR MINUTES; 3) PETITIONER WAS BEING WATCHED BY A DOZEN WITNESSES; 4) UPON R.P.D.'S ARRIVAL THE PETITIONER ACCOMPANIED TWO OFFICERS TO A RESTROOM, TO CONSENT TO BOTH A VISUAL INSPECTION AND A DNA SWAB OF HIS (PETITIONER'S) PENIS. (THE DNA TEST WAS CONDUCTED AND SAMPLE WAS COLLECTED WITHIN TEN MINUTES OF THE ALLEGED ATTACK). THE R.P.D. REPORT OF THAT NIGHT STATES NO VISIBLE MARKS, OR LACERATIONS UPON INSPECTION OF DUNCKLEY'S PENIS, SHAFT, HEAD OR BASE. SO NO BITE MARKS, ADD TO THE FACT THAT THE DNA TEST RESULT STATED: 'NO FOREIGN DNA TO SOURCE, BRENDAN DUNCKLEY, OBTAINED FROM GENITAL SWABS.' WHEN THE STATE WROTE 'THE ABSENCE OF HIS DNA' IT WAS MISREPRESENTING THE EVIDENCE TO THE COURT. IT WAS IN FACT THE ABSENCE OF HER DNA, WHICH IS IN FACT EXTREMELY RELEVANT, AND CERTAINLY THE COURT

1 SHOULD BE FINALLY ALLOWED TO DETERMINE WHAT IS RELEVANT AND WHAT IS
 2 NOT. BUT WHEN IT COMES TO HOW TO INTERPRET THE RELEVANCE, (IMPORTANCE OF
 3 THE DNA TEST RESULTS, WHICH THE STATE CONTINUOUSLY ATTEMPTS TO DISTANCE ITSELF FROM):
 4 "WHEN THE DNA FROM THE TRACE EVIDENCE CLEARLY DOES NOT MATCH THE DNA
 5 SAMPLES FROM THE SUSPECT, THE DNA ANALYSIS DEMONSTRATES THAT THE SUSPECT'S
 6 DNA IS NOT IN THE FORENSIC SAMPLE, TYPICALLY, PROOF TENDING TO SHOW THAT THE
 7 DEFENDANT IS THE SOURCE INCRIMINATES THE DEFENDANT, WHILE PROOF THAT SOME
 8 ONE ELSE IS THE SOURCE EXCULPATES THE DEFENDANT." (REFERENCE MANUAL ON SCIENTIFIC
 9 EVIDENCE, SECOND EDITION, PAGE 516, FEDERAL JUDICIAL CENTER, 2000)

10 NOW, GOING FURTHER, THE PROSECUTION REPEATEDLY STATES THAT THIS AND ALL
 11 THE PRESENTED EVIDENCE IS NOT "NEW EVIDENCE". AS STATED IN THE PETITION LEE V
 12 V. LAMBERT, 607 F.SUPP. 2d 1209, 2009 US LEXIS 25445, STATES: "UNDER THE GATEWAY
 13 STANDARD OF ACTUAL INNOCENCE, AS A THRESHOLD MATTER, A HABEAS PETITIONER
 14 MUST SUPPORT HIS ALLEGATIONS OF CONSTITUTIONAL ERROR WITH NEW EVIDENCE,
 15 WHETHER IT BE EXCULPATORY SCIENTIFIC EVIDENCE, TRUSTWORTHY EYEWITNESSES'
 16 ACCOUNTS, OR CRITICAL PHYSICAL EVIDENCE - THAT WAS NOT PRESENTED AT TRIAL.
 17 "NEW EVIDENCE" DOES NOT NECESSARILY MEAN NEWLY DISCOVERED EVIDENCE.
 18 ALSO INCLUDED IS EVIDENCE AVAILABLE BUT NOT PRESENTED AT TRIAL, OR
 19 IMPROPERLY EXCLUDED AT TRIAL. WHETHER AN ITEM CONSTITUTES RELIABLE NEW
 20 EVIDENCE, MUST BE VIEWED IN THE CONTEXT OF THE EVIDENCE AS A WHOLE."

21 THERE IS ABSOLUTELY NO DISPUTING THE FACT THAT THIS PETITIONER DID IN FACT
 22 ARGUE (IN THE WRIT) THE EXISTENCE OF THIS 'ALIBI EVIDENCE', AND HIS COUNSEL DID
 23 MENTION THESE DOCUMENTS EXISTENCE ON THE RECORD AT THE PREVIOUS EVIDENTIARY
 24 HEARING. IT CAN EVEN BE AGREED BY ALL PARTIES THAT ORIGINAL DEFENSE COUNSEL
 25 O'MARA ADMITTED TO 1) HAVING ALL THIS INFORMATION; 2) HANDING OVER ALL THE EVIDEN-
 26 CE (ALIBI) TO ADA VILORIA, AND, 3) NO ONE EVER ACTUALLY PRESENTED THE EVIDENCE TO HER
 27 HONOR, AS THE TRIER OF FACT, SHE HAD A CONSTITUTIONAL, ETHICAL RIGHT TO BE FULLY INFORMED
 28 OF ALL THE MATERIAL FACTS KNOWN BY THE OFFICERS OF THE COURT, BEFORE SHE DECIDED TO

1 ACCEPT A GUILTY PLEA, TO CHARGES (THAT SHE WAS LED TO BELIEVE) WERE FULLY
 2 SUPPORTED BY A FACTUAL BASIS, THAT ALL THE ELEMENTS OF THE OFFENSES WERE
 3 PRESENT. AFTERALL, HER HONOR IS THE LAST LINE OF DEFENSE TO ENSURE THAT THE
 4 DEFENDANT'S CONSTITUTIONAL RIGHTS ARE PROTECTED. STATE V. McVAY, 641 P.2d 857,
 5 131 ARIZ 369 (ARIZ. 1982): "FOR THE PURPOSE OF RULES REQUIRING THAT THERE BE A FACTUAL
 6 BASIS FOR A GUILTY PLEA, ALTHOUGH THE FACTS NEED NOT SHOW FACTS BEYOND A
 7 REASONABLE DOUBT, THERE MUST BE STRONG EVIDENCE OF ACTUAL GUILT." AND IN
 8 STATE V. REED, 809 P.2d 553: "FACTUAL BASIS EXISTS FOR A PLEA, WHERE PROSECUTORS PRE-
 9 SENT EVIDENCE TO THE COURT, AND THE EVIDENCE SHOWS THAT ALL THE ELEMENTS OF
 10 THE CRIME ARE PRESENT."

11 WE COULD ALSO USE PEOPLE V. TREVINO, 704 P.2d 719, 217 CAL. RPTR. 652, 39 C.3d 667:
 12 "PROSECUTORS MAY NOT BRING CRIMINAL CHARGES AGAINST AN INDIVIDUAL UNLESS SUPPORTED
 13 BY PROBABLE CAUSE, AND ONCE CHARGES ARE INSTITUTED, MUST REVEAL TO THE COURT ANY
 14 INFORMATION WHICH NEGATES THE EXISTANCE OF PROBABLE CAUSE." THE ABSENCE OF THE
 15 ALLEGED VICTIM'S DNA IS EXTREMELY RELEVANT, AND AS SUCH SHOULD HAVE BEEN
 16 INTRODUCED TO THE JUSTICE COURT AT THE PRELIMINARY HEARING (AT LEAST) BUT CERTAINLY
 17 SHOULD HAVE BEEN BROUGHT TO HER HONOR'S ATTENTION. ESPECIALLY IN COMPARISON
 18 OF THE DNA TEST RESULT (COLLECTED WITHIN 10 MINUTES OF "ASSAULT") AND HOW ADA
 19 NILORIA 'PRESENTED' THE CASE AT THE CHANGE OF PLEA HEARING ON MARCH 6, 2008.
 20 AND AT SENTENCING ON AUGUST 5, 2008, HOW THE TEST RESULT FULLY EXONER-
 21 ATED THE DEFENDANT.

22 THAT AND ALL THE OTHER EVIDENCE THAT NEGATED (OR SEVERLY WEAKENED) THE
 23 "PROBABLE CAUSE" MUST FINALLY COME TO LIGHT AND BE PRESENTED TO THIS COURT ON THE
 24 RECORD. WHICH IS EXACTLY WHAT THE EVIDENTIARY HEARING IS FOR. AT WHICH TIME THIS
 25 PETITIONER CAN AND WILL SHOW HOW ALL THIS 'IRRELEVANT' EVIDENCE IN FACT IS NOT
 26 ONLY RELEVANT, BUT SHOWS A REASONABLE DOUBT IS ESTABLISHED, AND THAT THIS
 27 PETITION WILL SYSTEMATICALLY DISMANTLE THE STATE'S "ELEMENTS" OF THE
 28 CHARGED OFFENSES.

1 FOR EXAMPLE AT THE EVIDENTIARY HEARING THE SUMMATION OF COUNT 1
 2 IS THAT - ASHLEY V. CLAIMS THAT SHE SPENT THE NIGHT AT THE PETITIONER'S
 3 HOUSE (ON PLUMAS) DOZENS AND DOZENS OF TIMES. (RESIDENCY / JURISDICTION); THEN
 4 ONE MORNING WHILE DRIVING HER HOME, THEY STOPPED ON LONGLY LANE AND
 5 PROCEEDED TO HAVE CONSENSUAL SEX IN THE BACK SEAT OF THE PETITIONER'S
 6 FORD TAURUS (SCENE OF THE CRIME). FINALLY ASHLEY STATED THAT SHE WAS 12 YEARS
 7 OLD, AND IT ONLY HAPPENED ONE TIME. (WINDOW OF OFFENSE). WITH A DATE OF BIRTH OF
 8 AUGUST 14, 1986, THE WINDOW OF OFFENSE WOULD BE AUGUST 14, 1998 TO AUGUST 13, 1999.
 9 NOT, AS THE STATE CONTINUES TO ASSERT THAT IT WOULD CONTINUE TO AUGUST 13, 2000,
 10 OR AS STATED, "DURING THE RELEVANT TIME ALLEGED IN THE INFORMATION" (PG. 5, 8, 9)
 11 SO TO SIMPLIFY MATTERS THE PETITIONER SUBMITS TO THIS HONORABLE COURT AND
 12 MR. PLATER THAT THE THREE 'ELEMENTS' OF THIS SPECIFIC OFFENSE ARE ① THE
 13 JURISDICTION / RESIDENCY; ② SCENE OF THE CRIME (TAURUS); AND (AS THE 'VICTIM' STATES
 14 1) INCIDENT OCCURED ONLY ONCE; 2) WHEN SHE WAS 12 YEARS OLD.) THE ③ WINDOW OF
 15 OFFENSE (AUGUST 14, 1998 TO AUGUST 13, 1999). IMPLOING THAT THE SUMMATIONS OF
 16 BOTH THESE CHARGES AND THESE ELEMENTS BE CONCEDED TO PRIOR TO THE
 17 EVIDENTIARY HEARING.

18 THE EVIDENCE SHOWS THAT PETITIONER WAS INFACIT RESIDING EVERYWHERE ELSE
 19 BUT RENO, SO AGAIN AN OBVIOUS ATTEMPT TO PROVIDE MISINFORMATION TO THE COURT.
 20 IT SHOULD BE FURTHER VIEWED AS RATHER TELLING THAT THE STATE ONLY ADDRESSED
 21 TWO OF THE THREE GROUNDS, SO TECHNICALLY THE REMAINING GROUND (PROSECUTORIAL
 22 MISCONDUCT) BEING UNADDRESSED AND THEREFORE REMAIN UNCHALLENGED. IT IS ENOUGH TO
 23 SURVIVE THE MOTION TO DISMISS, ON ALL GROUNDS. THE EVIDENCE FURTHER GOES TO
 24 SHOW WHY THE PETITIONER'S WRIT SHOULD BE GRANTED, IN THE LEAST WARRENT THE SETTING
 25 ASIDE OF THE JUDGMENT OF CONVICTION, AND THE WITHDRAWAL OF THIS GUILTY PLEA.

26 THEN, IF THE STATE IS STILL SO CONFIDENT THAT THE CASE WOULD BE SO STRONG
 27 SO AS TO OBTAIN A 'GUILTY' BEYOND A REASONABLE DOUBT AT TRIAL, WE WILL GO TO TRIAL.
 28 (PROVIDED IT SURVIVES THE PREPARED PRE-TRIAL MOTION TO DISMISS, OR A DISMISSAL ON PREJUDICE)

1 IF THE STATE IS NOT COMPLETELY CONFIDENT IN ITS CASE, THEN HOW CAN THIS COURT BE?

2 THE PROSECUTION SEEMS TO CONTINUALLY FORGET ITS DUTY IS TO ENSURE THAT
3 JUSTICE IS DONE. SO ITS FAILURE TO BRING THIS EVIDENCE FORWARD AND TO DISMISS THE
4 CHARGES, AS THE EVIDENCE DEMANDED IT, CERTAINLY HAD AN EFFECT ON THE PETIT -
5 IONER'S PLEA. THE STATE NEVER LEGALLY SHOULD HAVE DRAFTED SUCH A FRAUDULENT
6 DOCUMENT TO CONTINUE TO HIDE IT'S UNETHICAL CONDUCT AND IT'S MOTION TO
7 DISMISS IS A CONTINUAL ATTEMPT TO CHERRY-PICK THE FACTS, AND 'ALTER' THE
8 ACTUAL FACTS OF THIS CASE.

9 THIS PETITIONER, THEREFORE, HUMBLLY REQUESTS THAT THE STATE'S MOTION TO
10 DISMISS BE STRICKEN, AS IT IS NOTHING MORE THAN A 'REPLY BRIEF' MASKED
11 AS A MOTION TO DISMISS, OR OUTRIGHT DENY. FURTHER, CONTINUE TO THE COURT
12 ORDERED EVIDENTIARY HEARING DATED APRIL 27, 2017 AT 3:00 PM.

13 THIS MOTION ENTITLED 'RESPONSE TO STATE'S MOTION TO DISMISS' IS HEREBY
14 SUBMITTED TO THIS COURT FOR CONSIDERATION AND ADJUDICATION BY THIS COURT
15 AT, OR PRIOR TO THE EVIDENTIARY HEARING.

16
17 DATED THIS 6th DAY OF MARCH, 2017

18
19 Brendan Dunckley

20 BRENDAN DUNCKLEY (#1023236)

21 PETITIONER IN PRO SE.
22
23
24
25
26
27
28

AFFIRMATION

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING DOCUMENT
DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED THIS 6th DAY OF MARCH, 2017

Brendan Dunchley

BRENDAN DUNCHLEY (#1023236)

PETITIONER IN PRO SE

CERTIFICATE OF SERVICE

PURSUANT TO NRC.P 5(b) THE UNDERSIGNED BEING THE PETITIONER DOES HEREBY
CERTIFY THAT A TRUE COPY OF THE FOREGOING DOCUMENT WAS DEPOSITED FOR
MAILING THROUGH U.S. MAIL SERVICE, BY MEANS OF NDOC LAW LIBRARY PERSONNEL
TO THE FOLLOWING ADDRESSES.

JOSEPH B. PLATER, APPELLATE DEPUTY

WASHOE COUNTY DISTRICT ATTORNEY

APPELLATE DIVISION

P.O. Box 11130

RENO, NEVADA 89520

CLERK OF THE COURT

SECOND JUDICIAL DISTRICT

% DEPT. 4

P.O. Box 11130

RENO, NEVADA 89520

DATED THIS 6th DAY OF MARCH, 2017

Brendan Dunchley

BRENDAN DUNCHLEY (#1023236)

1 CODE #3860
CHRISTOPHER J. HICKS
2 #7747
P.O. Box 11130
3 Reno, Nevada 89520
(775)328-3200
4 Attorney for Respondent
5

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

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 THE STATE OF NEVADA, ROBERT
LEGRAND,

Dept. No. 4

13 Respondent.
14 _____/

15 REQUEST FOR SUBMISSION

16 It is requested that the Motion to Dismiss Petition for Writ of Habeas Corpus (Post-
17 Conviction), filed on March 1, 2017, be submitted to the Court for decision.

18 AFFIRMATION PURSUANT TO NRS 239B.030

19 The undersigned does hereby affirm that the preceding document does not contain the
20 social security number of any person.

21 DATED: March 14, 2017.

22 CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

23
24 By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
25 Appellate Deputy
26

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on March 14, 2017, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Brendan Dunckley #1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ DESTINEE ALLEN
DESTINEE ALLEN

Return Of NEF**Recipients**

DIV. OF PAROLE & PROBATION - Notification received on 2017-03-14 10:02:20.08.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-03-14 10:02:18.769.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

03-14-2017:09:52:04

Clerk Accepted:

03-14-2017:09:59:41

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Request for Submission

Filed By:

Joseph Plater

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-

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

JOSEPH R. PLATER, III, 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.):

STATE OF NEVADA for STATE OF NEVADA

BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

1 CODE
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3
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56 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 BRENDAN DUNCKLEY,

10 Petitioner,

Case No. CR07-1728

11 vs.

Dept. No. 4

12 THE STATE OF NEVADA,

13 Respondent.
14 _____/15 ORDER

16 On November 7, 2016, the Petitioner, Brendan Dunkley, in pro per, filed a *Petition*
17 *for Habeas Corpus to Exhaust State Claims*. On November 21, 2016, the Court entered
18 an *Order* directing the State of Nevada to respond to the Petition within forty-five (45) days
19 of the date of the order. On January 5, 2017, the State of Nevada, by and through
20 Christopher J. Hicks, District Attorney, and Joseph Plater, Deputy District Attorney, filed an
21 *Answer*. On January 11, 2017, the Petitioner filed a *Motion to Grant Petitioner's*
22 *Unopposed Writ of Habeas Corpus to Exhaust Claims* wherein the Petitioner is requesting
23 that the Court render a decision on the *Petition for Habeas Corpus to Exhaust State*
24 *Claims*. On February 15, 2017, the Court entered an Order setting an evidentiary hearing
25 on the *Petition for Habeas Corpus to Exhaust State Claims* for April 27, 2017 at 3:00 p.m.
26 On March 1, 2017, the State filed a *Motion to Dismiss Petition for Writ of Habeas Corpus*
27 *(Post-Conviction)*. On March 13, 2017, the Petitioner filed a *Response to State's Motion to*

28 ///

1 *Dismiss.* On March 14, 2017, the *Motion to Dismiss Petition for Writ of Habeas Corpus*
2 (*Post-Conviction*) was formally submitted to the Court for Decision.

3 This Court having reviewed the pleadings filed herein, in the interests of justice and
4 good cause appearing,

5 IT IS HEREBY ORDERED that oral arguments on the *Motion to Dismiss Petition*
6 *for Writ of Habeas Corpus (Post-Conviction)* are set for April 27, 2017 at 3:00 p.m. The
7 oral arguments on the Motion to Dismiss shall be presented to the Court prior to the
8 evidentiary hearing on the *Petition for Habeas Corpus to Exhaust State Claims* set the
9 same day.

10 DATED this 27 day of March, 2017.

11
12
13 Connie T. Steinheimer
14 DISTRICT JUDGE
15
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17
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CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
STATE OF NEVADA, COUNTY OF WASHOE; that on the 18th day of
March, 2017, I filed the attached document with
the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document
by the method(s) noted below:

 Personal delivery to the following: [NONE]

☒ **Electronically filed with the Clerk of the Court, using the eFlex system which
constitutes effective service for all eFiled documents pursuant to the efile User
Agreement:**

Joseph Plater, Esq.
Deputy District Attorney

☒ **Transmitted document to the Second Judicial District Court mailing system
in a sealed envelope for postage and certified mailing with the United States Postal
Service in Reno, Nevada:**

Brendan Dunckley
Inmate no. 1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Inter-Office Mail – **[NONE]**

DATED this 18th day of March, 2017.



Return Of NEF**Recipients**

DIV. OF PAROLE & PROBATION - Notification received on 2017-03-28 11:56:34.839.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-03-28 11:56:34.777.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

03-28-2017:11:55:30

Clerk Accepted:

03-28-2017:11:56:07

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord Setting Hearing

Filed By:

Court Clerk MTrabert

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:

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

STATE OF NEVADA for STATE OF NEVADA

FILED

MAY 16 2017

JACQUELINE BRYANT, CLERK
By: [Signature]
DEPUTY CLERKCase No: CR07-1728Dept. No: 4IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADAIN AND FOR THE COUNTY OF WASHOEBRENDAN DUNCKLEY)
Petitioner/Plaintiff,)

VS.)

NOTICE OF APPEALSTATE OF NEVADA)
Respondent/Defendant,)NOTICE IS HEREBY GIVEN that: PETITIONER BRENDAN DUNCKLEYhereby appeals the judgement entered in this Honorable court on or about the 27th day ofAPRIL, 2017DATED this 4th, day of MAY, 2017Brendan Dunckley
Petitioner / PlaintiffBRENDAN DUNCKLEY 7023236
(Print Name) In Proper Persona

1 PURSUANT TO N.R.S. 208.165, I understand that a false statement or answer to any question
2 In this declaration will subject me to penalties of perjury, I DECLARE UNDER PENALTY OF
3 PERJURY UNDER THE LAWS OF THE STATE OF NEVADA THAT THE FOREGOING
4 IS TRUE AND CORRECT. See N.R.S. 208.165.

5
6 Signed at

N.N.C.C.

(Location)

Brendan Dunchley

(Signature)

7
8 MAY, 4, 2017

(Date)

1023236

(Inmate Number)

CERTIFICATE OF SERVICE BY MAIL

Pursuant to F.R.C.P. Rule 5(b), I hereby certify that I am the petitioner/Defendant named herein and
that on this 5th day of MAY 2017, I deposited in the United States

Mails in Carson City, Nevada a true a correct copy of the foregoing addressed to:

Second Judicial District Court
CLERK OF THE COURT

P.O. Box 11130

RENO, NV 89520

Joseph Platter

%
WASCO COUNTY D.A.

P.O. Box 11130

RENO, NEVADA 89520

Brendan Dunchley

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

NOTICE OF APPEAL

(Title of Document)

filed in case number: CR07-1720



Document does not contain the social security number of any person

-OR-



Document contains the social security number of a person as required by:



A specific state or federal law, to wit:

(State specific state or federal law)

-or-



For the administration of a public program

-or-



For an application for a federal or state grant

-or-



Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: MAY 4, 2017

Brendan Dunckley
(Signature)

BRENDAN DUNCKLEY
(Print Name)

PRO PER
(Attorney for)

Dept No: 4

FILED

MAY 16 2017

JACQUELINE BRYANT, CLERK-
DEPUTY CLERKIN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOEBRENDAN DUNCKLEY

Petitioner / Plaintiff

-VS-

DESIGNATION OF RECORD
ON APPEALSTATE OF NEVADA

Respondent / Defendant

COMES NOW, BRENDAN DUNCKLEY Petitioner/Plaintiff herein designates the
 record on appeal to be certified by the Clerk of the Court and transcribed to the Clerk of the Nevada
 Supreme Court.

All Motions, Pleading, and Transcripts.

Dated this 4th day of May, 2017Brendan Dunckley
Petitioner / PlaintiffBRENDAN DUNCKLEY (#102322)
(Print Name) In Proper Persona

PURSUANT TO N.R.S. 208.165, I understand that a false statement or answer to any question

In this declaration will subject me to penalties of perjury, I DECLARE UNDER PENALTY OF
PERJURY UNDER THE LAWS OF THE STATE OF NEVADA THAT THE FOREGOING
IS TRUE AND CORRECT. See N.R.S. 208.165.

Signed at

N.N.C.C.

(Location)

Brendan Dunchley

(Signature)

MAY, 4, 2017

(Date)

1023236

(Inmate Number)

CERTIFICATE OF SERVICE BY MAIL

Pursuant to F.R.C.P. Rule 5(b), I hereby certify that I am the petitioner/Defendant named herein and that on this 5TH day of MAY 2017, I deposited in the United States Mails in Carson City, Nevada a true a correct copy of the foregoing addressed to:

Second Judicial District Court
CLERK OF THE COURT
P.O. Box 11130
RENO, NV 89520

Joseph Platten
%
WASHOE COUNTY D.A.
P.O. Box 11130
RENO, NEVADA 89520

Brendan Dunchley

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

NOTICE OF APPEAL

(Title of Document)

filed in case number: CR07-1720



Document does not contain the social security number of any person

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(State specific state or federal law)

-or-



For the administration of a public program

-or-



For an application for a federal or state grant

-or-



Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: MAY 4, 2017

Brendan Dunckley
(Signature)

BRENDAN DUNCKLEY
(Print Name)

PRO REC
(Attorney for)

DC-09900084599-021
STATE VS. BRENDAN DUNCKLEY 3 Pages
District Court 05/16/2017 09:16 AM
Washoe County 2525
VUT:ADTC

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA MAY 16 2017

JACQUELINE BRYANT, CLERK
By: *[Signature]*
DEPUTY CLERK

CR07-1728

THE STATE OF NEVADA,

Respondent,

vs.

NOTICE OF CHANGE OF ADDRESSBRENDAN DUNCKLEY

Appellant.

TO: The Clerk of the Nevada Supreme Court of the State
of Nevada.

PLEASE BE ADVISED and enter into the records of the above
entitled case the following change of address:

OLD ADDRESS: BRENDAN DUNCKLEY #1023236
L.C.C.
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

NEW ADDRESS: BRENDAN DUNCKLEY NDOP # 1023236
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702

Please direct all further Court mail to the new address
herein noticed.

Respectfully submitted this 10th day of MAY, 2017 .

Brendan Dunckley

CERTIFICATE OF SERVICE BY MAIL

Pursuant to N.R.C.P. Rule 5 (b), I hereby certify that I am the petitioner/Defendant named herein and that on this 10th day of MAY 2017, I mailed a true a correct copy of the foregoing document to the following:

JOSEPH PLATTER
% W.C.D.A.
P.O. Box 11130
RENO, NV 89520

CLERK of the COURT
Second Judicial Court
P.O. Box 11130
RENO, NEVADA 89520

Brendan D. [Signature]

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document,

NOTICE OF CHANGE of Address

(Title of Document)

filed in case number: CR 07-1728



Document does not contain the social security number of any person

-OR-



Document contains the social security number of a person as required by:



A specific state or federal law, to wit:

(State specific state or federal law)

-or-



For the administration of a public program

-or-



For an application for a federal or state grant

-or-



Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: MAY 10, 2017

Brendan Donckley
(Signature)

BRENDAN DONCKLEY
(Print Name)

Pro. Per
(Attorney for)

Code 1310

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

BRENDAN DUNCKLEY,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. CR07-1728
Dept. No. 4

CASE APPEAL STATEMENT

This case appeal statement is filed pursuant to N.R.A.C.P. 3(f).

1. Appellant is Brendan Dunckley
2. This appeal is from an order entered by the Honorable Judge Connie Steinheimer.
3. Appellant is representing himself in Proper Person on appeal. The Appellant's address is:
Brendan Dunckley
N.N.C.C.
P.O. Box 7000
Carson City, Nevada 89702
4. Respondent is the State of Nevada. Respondent is represented by: the Washoe County District Attorney's Office
Terrance McCarthy, Esq., SBN 2745
P.O. Box 30083
Reno, NV 89520
5. Respondent's attorney is not licensed to practice law in Nevada: n/a
6. Appellant was represented by appointed counsel in District Court.

7. Appellant is not represented by appointed counsel on appeal.
8. Appellant was granted leave to proceed in forma pauperis in the District Court filed on October 28, 2009.
9. Proceeding commenced by an Information filed on July 12, 2007.
10. This is a criminal proceeding and the Appellant's Notice of Appeal does not designate the Judgment, order or part thereof being appealed as required by N.R.A.C.P. 3 (C)(1)(B). It appears that Appellant is appealing the Order filed March 28, 2017.
11. The case has been the subject of a previous appeal to the Supreme Court:
Supreme Court No.: 52383, 55545, 59957 and 59958
12. This case does not involve child custody or visitation.
13. This is not a civil case involving the possibility of a settlement.

Dated this 19th day of May, 2017.

Jacqueline Bryant
Clerk of the Court

By: /s/ Yvonne Vilorio
Yvonne Vilorio
Deputy Clerk

Code 1350

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

BRENDAN DUNCKLEY,

Case No. CR07-1728

Petitioner,

Dept. No. 4

vs.

THE STATE OF NEVADA,

Respondent.

_____ /

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 19th day of May, 2017, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 19th day of May, 2017

Jacqueline Bryant
Clerk of the Court

By /s/ Yvonne Vilorio
Yvonne Vilorio
Deputy Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-05-19 09:07:03.093.
DIV. OF PAROLE & PROBATION - Notification received on 2017-05-19 09:07:03.233.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-05-19 09:07:03.171.

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

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A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-19-2017:09:05:59

Clerk Accepted:

05-19-2017:09:06:32

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Case Appeal Statement
Certificate of Clerk

Filed By:

Deputy Clerk YViloria

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.

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The following people were served electronically:

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA
DIV. OF PAROLE & PROBATION
TERRENCE P. MCCARTHY, ESQ.

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

STATE OF NEVADA for STATE OF NEVADA
BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

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

Supreme Court No. 73095
District Court Case No. CR071728

dy

RECEIPT FOR DOCUMENTS

TO: Brendan Dunckley
Washoe County District Attorney \ Terrence P. McCarthy, Deputy District Attorney
Jacqueline Bryant, Washoe District Court Clerk ✓

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

05/22/2017 Appeal Filing Fee waived. Criminal.

05/22/2017 Filed Notice of Appeal/Proper Person. Appeal docketed in the
Supreme Court this day.

DATE: May 22, 2017

Elizabeth A. Brown, Clerk of Court
lh

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-05-23 11:19:06.182.
DIV. OF PAROLE & PROBATION - Notification received on 2017-05-23 11:19:06.353.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-05-23 11:19:06.275.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-23-2017:11:17:50

Clerk Accepted:

05-23-2017:11:18:32

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Court Receipt for Doc

Filed By:

Deputy Clerk YViloria

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:

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

TERRENCE P. MCCARTHY, ESQ.

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

STATE OF NEVADA for STATE OF NEVADA
BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

1 CODE No. 3370
2
3
4

5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 Dept. No. 4

13 THE STATE OF NEVADA,
14 ROBERT LEGRAND,

15 Respondent.
16 _____/

17 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

18 This matter comes before the Court on Petitioner's post-conviction petition for a writ of
19 habeas corpus. The Court held a hearing on the State's motion to dismiss the petition on April
20 27, 2017. The Court grants the motion to dismiss and makes the following findings of fact and
21 conclusions of law.

22 1. On August 5, 2008, this Court convicted petitioner, pursuant to his guilty plea, of
23 lewdness with a child under the age of fourteen years and attempted sexual assault. On May 8,
24 2009, the Nevada Supreme Court affirmed the judgment of conviction on direct appeal.
25 *Dunkley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009).

26 ///

///

1 2. On July 8, 2009, petitioner filed a motion in this Court to modify his sentence,
2 arguing he was innocent. This Court denied the motion, and on September 9, 2010, the
3 Nevada Supreme Court affirmed this Court's order. *Dunkley v. State*, Docket No. 55545
4 (Order of Affirmance, September 9, 2010).

5 3. On July 21, 2009, petitioner filed a post-conviction petition for a writ of habeas
6 corpus. The Court denied the petition after an evidentiary hearing, and on January 16, 2013,
7 the Nevada Supreme Court affirmed this Court's order denying habeas relief. *Dunkley v.*
8 *State*, Docket No. 59957 (Order of Affirmance, January 16, 2013).

9 4. On November 7, 2016, petitioner filed a second post-conviction petition for a writ of
10 habeas corpus. The State moved this Court to dismiss the petition because it is untimely and
11 successive.

12 5. A petitioner must file a post-conviction petition for a writ of habeas corpus within
13 one year after entry of the judgment of conviction, or one year after the Supreme Court issues
14 its remittitur, if an appeal is taken. NRS 34.726(1). An untimely or successive petition is
15 procedurally barred and must be dismissed absent a demonstration of good cause for the delay
16 and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69
17 P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction petitions
18 for writs of habeas corpus is mandatory); *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519,
19 530 (2001) (the Nevada Legislature "never intended for petitioners to have multiple
20 opportunities to obtain post-conviction relief absent extraordinary circumstances.").

21 6. Good cause is established by showing that an impediment external to the defense
22 prevented a petitioner from filing a timely petition. *See Harris v. Warden*, 114 Nev. 956, 959,
23 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003);
24 *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

25 7. "An impediment external to the defense may be demonstrated by a showing 'that the
26 factual or legal basis for a claim was not reasonably available to counsel, or that 'some

1 interference by officials,' made compliance impracticable.' ” *Hathaway v. State*, 119 Nev. 248,
2 252, 71 P.3d 503, 506 (2003) (quoting *Murray*, 477 U.S. at 488 (1986) (citations omitted)).

3 8. “[A]ctual prejudice” requires a showing “ ‘not merely that the errors [complained of]
4 created a possibility of prejudice, but that they worked to [the petitioner's] actual and
5 substantial disadvantage, in affecting the state proceeding with error of constitutional
6 dimensions.’ ” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting
7 *United States v. Frady*, 456 U.S. 152, 170 (1982)).

8 9. A claim of ineffective assistance of post-conviction counsel may provide good cause
9 for filing a successive petition if counsel was appointed under statutory mandate, *Crump v.*
10 *Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997); see also *McKague v. Warden*, 112
11 Nev. 159, 164–65 & n. 5, 912 P.2d 255, 258 & n. 5 (1996), but such a claim is still subject to
12 other procedural bars, including timeliness under NRS 34.726, *State v. Dist. Ct. (Riker)*, 121
13 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also *Hathaway v. State*, 119 Nev. 248, 252–53,
14 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective
15 assistance of counsel claim itself must not be procedurally defaulted”).

16 10. The failure to show good cause may be excused where the prejudice from a failure to
17 consider the claim amounts to a “fundamental miscarriage of justice.” *Mazzan v. Warden*, 112
18 Nev. 838, 842, 921 P.2d 920, 922 (1996); *Hogan*, 109 Nev. at 959, 860 P.2d at 715–16; cf. NRS
19 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is
20 actually innocent of the crime or is ineligible for the death penalty. See *Mazzan*, 112 Nev. at
21 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16.

22 11. To prove actual innocence as a gateway to reach procedurally-barred constitutional
23 claims of error, a petitioner must show that “ ‘it is more likely than not that no reasonable juror
24 would have convicted him in light of the new evidence.’ ” *Calderon v. Thompson*, 523 U.S.
25 538, 559 (1998); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. “ ‘[A]ctual innocence’

26 ///

1 means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614,
2 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)); see also *Rozzelle v. Sec’y,*
3 *Florida Dep’t of Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012) (explaining that the actual
4 innocence exception contemplates the “extremely rare” cases where the State convicted an
5 innocent man, not “run of the mill” cases where the petitioner argues that he is guilty of a
6 lesser offense than that for which he was convicted). “‘To be credible,’ a claim of actual
7 innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*,
8 523 U.S. 538, 559 (1998) (quoting *Schulp*, 513 U.S. at 324 (1995)).

9 12. Here, petitioner filed his second post-conviction habeas petition on November 7,
10 2016. The Nevada Supreme Court affirmed petitioner’s judgment of conviction on direct
11 appeal on May 8, 2009, and issued the remittitur on June 2, 2009. Thus, the present petition
12 is untimely and successive. It is barred absent a demonstration of good cause and prejudice or
13 actual innocence to overcome the procedural bars. NRS 34.726(1); NRS 34.810(1)(b)(2).

14 13. Petitioner claims he is actually innocent because certain exhibits he has provided
15 purportedly show he was in other cities when he committed his crimes.¹ The exhibits, however,
16 do not show petitioner was never in Reno during the time the State alleged he committed his
17 crimes, although they do tend to show he may have also been in other places during the general
18 time frame the State contends he committed his crimes. In other words, petitioner may have
19 been in other cities and in Reno during the relevant time period alleged in the Information. In
20 short, petitioner’s exhibits do not show he is actually innocent.

21 14. Nor is the alibi evidence new. According to petitioner’s allegations in his petition
22 (pp.28-29), both his lawyer and the prosecutor knew of the evidence.

23
24 ¹Petitioner appears to assert actual innocence more as a substantive claim for habeas
25 relief rather than a procedural claim to overcome the procedural bars. See *Berry v. State*, 131
26 Nev. Adv. Op. 96, 363 P.3d 1148, 1154-55 (2015) (explaining that actual innocence provides a
gateway to have procedurally defaulted claims heard on the merits). The Court addresses the
actual innocence claim procedurally and substantively.

1 15. Petitioner also pursued his alibi defense at his first habeas proceeding. There, as the
2 Nevada Supreme Court noted, “[t]he district court denied Dunckley relief on this ground
3 because it found credible counsel’s testimony that he investigated Dunckley’s alibi defense yet
4 Dunckley insisted on pleading guilty in an attempt to receive probation.” *Dunckley v. State*,
5 Docket No. 59958 (Order of Affirmance, January 16, 2013). The Nevada Supreme Court
6 concluded this Court’s finding was supported by substantial evidence, and affirmed this Court’s
7 finding that Dunckley had failed to demonstrate his counsel’s performance was deficient. *Id.*
8 Thus, Dunckley failed to prove that even if he had an alibi defense, he would not have pleaded
9 guilty and would have insisted on proceeding to trial. *See Hill v. Lockhart*, 474 U.S. 52, 58-59
10 (1985) (To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment
11 of conviction based on a guilty plea, a petitioner must demonstrate that his counsel’s
12 performance was deficient in that it fell below an objective standard of reasonableness, and
13 that there is a reasonable probability that, but for counsel’s errors, petitioner would not have
14 pleaded guilty and would have insisted on going to trial); *Kirksey v. State*, 112 Nev. 980, 988,
15 923 P.2d 1102, 1107 (1996).

16 16. The Nevada Supreme Court’s ruling is law of the case and may not be litigated again,
17 absent new and unforeseen evidence of actual innocence. *See Hall v. State*, 91 Nev. 314, 315,
18 535 P.2d 797, 798 (1975) (“The law of a first appeal is the law of the case on all subsequent
19 appeals in which the facts are substantially the same.” (quoting *Walker v. State*, 85 Nev. 337,
20 343, 455 P.2d 34, 38 (1969))). Thus, petitioner’s actual innocence claim, as a substantive and
21 procedural claim, fails to show he is entitled to relief.

22 17. Petitioner also asserts he is actually innocent because DNA results show the absence
23 of the victim’s DNA on him. He alleges that if he forced the victim to perform fellatio on him,
24 certainly her DNA would have been on him, since police officers responded within minutes of
25 the victim’s report.

26 ///

1 18. The absence of DNA, however, is not evidence of actual innocence. There are any
2 number of reasons why there was no DNA evidence found on Dunckley.

3 19. The DNA evidence is also not new evidence. Petitioner litigated the effect of the
4 DNA results on his guilty plea, this Court rejected the claim, and the Nevada Supreme Court
5 affirmed this Court's ruling. *Dunckley v. State, supra*. Thus, the DNA evidence is irrelevant
6 both as a substantive claim and as a procedural device to overcome defaulted claims, it is not
7 new evidence, and the claim is barred by the law of the case.

8 20. At the hearing on the State's motion to dismiss, petitioner argued the fact that
9 because he pursued habeas relief in federal court good cause exists to overcome the procedural
10 bars. The Court disagrees. *See Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989).

11 21. The State also moves to dismiss the petition because "[a] period exceeding 5 years
12 between the filing of a . . . decision on direct appeal of a judgment of conviction and the filing of
13 a petition challenging the validity of a judgment of conviction creates a rebuttable presumption
14 of prejudice to the State." NRS 34.800(2).

15 22. Petitioner has failed to rebut the presumption of prejudice to the State because of
16 laches. The Court dismisses the petition for this additional reason.

17 23. Wherefore, the Court dismisses the post-conviction petition for a writ of habeas
18 corpus.

19
20 DATED this 28 day of June, 2017.

21
22 Connie J. Steinheimer
23 DISTRICT JUDGE
24
25
26

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 29th day of June, 2017, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Joseph Plater, Esq.
Deputy District Attorney

X **Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and certified mailing with the United States Postal Service in Reno, Nevada:**

Brendan Dunckley
Inmate no. 1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Inter-Office Mail – **[NONE]**

DATED this 29th day of June, 2017.



Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-06-29 14:30:10.819.
DIV. OF PAROLE & PROBATION - Notification received on 2017-06-29 14:30:10.959.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-06-29 14:30:10.897.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

06-29-2017:14:29:06

Clerk Accepted:

06-29-2017:14:29:40

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Findings, Conclusions & Judg

Filed By:

Court Clerk MTrabert

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:

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

TERRENCE P. MCCARTHY, ESQ.

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

STATE OF NEVADA for STATE OF NEVADA

BRENDAN DUNCKLEY for BRENDAN
DUNCKLEY

CODE: 2540

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

BRENDAN DUNCKLEY,
Petitioner,

CASE NO: CR07-1728

vs.

DEPT. NO.: 4

THE STATE OF NEVADA,
ROBERT LEGRAND,

Respondent,

_____ /

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 29th day of June, 2017 the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

You may appeal to the Supreme Court from the decision or order of the Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-three (33) days, after the date this notice is mailed to you. This notice was mailed on the 30th day of June, 2017.

JACQUELINE BRYANT
Clerk of the Court

By /s/ Mia Cholico
Deputy Clerk

CERTIFICATE OF SERVICE

CASE NO. CR07-1728

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; and that on the 30th day of June, 2017, I electronically filed the Notice of Entry of Order with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to:

Terrence McCarthy, Esq. for State of Nevada

Joseph Plater, III, Esq. for State of Nevada

Div. of Parole & Probation

I further certify that on the 30th day of June, 2017, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true and correct copy of the Notice of Entry of Order, addressed to:

Brendan Dunckley #1023236
c/o LCC
1200 Prison Road
Lovelock, NV 89419

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

/s/ Mia Cholico
Mia Cholico

1 CODE No. 3370
2
3
4

5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 Dept. No. 4

13 THE STATE OF NEVADA,
14 ROBERT LEGRAND,

15 Respondent.
16 _____/

17 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

18 This matter comes before the Court on Petitioner's post-conviction petition for a writ of
19 habeas corpus. The Court held a hearing on the State's motion to dismiss the petition on April
20 27, 2017. The Court grants the motion to dismiss and makes the following findings of fact and
21 conclusions of law.

22 1. On August 5, 2008, this Court convicted petitioner, pursuant to his guilty plea, of
23 lewdness with a child under the age of fourteen years and attempted sexual assault. On May 8,
24 2009, the Nevada Supreme Court affirmed the judgment of conviction on direct appeal.
25 *Dunkley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009).

26 ///

///

1 2. On July 8, 2009, petitioner filed a motion in this Court to modify his sentence,
2 arguing he was innocent. This Court denied the motion, and on September 9, 2010, the
3 Nevada Supreme Court affirmed this Court's order. *Dunkley v. State*, Docket No. 55545
4 (Order of Affirmance, September 9, 2010).

5 3. On July 21, 2009, petitioner filed a post-conviction petition for a writ of habeas
6 corpus. The Court denied the petition after an evidentiary hearing, and on January 16, 2013,
7 the Nevada Supreme Court affirmed this Court's order denying habeas relief. *Dunkley v.*
8 *State*, Docket No. 59957 (Order of Affirmance, January 16, 2013).

9 4. On November 7, 2016, petitioner filed a second post-conviction petition for a writ of
10 habeas corpus. The State moved this Court to dismiss the petition because it is untimely and
11 successive.

12 5. A petitioner must file a post-conviction petition for a writ of habeas corpus within
13 one year after entry of the judgment of conviction, or one year after the Supreme Court issues
14 its remittitur, if an appeal is taken. NRS 34.726(1). An untimely or successive petition is
15 procedurally barred and must be dismissed absent a demonstration of good cause for the delay
16 and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69
17 P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction petitions
18 for writs of habeas corpus is mandatory); *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519,
19 530 (2001) (the Nevada Legislature "never intended for petitioners to have multiple
20 opportunities to obtain post-conviction relief absent extraordinary circumstances.").

21 6. Good cause is established by showing that an impediment external to the defense
22 prevented a petitioner from filing a timely petition. *See Harris v. Warden*, 114 Nev. 956, 959,
23 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003);
24 *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

25 7. "An impediment external to the defense may be demonstrated by a showing 'that the
26 factual or legal basis for a claim was not reasonably available to counsel, or that 'some

1 interference by officials,' made compliance impracticable.' ” *Hathaway v. State*, 119 Nev. 248,
2 252, 71 P.3d 503, 506 (2003) (quoting *Murray*, 477 U.S. at 488 (1986) (citations omitted)).

3 8. “[A]ctual prejudice” requires a showing “ ‘not merely that the errors [complained of]
4 created a possibility of prejudice, but that they worked to [the petitioner's] actual and
5 substantial disadvantage, in affecting the state proceeding with error of constitutional
6 dimensions.’ ” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting
7 *United States v. Frady*, 456 U.S. 152, 170 (1982)).

8 9. A claim of ineffective assistance of post-conviction counsel may provide good cause
9 for filing a successive petition if counsel was appointed under statutory mandate, *Crump v.*
10 *Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997); see also *McKague v. Warden*, 112
11 Nev. 159, 164–65 & n. 5, 912 P.2d 255, 258 & n. 5 (1996), but such a claim is still subject to
12 other procedural bars, including timeliness under NRS 34.726, *State v. Dist. Ct. (Riker)*, 121
13 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also *Hathaway v. State*, 119 Nev. 248, 252–53,
14 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective
15 assistance of counsel claim itself must not be procedurally defaulted”).

16 10. The failure to show good cause may be excused where the prejudice from a failure to
17 consider the claim amounts to a “fundamental miscarriage of justice.” *Mazzan v. Warden*, 112
18 Nev. 838, 842, 921 P.2d 920, 922 (1996); *Hogan*, 109 Nev. at 959, 860 P.2d at 715–16; cf. NRS
19 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is
20 actually innocent of the crime or is ineligible for the death penalty. See *Mazzan*, 112 Nev. at
21 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16.

22 11. To prove actual innocence as a gateway to reach procedurally-barred constitutional
23 claims of error, a petitioner must show that “ ‘it is more likely than not that no reasonable juror
24 would have convicted him in light of the new evidence.’ ” *Calderon v. Thompson*, 523 U.S.
25 538, 559 (1998); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. “ ‘[A]ctual innocence’

26 ///

1 means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614,
2 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)); see also *Rozzelle v. Sec’y,*
3 *Florida Dep’t of Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012) (explaining that the actual
4 innocence exception contemplates the “extremely rare” cases where the State convicted an
5 innocent man, not “run of the mill” cases where the petitioner argues that he is guilty of a
6 lesser offense than that for which he was convicted). “‘To be credible,’ a claim of actual
7 innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*,
8 523 U.S. 538, 559 (1998) (quoting *Schulp*, 513 U.S. at 324 (1995)).

9 12. Here, petitioner filed his second post-conviction habeas petition on November 7,
10 2016. The Nevada Supreme Court affirmed petitioner’s judgment of conviction on direct
11 appeal on May 8, 2009, and issued the remittitur on June 2, 2009. Thus, the present petition
12 is untimely and successive. It is barred absent a demonstration of good cause and prejudice or
13 actual innocence to overcome the procedural bars. NRS 34.726(1); NRS 34.810(1)(b)(2).

14 13. Petitioner claims he is actually innocent because certain exhibits he has provided
15 purportedly show he was in other cities when he committed his crimes.¹ The exhibits, however,
16 do not show petitioner was never in Reno during the time the State alleged he committed his
17 crimes, although they do tend to show he may have also been in other places during the general
18 time frame the State contends he committed his crimes. In other words, petitioner may have
19 been in other cities and in Reno during the relevant time period alleged in the Information. In
20 short, petitioner’s exhibits do not show he is actually innocent.

21 14. Nor is the alibi evidence new. According to petitioner’s allegations in his petition
22 (pp.28-29), both his lawyer and the prosecutor knew of the evidence.

23
24 ¹Petitioner appears to assert actual innocence more as a substantive claim for habeas
25 relief rather than a procedural claim to overcome the procedural bars. See *Berry v. State*, 131
26 Nev. Adv. Op. 96, 363 P.3d 1148, 1154-55 (2015) (explaining that actual innocence provides a
gateway to have procedurally defaulted claims heard on the merits). The Court addresses the
actual innocence claim procedurally and substantively.

1 15. Petitioner also pursued his alibi defense at his first habeas proceeding. There, as the
2 Nevada Supreme Court noted, “[t]he district court denied Dunckley relief on this ground
3 because it found credible counsel’s testimony that he investigated Dunckley’s alibi defense yet
4 Dunckley insisted on pleading guilty in an attempt to receive probation.” *Dunckley v. State*,
5 Docket No. 59958 (Order of Affirmance, January 16, 2013). The Nevada Supreme Court
6 concluded this Court’s finding was supported by substantial evidence, and affirmed this Court’s
7 finding that Dunckley had failed to demonstrate his counsel’s performance was deficient. *Id.*
8 Thus, Dunckley failed to prove that even if he had an alibi defense, he would not have pleaded
9 guilty and would have insisted on proceeding to trial. *See Hill v. Lockhart*, 474 U.S. 52, 58-59
10 (1985) (To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment
11 of conviction based on a guilty plea, a petitioner must demonstrate that his counsel’s
12 performance was deficient in that it fell below an objective standard of reasonableness, and
13 that there is a reasonable probability that, but for counsel’s errors, petitioner would not have
14 pleaded guilty and would have insisted on going to trial); *Kirksey v. State*, 112 Nev. 980, 988,
15 923 P.2d 1102, 1107 (1996).

16 16. The Nevada Supreme Court’s ruling is law of the case and may not be litigated again,
17 absent new and unforeseen evidence of actual innocence. *See Hall v. State*, 91 Nev. 314, 315,
18 535 P.2d 797, 798 (1975) (“The law of a first appeal is the law of the case on all subsequent
19 appeals in which the facts are substantially the same.” (quoting *Walker v. State*, 85 Nev. 337,
20 343, 455 P.2d 34, 38 (1969))). Thus, petitioner’s actual innocence claim, as a substantive and
21 procedural claim, fails to show he is entitled to relief.

22 17. Petitioner also asserts he is actually innocent because DNA results show the absence
23 of the victim’s DNA on him. He alleges that if he forced the victim to perform fellatio on him,
24 certainly her DNA would have been on him, since police officers responded within minutes of
25 the victim’s report.

26 ///

1 18. The absence of DNA, however, is not evidence of actual innocence. There are any
2 number of reasons why there was no DNA evidence found on Dunckley.

3 19. The DNA evidence is also not new evidence. Petitioner litigated the effect of the
4 DNA results on his guilty plea, this Court rejected the claim, and the Nevada Supreme Court
5 affirmed this Court's ruling. *Dunckley v. State, supra*. Thus, the DNA evidence is irrelevant
6 both as a substantive claim and as a procedural device to overcome defaulted claims, it is not
7 new evidence, and the claim is barred by the law of the case.

8 20. At the hearing on the State's motion to dismiss, petitioner argued the fact that
9 because he pursued habeas relief in federal court good cause exists to overcome the procedural
10 bars. The Court disagrees. *See Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989).

11 21. The State also moves to dismiss the petition because "[a] period exceeding 5 years
12 between the filing of a . . . decision on direct appeal of a judgment of conviction and the filing of
13 a petition challenging the validity of a judgment of conviction creates a rebuttable presumption
14 of prejudice to the State." NRS 34.800(2).

15 22. Petitioner has failed to rebut the presumption of prejudice to the State because of
16 laches. The Court dismisses the petition for this additional reason.

17 23. Wherefore, the Court dismisses the post-conviction petition for a writ of habeas
18 corpus.

19
20 DATED this 28 day of June, 2017.

21
22 Connie J. Steinheimer
23 DISTRICT JUDGE
24
25
26

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 29th day of June, 2017, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Joseph Plater, Esq.
Deputy District Attorney

X **Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and certified mailing with the United States Postal Service in Reno, Nevada:**

Brendan Dunckley
Inmate no. 1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Inter-Office Mail – **[NONE]**

DATED this 29th day of June, 2017.



Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-06-30 08:15:45.109.
DIV. OF PAROLE & PROBATION - Notification received on 2017-06-30 08:15:45.265.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-06-30 08:15:45.187.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

06-30-2017:08:14:01

Clerk Accepted:

06-30-2017:08:15:12

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Notice of Entry of Ord

Filed By:

Deputy Clerk MCholico

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:

TERRENCE P. MCCARTHY, ESQ. for STATE
OF NEVADA

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

CASE NO. CR07-1728
(POST-CONVICTION)

TITLE: THE STATE OF NEVADA VS. BRENDAN DUNCKLEY

DATE, JUDGE
OFFICERS OF

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

4/27/17

HONORABLE

CONNIE

STEINHEIMER

DEPT. NO.4

M. Stone

(Clerk)

J. Schonlau

(Reporter)

EVIDENTIARY HEARING ON PETITION FOR HABEAS CORPUS TO

EXHAUST STATE CLAIMS/ORAL ARGUMENTS ON MOTION TO

DISMISS PETITION

Petitioner, Brendan Dunckley, present representing himself. Deputy District Attorney Joseph Plater represented the State.

Motion to Dismiss the Petition for Habeas Corpus to Exhaust State Claims by State's counsel; presented argument; objection and argument by Petitioner; reply argument by State's counsel. Petitioner presented further argument against the Motion to Dismiss the Petition.

Although the Petitioner has well-thought out issues and a strong ideas, the statutes regulate and this instant petition is successive and the Petitioner is unable to overcome that procedural bar. Therefore, **COURT ENTERED ORDER** granting the Motion to Dismiss the Petition for Habeas Corpus to Exhaust State Claims.

State's counsel shall prepare proposed Order for the Court.

Court recessed.

Defendant remanded to the custody of the Warden.

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-08-08 08:36:07.915.
DIV. OF PAROLE & PROBATION - Notification received on 2017-08-08 08:36:08.056.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-08-08 08:36:07.978.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

08-08-2017:08:35:08

Clerk Accepted:

08-08-2017:08:35:37

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

***Minutes

Filed By:

Court Clerk MTrabert

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:

TERRENCE P. MCCARTHY, ESQ. for STATE
OF NEVADA

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

CR07-1728
No. 73095 04

FILED

AUG 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER DIRECTING ENTRY AND TRANSMISSION OF
WRITTEN ORDER*

This is a pro se appeal from a decision dismissing a postconviction petition for a writ of habeas corpus. The documents before this court do not contain a written order memorializing the court's decision made on April 27, 2017. A copy of the written order is essential to a determination of this court's jurisdiction to consider this appeal.¹ The district court shall have 60 days from the date of this order to: (1) enter a written order, (2) inform this court in writing that it is reconsidering its decision, or (3) inform this court in writing that additional time is needed to enter the written order. In the event the district court enters a written order (or has already entered a written order of which this court is

¹Prior to the entry of a final written judgment, and the timely filing of a notice of appeal, the district court technically retains jurisdiction over appellant's case. See *Bradley v. State*, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1275 (1993). In a criminal case, a notice of appeal filed after announcement of the decision, but before entry of the written judgment or order is deemed to have been filed after such entry and on the day thereof. NRAP 4(b)(2).

unaware), the clerk of the district court shall immediately transmit a certified copy of the order to the clerk of this court.

It is so ORDERED.

Cherry, C.J.

cc: Hon. Connie J. Steinheimer, District Judge
Brendan Duncley
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-08-17 10:52:12.528.
DIV. OF PAROLE & PROBATION - Notification received on 2017-08-17 10:52:12.981.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-08-17 10:52:12.591.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

08-17-2017:10:51:10

Clerk Accepted:

08-17-2017:10:51:40

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Ct Order Directing

Filed By:

Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

TERRENCE P. MCCARTHY, ESQ. for STATE
OF NEVADA

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

Code 1350

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

BRENDAN DUNCKLEY,

Petitioner,

Case No. CR07-1728

Dept. No. 4

Vs,

**THE STATE OF NEVADA
ROBERT LEGRAND,**

Respondent.

_____ /

CERTIFICATE OF CLERK AND TRANSMITTAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe. On the 17th day of August, 2017, I electronically filed to the Supreme Court the Findings of Fact, Conclusions of Law and Judgment filed June 29, 2017. The Order is transmitted pursuant to the Supreme Court's Order Directing Entry and Transmission of Written Order filed August 16, 2017.

I further certify that the transmitted record is a copy of the original pleadings on file with the Second Judicial District Court.

Dated this 17th day of August, 2017.

Jacqueline Bryant
Clerk of the Court

By /s/Yvonne Vilorio
Yvonne Vilorio
Deputy Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-08-17 10:58:03.655.
DIV. OF PAROLE & PROBATION - Notification received on 2017-08-17 10:58:03.796.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-08-17 10:58:03.718.

******* IMPORTANT NOTICE - READ THIS INFORMATION *******

PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

08-17-2017:10:56:51

Clerk Accepted:

08-17-2017:10:57:36

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Certificate of Clerk

Filed By:

Deputy Clerk YViloria

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:

TERRENCE P. MCCARTHY, ESQ. for STATE
OF NEVADA

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 73095

FILED

AUG 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER DIRECTING TRANSMISSION OF RECORD

This court has concluded that its review of the complete record is warranted. *See* NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 30 days from the date of this order to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. *See* NRAP 11(a)(2). The record shall include copies of documentary exhibits submitted in the district court proceedings, but shall not include any physical, non-documentary exhibits or the original documentary exhibits. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. *See* NRS 176.156(5).

Within 120 days, appellant may file either (1) a brief that complies with the requirements in NRAP 28(a) and NRAP 32; or (2) the "Informal Brief Form for Pro Se Parties" provided by the supreme court clerk. NRAP 31(a)(1). If no brief is submitted, the appeal may be decided on the record on appeal. NRAP 34(g).

It is so ORDERED.

Cherry, C.J.

cc: Brendan Dunckley
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-08-29 10:50:32.499.
DIV. OF PAROLE & PROBATION - Notification received on 2017-08-29 10:50:32.671.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-08-29 10:50:32.593.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

08-29-2017:10:49:28

Clerk Accepted:

08-29-2017:10:50:00

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Ct Order Directing

Filed By:

Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

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-

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

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JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY,

Petitioner,

vs.

Case No. CR07-1728

**THE STATE OF NEVADA,
ROBERT LEGRAND,**

Dept. No. 4

Respondent.

_____ /

CERTIFICATE OF CLERK AND TRANSMITTAL – RECORD ON APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 31st day of August, 2017, I electronically filed Volumes 1 through 10 of the Record on Appeal in the above entitled matter to the Nevada Supreme Court and deposited Volume 11 containing sealed documents addressed to the Nevada Supreme Court 201 S. Carson Street, Suite 201, Carson City, Nevada 89701 in the Washoe County mailing system for postage and mailing in the United States Postal Service in Reno, Nevada.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court in accordance NRAP 11(2)(b).

Dated this 31st day of August, 2017.

Jacqueline Bryant
Clerk of the Court

By /s/Yvonne Vilorio
Yvonne Vilorio
Deputy Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2017-08-31 15:26:00.181.
DIV. OF PAROLE & PROBATION - Notification received on 2017-08-31 15:26:00.306.
JOSEPH PLATER, III, ESQ. - Notification received on 2017-08-31 15:26:00.244.

******* IMPORTANT NOTICE - READ THIS INFORMATION *******

PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

08-31-2017:15:24:25

Clerk Accepted:

08-31-2017:15:25:30

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Certificate of Clerk

Filed By:

Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

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-

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NEVADA

DIV. OF PAROLE & PROBATION

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BRENDAN DUNCKLEY

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

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

Supreme Court No. 73095
District Court Case No. CR071728

DH

NOTICE OF TRANSFER TO COURT OF APPEALS

TO: Hon. Connie J. Steinheimer, District Judge
Brendan Dunckley
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General
Washoe County District Attorney \ Terrence P. McCarthy, Deputy District Attorney
Jacqueline Bryant, Washoe District Court Clerk ✓

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: January 18, 2018

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

Notification List

Electronic

Washoe County District Attorney \ Terrence P. McCarthy, Deputy District Attorney
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General

Paper

Hon. Connie J. Steinheimer, District Judge
Brendan Dunckley
Jacqueline Bryant, Washoe District Court Clerk

Return Of NEF**Recipients**

TERRENCE - Notification received on 2018-01-19 13:46:03.533.
MCCARTHY, ESQ.
DIV. OF PAROLE & - Notification received on 2018-01-19 13:46:03.673.
PROBATION
JOSEPH PLATER, III, - Notification received on 2018-01-19 13:46:03.595.
ESQ.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

01-19-2018:13:45:00

Clerk Accepted:

01-19-2018:13:45:32

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Court Notice

Filed By:

Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

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-

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NEVADA

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,
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THE STATE OF NEVADA,
Respondent.

CR07-1728
No. 73095 04

FILED

APR 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brendan Dunckley appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on November 7, 2016.¹ Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Dunckley filed his petition more than seven years after issuance of the remittitur on direct appeal on June 2, 2009. *See Dunckley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009). Thus, Dunckley's petition was untimely filed. *See* NRS 34.726(1). Moreover, Dunckley's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus.² *See* NRS 34.810(2). Dunckley's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover,

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²*Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013).

because the State specifically pleaded laches, Dunckley was required to overcome the rebuttable presumption of prejudice. *See* NRS 34.800(2).

First, Dunckley claimed he had good cause and prejudice to overcome the procedural bars because he is exhausting his claims for federal review. Exhausting claims for federal review is insufficient to demonstrate cause to excuse the procedural bars. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, the district court did not err by denying this claim.


Second, Dunckley claimed he could overcome the procedural bars because he was actually innocent. Specifically, he claimed he was actually innocent because he had alibi evidence placing him outside of the State during the time period alleged in count one of the information and because the victim's DNA was not found on Dunckley's genitals minutes after the alleged conduct in count two.


Dunckley failed to demonstrate actual innocence because he failed to show "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Dunckley argued in his previous petition that counsel was ineffective for failing to investigate his alibi evidence or to present him with the DNA evidence prior to pleading guilty. However, after holding an evidentiary hearing on those claims, the district court concluded counsel did investigate and discuss the DNA evidence with Dunckley prior to him pleading guilty, and Dunckley decided to plead guilty anyway. This conclusion was affirmed on appeal by the Nevada Supreme Court. *See Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013). Therefore, Dunckley failed

to show new evidence demonstrates he is actually innocent. Accordingly, the district court did not err by denying this claim.

Finally, Dunckley failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

, C.J.
Silver

, J.
Tao

, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Brendan Dunckley
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2018-04-12 11:38:21.92.
DIV. OF PAROLE & PROBATION - Notification received on 2018-04-12 11:38:22.045.
JOSEPH PLATER, III, ESQ. - Notification received on 2018-04-12 11:38:21.982.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

04-12-2018:11:36:52

Clerk Accepted:

04-12-2018:11:37:39

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Court Order Affirming

Filed By:

Deputy Clerk YViloria

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.

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OF NEVADA

JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 73095
District Court Case No. CR071728

04

REMITTITUR

TO: Jacqueline Bryant, 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: May 08, 2018

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

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

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAY 9 2018



District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 73095
District Court Case No. CR071728

DY

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, 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 April, 2018.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
May 08, 2018.

Elizabeth A. Brown, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

CR07-1728
No. 73095 04

FILED

APR 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brendan Dunckley appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on November 7, 2016.¹ Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Dunckley filed his petition more than seven years after issuance of the remittitur on direct appeal on June 2, 2009. *See Dunckley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009). Thus, Dunckley's petition was untimely filed. *See* NRS 34.726(1). Moreover, Dunckley's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus.² *See* NRS 34.810(2). Dunckley's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover,

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²*Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013).

because the State specifically pleaded laches, Dunckley was required to overcome the rebuttable presumption of prejudice. *See* NRS 34.800(2).

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Dunckley failed to demonstrate actual innocence because he failed to show "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Dunckley argued in his previous petition that counsel was ineffective for failing to investigate his alibi evidence or to present him with the DNA evidence prior to pleading guilty. However, after holding an evidentiary hearing on those claims, the district court concluded counsel did investigate and discuss the DNA evidence with Dunckley prior to him pleading guilty, and Dunckley decided to plead guilty anyway. This conclusion was affirmed on appeal by the Nevada Supreme Court. *See Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013). Therefore, Dunckley failed


to show new evidence demonstrates he is actually innocent. Accordingly, the district court did not err by denying this claim.

Finally, Dunckley failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Silver

 J.
Tao

 J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Brendan Dunckley
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: 5/3/18
Supreme Court Clerk, State of Nevada
By: [Signature] Deputy
* * * * *
JUSTITIA

Return Of NEF**Recipients**

TERRENCE MCCARTHY, ESQ. - Notification received on 2018-05-09 11:53:39.179.
DIV. OF PAROLE & PROBATION - Notification received on 2018-05-09 11:53:39.288.
JOSEPH PLATER, III, ESQ. - Notification received on 2018-05-09 11:53:39.225.

******* IMPORTANT NOTICE - READ THIS INFORMATION *******

PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-09-2018:11:52:24

Clerk Accepted:

05-09-2018:11:53:05

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Court Remittitur
Supreme Ct Clk's Cert & Judg
Supreme Court Order Affirming

Filed By:

Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

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OF NEVADA
JOSEPH R. PLATER, III, ESQ. for STATE OF
NEVADA
DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

1 Code:

FILED

2020 JUN 17 PM 3:31

JACOB E. GILBERT
CLERK OF THE COURT*Hayle Pitt*

3
4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 STATE OF NEVADA,

9 Plaintiff(s),

Case No. CR07-1728

10 vs.

Dept. No. 4

11 BRENDAN DUNCKLEY,

12
13 Defendant(s).
14 _____/

15 LETTER FROM DEFENDANT
16

17 The following was received at the Second Judicial District Court Filing office on
18 June 17, 2020.
19

20 Affirmation pursuant to NRS 239B.030 / 603A.040: The undersigned hereby affirms that this document does not contain
21 the personal information of any person.

22 Dated June 17, 2020.
23
24
25
26
27
28

Thursday, May 28, 2020

Re: 3:13-cv-00393-RJ-CBC

CR07-1728

Your Honor,

I know that I do not currently have any judicial business before you. But there is an important reason for this ex-parte communication. Because all other officials involved with the generating, charging, enforcing the current conviction I am still challenging have been informed of the following.

On May 7, 2020 I was curious about a question I had Mr. Story ask my former "defense attorney" David O'Mara. "Q: Have you ever seen a police report for Ashley? A: I don't believe so, does one even exist?" So I wondered the exact same thing, does a police report exist for Ashley? I mean I have been charged, given a "deal" convicted and then sentenced by you to a 10-life sentence, so surely there is a police report.

So on May 7, 2020 I had asked my parents to contact the Reno Police Department Records Division to make the following search request:

"Police Report or any search for listing Ashley Vanderby DOB 08/13/1986 as victim and Brendan Dunchley DOB 07/04/1976 as suspect or person of interest."

the search request resulted in the following:

"Our Office has reviewed its files and has determined there are no documents responsive to your request." (I have included the actual request and response/answer).

How is that possible? If there is no existing police report, then there was no actual investigation by the police. But this search result brings up an even larger issue of Constitutionality of the conviction. It raises the question that, if no police report has been filed by Ashley (or a party acting on her behalf) with law enforcement, prior to her turning twenty-one years old (August 7, 2007) then NRS 171.083 and NRS 171.095 was not fulfilled. Which legally means the State became statutorily precluded

pursuing any further criminal charges.

NRS 171.083 and 171.095 are extremely specific in what exactly is required to remove the statute of limitations. A phone call and a resulting hastily filed amended criminal complaint is not a written report that the statutes require. Even Ashley testified at the preliminary hearing that she never went to the police, it was only a phone call with Detective Broome. A written report is not optional.

"No limitation for sexual assault if written report filed with law enforcement officer...

(1) If, at any time during the period of limitation prescribed in NRS 171.085 and NRS 171.095, a victim of a sexual assault files with law enforcement officers a written report concerning the sexual assault, the period of limitation prescribed in NRS 171.085 and 171.095 is removed and there is no limitation of the time within which a prosecution for the sexual assault must be commenced." (NRS 171.083)

"Limitations for offenses committed in a secret manner and offenses constituting sexual abuse of a child"

"(b) An indictment must be found, or an information or complaint filed, for any offense constituting sexual abuse of a child, as defined in NRS 432B.100 before the victim of the sexual abuse is:

"(i) Twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age" (NRS 171.095).

A written report, or statement alleging the criminal activity that is being alleged, which is exactly what a police begins with. Then the law enforcement department would investigate if any illegal conduct has in fact occurred. At which time they would either make an arrest if probable cause exists or consult with the District Attorney about proceeding forward. The actual police report is the very investigation that builds the case that an Assistant District Attorney will present. There is a reason why the State will always have the investigating detectives as their key witness to support their case to obtain a potential conviction. So how do they

expect a trial would succeed? Which brings up yet another matter, when ADA Vitoria drafted the guilty plea she had included the statement that it is in my (the defendant's) best interest to enter the deal because the State would be able to convict me if we were to go to trial. (Guilt beyond a reasonable doubt)

Whether the error (never having a supporting police report) was intentional and by bad faith, or unintentional does not matter, it violates due process rights. There is reason to believe that all the ADA's had naturally assumed that there is a police report existing. But Detective Tom Broome clearly knew he had bypassed legal procedure to convict me. Also there is no excuse for David O'Mara and his incompetence. He had testified in your courtroom (and you used his testimony to DENY my writ back in 2010) that his entire investigation was simply reviewing the police reports and the transcripts. Seriously it was two charges, two. If (as we now know) there is one of the charges with no report, what did he investigate?

I have enclosed a draft copy of the motion I filed to introduce this search result onto the record. As you will see in the pleading I have requested that the writ be granted so that the proper court to address this matter receive jurisdiction. Which there is now a clear case to support the argument that without the necessary police report the State never received subject matter jurisdiction on Ashley's case. (For the record in the second count I have already served all the time and expired it)

Twelve years of incarceration for a crime that ① the State had a DNA test that had been taken on the scene moments after the alleged attack, that fully exonerated me, and yet never presented it (NRS 171.1965 evidence presentation) ② I was not even in the State for or near the scene of the crime until two years later ③ No police report ever filed. Enough is enough your honor, so I have spent the last month writing letters to over a dozen members of the various medias, over a dozen of each: criminal defense, personal injury and civil rights lawyers, U.S. department of justice, various advocacy groups, various officials. All these letters have detailed all the "nonsense" done by all the officers of the court. You would be surprised how the common man feels about a DNA report and not having a police report.

There is an expression I have grown fond of, "Democracy dies in the darkness. All the actors of this case has continually brushed their initial "mistake" under the rug and hide it from becoming a part of the public record. Well, with all due respect, Your Honor, I turned on the light and made it extremely public.

I just felt, as you have always adjudicated this case in an upright and just manner. As our last hearing showed, even you are beginning to see just how unjust I have been treated. So you deserved a heads-up on what is going on in the case that may return to your Court. As all parties have the same information this ex-parte communication should not effect any future proceedings.

Sincerely,

Brendan Punchley #1023236
Petitioner in Pro per.

cc: copy for personal file and records.

1 BRENDAN DUNCKLEY #1023236

2 NORTHERN NEVADA CORRECTIONAL CENTER

3 P.O. BOX 7000

4 CARSON CITY, NEVADA 89701

5 PETITIONER IN PRO PER.

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

10 BRENDAN DUNCKLEY,

11 PETITIONER,

CASE NO: 3:13-cv-00393-RCT-CBC

12 VS.

13 ROBERT LEGRAND, et. al.,

MOTION TO INTRODUCE CRUTIAL SUPPORTING

14 RESPONDENT,

EVIDENCE & SUBMISSION FOR A SPEEDY

15 ADJUDICATION

17 PETITIONER, BRENDAN DUNCKLEY, HEREBY SUBMITS TO THIS COURT THIS
18 MOTION TO INTRODUCE CRUTIAL SUPPORTING EVIDENCE AND HIS SUBMISSION FOR A
19 SPEEDY ADJUDICATION. THIS MOTION IS BEING FILED TO SUPPORT THIS INSTANT WRIT
20 OF HABEAS CORPUS, IN DIRECT CONNECTION TO THE REMAINING GROUND OF INEFFECTIVE
21 ASSISTANCE OF COUNSEL, FAILURE TO INVESTIGATE. THIS MOTION IS BASED UPON THE
22 FOLLOWING MEMORANDUMS OF POINTS AND AUTHORITY TOGETHER WITH ALL OTHER
23 PLEADINGS, PAPERS AND EXHIBITS ON FILE HEREIN.

24 POINTS AND AUTHORITIES

25 THIS ENTIRE CASE NOW RESTS UPON A SINGLE GROUND OF INEFFECTIVE ASSISTANCE
26 OF COUNSEL - FAILURE TO INVESTIGATE. WHETHER OR NOT DEFENSE COUNSEL O'MARA'S
27 "INVESTIGATION" INTO THIS INSTANT CASE WAS ADAQUATE ENOUGH TO HAVE RISEN TO
28 THE LEVEL OF REPRESENTATION GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT.

1 WHILE REVIEWING THE NOW YEAR LONG FILED 'RESPONSE TO STATE'S ANSWER' THAT HAS
 2 STILL YET TO BE RULED UPON, PAGE 17/18 - PG 18/2 SPARKED A THOUGHT. WHAT IF THE
 3 STATE NEVER ACTUALLY INVESTIGATED THE ALLEGATION? THEREFORE, ON A WHIM, THIS
 4 PETITIONER ASKED HIS PARENTS TO CONTACT THE RENO POLICE DEPARTMENT, RECORDS
 5 DIVISION, AND HAD THEM SUBMIT A SEARCH REQUEST, THE FOLLOWING IS THAT REQUEST AND
 6 THE RESPONSE:

7 " POLICE REPORT OR ANY SEARCH FOR LISTING ASHLEY VANDERBY
 8 DOB 08/13/1986 AS VICTIM AND BRENDAN DUNCKLEY DOB 07/04/1976
 9 AS SUSPECT OR PERSON OF INTEREST.

10 " OUR OFFICE HAS REVIEWED ITS FILES AND HAS DETERMINED THERE ARE
 11 NO DOCUMENTS RESPONSIVE TO YOUR REQUEST. " (REPORT ANSWER ATTACHED)

12 'NO DOCUMENT RESPONSIVE TO YOUR REQUEST,' WHAT DOES THAT MEAN? IT MEANS
 13 ALL THE WAY UP UNTIL MAY, 7, 2020 THERE HAS NEVER BEEN A POLICE REPORT GENER-
 14 ATED BY THE RENO POLICE DEPARTMENT INVESTIGATING ASHLEY'S ALLEGATION, THE VERY
 15 ALLEGATION THAT THIS CURRENT CONVICTION RESTS UPON. THE LEGAL / FACTUAL QUEST-
 16 ION OF SUCH FAILURE TRIGGERING A VIOLATION OF NRS 171.083 & 171.095, AND AN
 17 ISSUE OF WHETHER OR NOT THE STATE WAS IN FACT STATUTORALLY PRECLUDED FROM
 18 PROSECUTING THIS VERY CASE (LET ALONE OFFER A GUILTY PLEA INCLUDING ASHLEY
 19 AS A CHARGE, IE: LEWDNESS) (BRANNEN V. STATE, 102 NEV. 7, 714 P.2d 175 (1986)), IS FOR
 20 THE ORIGINAL DISTRICT COURT TO DECIDE, AND HAS THE INHERENT RIGHT TO DO SO.

21 BUT TO REMAIN WITHIN THIS SPECIFIC, NARROW GROUND BEFORE THE COURT, IT
 22 PUTS ANOTHER QUESTION OF CONFIDENCE THAT THIS CONVICTION, BASED UPON A GUILTY
 23 PLEA IS IN FACT FREE FROM ANY ILLEGALITY OR UNCONSTITUTIONAL MEANS TO
 24 OBTAIN THE CONVICTION. THE QUESTION NOW IS: IF THE STATE NEVER INVESTIGATED THIS
 25 ALLEGATION (WHICH IS BASICALLY WHAT A POLICE REPORT IS, BECAUSE THEY NEVER OPENED A CASE
 26 HOW COULD MR. O'MARA BE VIEWED TO HAVE PERFORMED A 'CONSTITUTIONALLY WORTHY' INVESTIGA-
 27 TION?

28 "THE INDIVIDUAL PROSECUTING ATTORNEY HAS A DUTY TO LEARN OF ANY FAVORABLE

1 EVIDENCE KNOWN TO OTHERS ACTING ON BEHALF OF THE GOVERNMENT IN THE
2 CASE INCLUDING THE POLICE." KYLES V. WHITLEY, (514 US 419, 433, 115 S.Ct. 1555
3 131 L.Ed2d 490) (1995). HOW MUCH MORE SO SHOULD A DEFENSE ATTORNEY, WHO HAD
4 TESTIFIED HIS ENTIRE INVESTIGATION WAS REVIEWING THE POLICE REPORTS, NOT
5 NOTICE THAT NO POLICE REPORT / INVESTIGATION EXISTED.

6 IT COULD BE VIEWED BY THE LATER ASSISTANT DISTRICT ATTORNEYS AND
7 EVEN COURT OFFICERS WHO FOLLOWED, TO HAVE ASSUMED THAT A INITIAL POLICE
8 REPORT WAS IN THE FILE. BUT THERE CAN ONLY BE GROSS INCOMPETENCE OR
9 NEGLIGENCE TO THE ORIGINAL ADA AND CERTAINLY MR. O'MARA AND HIS "REPRESENTA-
10 TATION": IN TOWNSEND V. BURKE, 68 S.Ct. 1252, 334 U.S. 736 (1948) THE EXPRESSLY
11 "HELD THAT WHERE A DEFENDANT IS SENTENCED ON THE BASIS OF MATERIALLY UNTRUE
12 ASSUMPTIONS CONCERNING CRIMINAL RECORD, THE RESULTS, WHETHER CAUSED BY
13 CARELESSNESS OR BY DESIGN, IS INCONSISTANT WITH DUE PROCESS OF LAW."

14 WHAT GREATER "MATERIALLY UNTRUE ASSUMPTION CONCERNING CRIMINAL
15 RECORD" THAN TO PURSUE CHARGES / CONVICTION TO A 'CRIME' THAT WAS NEVER
16 FILED. MR. O'MARA WOULD HAVE REALIZED THAT HAD HE ACTUALLY DONE ANY FORM
17 OF AN INVESTIGATION, THIS REPORT BRINGS SERIOUS DOUBT THAT HE EVEN DID
18 THE CURSORY INVESTIGATION HE HAD TESTIFIED TO.

19 NOW, THE STATE MAY ATTEMPT TO RESPOND THAT THIS PETITIONER IS INCORRECT
20 IN THE 'POWER' OF THIS SEARCH RESULT. ASHLEY SPOKE TO DETECTIVE BROOME
21 AND THAT WAS NOTED IN RPD REPORT 05-34027, SO THEREFORE THERE WAS
22 NO VIOLATION AND THERE WAS A POLICE REPORT. SO TO PREVENT FURTHER UNNEEDED
23 DELAY ALLOW ME TO ADDRESS THAT POTENTIAL RESPONSE.

24 NRS 171.083 & 171.095 REQUIRE A WRITTEN REPORT BEING FILED BY THE
25 ALLEGED VICTIM WITH LAW ENFORCEMENT. RPD REPORT 05-34027 LISTS ASHLEY AS
26 A WITNESS, POLICE PROCEDURE REQUIRED THAT ONCE ASHLEY MADE THE
27 ALLEGATION, DETECTIVE BROOME WAS TO OPEN A NEW, SEPERATE CASE NUMBER
28 AND LIST HER AS A NEW VICTIM, THEN TO INVESTIGATE THESE ALLEGATIONS.

1 A PHONE CALL AND THE SUBSEQUENT AMENDED CRIMINAL COMPLAINT DID
2 NOT RISE OR OVERCOME THE STATUTORY REQUIREMENTS OF NRS 171.093 &
3 171.095. A FACT MR. O'MARA'S 'INVESTIGATION' SHOULD HAVE UNCOVERED
4 AND PRESENTED TO THE JUSTICE COURT AT THE PRELIMINARY HEARING.
5 SUCH INFORMATION WOULD CERTAINLY DAMAGE EVEN THE LOW BAR A
6 CRIME IS HELD TO IN ORDER TO BIND IT OVER TO THE DISTRICT COURT.

7 CONCLUSION

8 THIS NEW EVIDENCE PUTS THIS CASE'S CONSTITUTIONAL VIOLATION OF
9 INEFFECTIVE ASSISTANCE OF COUNSEL- FAILURE TO INVESTIGATE TO BE SO EGREGIOUS
10 THAT IT CREATES AN EXIGENCY TO ADJUDICATE THIS MATTER BACK TO THE DISTRICT
11 COURT FOR THEM TO RETAIN JURISDICTION WITH THE INSTRUCTIONS TO ALLOW THIS
12 PETITIONER TO WITHDRAW HIS PLEA AND TO PLEAD ANEW. TO GRANT THIS PETITION
13 ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL- FAILURE TO INVESTIGATE,
14 SINCE HE SHOULD HAVE FOUND THE SAME INFORMATION TWO ELDERLY INDIVIDUALS
15 FOUND WITH ONLY A COMPUTER AND A QUESTION.

16 AS THIS PETITIONER HAS BEEN INCARCERATED FOR OVER 12 YEARS ON
17 WHAT IS BECOMING MORE AND MORE CLEARLY A FAULTY GUILTY PLEA. SO ANY
18 FURTHER EXCESSIVE DELAY WOULD BE PREJUDICIAL AND INDUELY HARMFUL TO
19 THIS PETITIONER. THIS CASE HAS BEEN ON THE FEDERAL COURT'S SHELF FOR YEARS
20 SINCE 2013 (EXCEPT FOR SIX MONTHS TO GO BACK TO EXHAUST) ANY FURTHER EXCESS-
21 IVE DELAY IN JUDICIAL ACTION WOULD WARRANT AND ALLOW FOR A WRIT OF
22 MANDAMUS WITH THE U.S. DISTRICT COURT CHIEF JUDGE AND THE NINTH CIRCUIT
23 COURT OF APPEALS. ALL THIS PETITIONER WANTS IS HIS CONSTITUTIONAL RIGHT TO
24 HAVE HIS DAY IN COURT.

25
26 SUBMITTED THIS 22ND DAY OF MAY, 2020

27 BRENDAN DUNKLEY #1023236

28 *Brendan Dunkley*

PETITIONER IN PROPER

CERTIFICATE OF SERVICE

THE UNDERSIGNED DOES HEREBY CERTIFY THAT A TRUE AND CORRECT COPY
 OF THIS MOTION TO INTRODUCE CRUTIAL SUPPORTING EVIDENCE AND SUBMISSION FOR A
 SPEEDY ADJUDICATION, HAS BEEN PLACED INTO THE HANDS OF NDOC PRISON
 OFFICIALS FOR MAILING BY MEANS OF THE U.S. POSTAL SERVICE THIS 22ND DAY OF
 MAY, 2020

GEORDAN GOEBEL	CLERK, U.S. DISTRICT COURT
DEPUTY ATTORNEY GENERAL	DISTRICT OF NEVADA
STATE OF NEVADA	400 SOUTH VIRGINIA STREET
OFFICE OF THE ATTORNEY GENERAL	Room 301
100 NORTH CARSON STREET	RENO, NEVADA 89501
CARSON CITY, NEVADA 89701-4717	

BRIN GIBSON	HON. GLORIA M. NAVARO
FIRST ASSISTANT ATTORNEY GENERAL	CHIEF U.S. DISTRICT JUDGE
STATE OF NEVADA	DISTRICT OF NEVADA
OFFICE OF THE ATTORNEY GENERAL	333 LAS VEGAS BLVD, SOUTH
100 NORTH CARSON STREET	Room 7005
CARSON CITY, NEVADA 89707-4717	LAS VEGAS, NEVADA 89101

DATED THIS 22ND DAY OF MAY 2020

Brendan Dunchley

BRENDAN DUNCHLEY #1023236

PETITIONER PRO SE.

Dear James:

Thank you for your interest in public records of the City of Reno.

Your request was received in this office on May 07, 2020 and given the reference number:

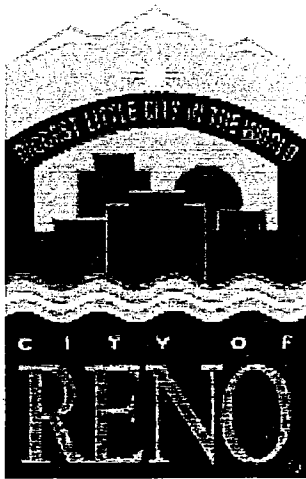
#P040077-050720 for tracking purposes.

Request Details: *Police Report or any search for listing Ashley Vanderby DOB 08/13/1986 as victim and Brendan Dunckley DOB 07/04/1976 as suspect or person of interest*

Your request will be forwarded to the appropriate City department(s) to locate the information requested. Pursuant to NRS 239.0107 we will notify you within five (5) business days of receipt of the anticipated date your records will be available, and any estimated cost to produce them. Please note any confidential, proprietary, or protected information will be redacted prior to the release of your records.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

Again, thank you for using the City of Reno Public Records Center.



Dear James,

RE: Public Records Request Reference # P040077-050720.

The Reno Police Department received a public records request from you on May 07, 2020.

Your request mentioned:

Police Report or any search for listing Ashley Vanderby DOB 08/13/1986 as victim and Brendan Dunckley DOB 07/04/1976 as suspect or person of interest

Our office has reviewed its files and has determined there are no documents responsive to your request.

If you have any additional questions, please feel free to contact the Reno Police Department Records Division at 775-334-2155 x 0.

Thank you for contacting the City of Reno.

Sincerely,
Records Division
Reno Police Department

1 BRENDAN DUNCKLEY # 1023236

2 NORTHERN NEVADA CORRECTIONAL CENTER

3 P.O. BOX 7000

4 CARSON CITY, NEVADA 89701

5 DEFENDANT IN PRO PER

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE

8 OF NEVADA IN AND FOR THE COUNTY OF WASHOE.

10 STATE OF NEVADA,

11 PLAINTIFF,

CASE NO. CR07-1728

12 VS.

DEPT. NO.

4

13 BRENDAN DUNCKLEY,

14 DEFENDANT,

MOTION TO CORRECT AN ILLEGAL

15 SENTENCE

17 COMES NOW, DEFENDANT, BRENDAN DUNCKLEY, AND SUBMITS TO THIS COURT HIS

18 MOTION TO CORRECT AN ILLEGAL SENTENCE. THIS MOTION IS PRESENTED AND BASED

19 UPON THE PROVISION FOUND IN NRS 176.555, WHERE THIS COURT HAS THE JURISDICTION

20 TO BOTH ENTERTAIN AND TO ADJUDICATE A MOTION THAT RAISES THE NARROW SCOPE

21 OF "ISSUES" AT ANY TIME. THERE ARE NO TIME BARS, NOR LATCHES THAT CAN BE ATTACHED.

22 THIS MOTION IS SUPPORTED BY ALL PAPERS, PLEADINGS AND DOCUMENTS ON FILE HEREIN,

23 AND THE FOLLOWING POINTS AND AUTHORITIES.

24 POINTS AND AUTHORITIES

25 IF THIS DEFENDANT MAY ADDRESS THE OBVIOUS ARGUMENTS OF THE STATE, THAT

26 THIS DEFENDANT'S FILING HISTORY IS EXTENSIVE SINCE HIS INCARCERATION, ALL OF

27 WHICH HAS BEEN UNSUCCESSFUL, CULMINATING IN THE DENIAL OF HIS FEDERAL

28 WRIT OF HABEAS CORPUS ON SEPTEMBER 22, 2020. HOWEVER, THIS MOTION IS BASED UPON

1 A MOTION FILED IN THE U.S. DISTRICT COURT ON MAY 22, 2020, ENTITLED 'MOTION
2 TO INTRODUCE CRITICAL SUPPORTING EVIDENCE...' WHILE THE BASIS FOR THAT MOTION
3 WAS FOCUSED ON THE SOLE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVID-
4 ENCE PRESENTED IN THAT MOTION IS ALSO CRITICAL TO THIS INSTANT MOTION. THE
5 INFORMATION AND EVIDENCE PRESENTED IN THIS MOTION GO DIRECTLY TO THE QUE-
6 STION OF JURISDICTION. THE U.S. DISTRICT COURT OPINED THAT IT COULD NOT DECIDE ON
7 THE STRENGTH OF THIS EVIDENCE SINCE THE LOWER STATE COURT HAD NOT BEEN
8 GIVEN THE OPPORTUNITY TO HEAR IT AND TO ADJUDICATE THE MATTER.

9 ALTHOUGH IT IS TRUE THAT GUILTY PLEAS (OF WHICH THIS CASE RESTS UPON)
10 GENERALLY WAIVES ALL CONSTITUTIONAL VIOLATIONS OCCURRING BEFORE THE
11 PLEA. "JURISDICTIONAL" CLAIMS, HOWEVER ARE AN EXCEPTION TO THIS RULE. (SEE
12 UNITED STATES V. MONTILLA, 870 F.2d 549 (9th CIR 1989)). IN MONTILLA, THE COURT
13 OPINED THAT WHETHER A CLAIM IS "JURISDICTIONAL" AND THEREFORE APPELLABLE
14 DEPENDS ON WHETHER A CLAIM CAN BE RESOLVED BY EXAMINING THE FACE
15 OF THE INDICTMENT OR THE RECORD AT THE TIME OF THE PLEA WITHOUT REQUIR-
16 ING FURTHER PROCEEDINGS. (MONTILLA, 870 F.2d AT 552)

17 THE NEVADA SUPREME COURT CITED IN EDWARDS V. STATE, 112 NEV. 704, 918
18 P.2d 321 (1996) THAT AN 'ILLEGAL SENTENCE FOR THE PURPOSE OF A STATUTE IDEN-
19 TICAL TO NRS 176.555 WAS DEFINED BY THE DISTRICT COURT OF APPEALS AS 'ONE
20 AT VARIANCE WITH THE CONTROLLING STATUTE, OR, ILLEGAL IN THE SENSE THAT THE
21 COURT GOES BEYOND ITS AUTHORITY BY ACTING WITHOUT JURISDICTION.' (ALLEN V. UNITED
22 STATES, 495 A.2d 1145, 1149 (D.C. 1985)) [QUOTING PRINCE V. UNITED STATES, 432 A.2d
23 720, 721 (D.C. 1981)]. EDWARDS, ALSO NOTES THAT MOTIONS FOR RELIEF FROM A
24 SENTENCE THAT IS FACIALLY ILLEGAL ARE EXEMPT FROM THE TIME CONSTRAINTS AND
25 PROCEDURAL DEFAULTS APPLICABLE TO HABEAS PETITIONS. [Id 324]

26 THE EFFECT OF A PLEA, GENERALLY SPEAKING, IS A RECORD OF ADMISSION OF
27 WHATEVER IS CHARGED IN AN INDICTMENT/COMPLAINT, BUT IF IT IS LATER DEEMED
28 INSUFFICIENT, EITHER FROM A STANDPOINT OF FAILING TO CONFER JURISDICTION, OR TO

1 SET FORTH FACTS SUFFICIENT TO CONSTITUTE A CRIMINAL ACT, THE PLEA OF GUILTY
2 CONFESSES NOTHING. IN FACT IT CAN BE SAID THAT IF THE JURISDICTION WAS
3 NEVER OBTAINED, THEN THE PLEA OF GUILTY AMOUNTS TO NOTHING MORE THAN AN
4 ACKNOWLEDGMENT OF FACTS CHARGED IN THE COMPLAINT. PROCEDURAL DEFECTS MAY
5 BE INFERENTIALLY WAIVED BY A GUILTY PLEA WHERE THE DEFENDANT WAS REPRESENTED
6 BY 'COMPETENT COUNSEL'. (SEE BATES V. STATE, 84 NEV. 43, 436 P.2d 27 (1986))
7 SUBSTANTIVE RIGHTS CAN NOT BE DEEMED WAIVED IN THE SAME MANNER.
8 WHICH BRINGS US TO THE BASIS FOR THIS MOTION. A QUESTION OF LAW FOR
9 THIS COURT TO ANSWER / ADDRESS. FIRST, IF THE STATE NEVER OBTAINED A WRITTEN
10 REPORT FROM ASHLEY (DETAILING THE ALLEGED ASSAULT) PURSUANT TO NRS 171.083
11 PRIOR TO HER TWENTY-FIRST BIRTHDAY (NRS 171.095) AND NEVER GENERATED A
12 POLICE REPORT TO INVESTIGATE THE ACCUSATION, DID THE STATE OBTAIN JURISDICTION?
13 SECOND; IF THE STATUTE OF LIMITATION HAD IN FACT RUN ITS COURSE, AND EXPIRED
14 PRIOR TO THE STATE OBTAINING AN ACTUAL VICTIM'S WRITTEN REPORT (WHICH THE
15 STATE COULD / SHOULD HAVE OBTAINED AT THE PRELIMINARY HEARING, BUT FAILED TO DO SO)
16 DID THE STATE VIOLATE THIS DEFENDANT'S CONSTITUTIONALLY PROTECTED RIGHT TO
17 DUE PROCESS, BY INCLUDING A CHARGE THEY WERE PROSECUTORIALLY, PROCEDURALLY,
18 AND STATUTORIALLY PRECLUDED FROM PURSUING, BY INCLUDING IT IN A GUILTY PLEA
19 AGREEMENT GENERATED / OFFERED SEVEN (7) MONTHS AFTER ASHLEY TURNED 21
20 YEARS OF AGE. (BRANNEN V. STATE, 102 NEV. 7, 714 P.2d 175 (1986)).
21 ON A WHIM, THIS DEFENDANT ASKED HIS PARENTS TO CONTACT THE CITY OF
22 RENO RECORDS DIVISION, AND TO REQUEST THE FOLLOWING SEARCH:
23 "POLICE REPORT OR ANY SEARCH FOR LISTING ASHLEY VANDERBY DOB 08/13/
24 1986 AS VICTIM AND BRENDAN DUNCKLEY DOB 07/04/1976 AS SUSPECT OR PERSON
25 OF INTEREST"
26 THE ANSWER THEY RECEIVED WAS:
27 "OUR OFFICE HAS REVIEWED ITS FILES AND HAS DETERMINED THERE ARE NO DOCUMENTS
28 RESPONSIVE TO YOUR REQUEST." (REQUEST AND ANSWER ATTACHED)

1 "NO DOCUMENTS RESPONSIVE TO YOUR REQUEST." WHAT DOES THAT MEAN? IT MEANS
 2 THAT ALL THE WAY UP TO MAY 7, 2020 (AND STILL TO DATE) THERE HAS NEVER BEEN A
 3 POLICE REPORT GENERATED BY THE RENO POLICE DEPARTMENT INVESTIGATING ASHLEY'S
 4 ALLEGATIONS. THE VERY ALLEGATIONS THAT THIS CURRENT CONVICTION RESTS UPON. "THE
 5 INDIVIDUAL PROSECUTING ATTORNEY HAS A DUTY TO LEARN OF ANY EVIDENCE KNOWN
 6 TO OTHERS ACTING ON BEHALF OF THE GOVERNMENT IN THE CASE, INCLUDING THE
 7 POLICE." KYLES V. WHITLEY, 514 US 419, 433, 45 S. CT. 1535, 131 L. ED 2d 490 (1995).

8 THAT FACT CAN NOT BE TAKEN LIGHTLY. EVERY CRIMINAL COMPLAINT HAS A
 9 REFERENCE TO THE SUPPORTING POLICE REPORT. IT CAN'T BE DENIED THAT THE POLICE
 10 REPORT AND THE SUBSEQUENT POLICE INVESTIGATION IS WHAT THE STATE CRITICA-
 11 LLY RELIES UPON TO PROCEED TO A CRIMINAL TRIAL, WITH THE GOAL OF OBT-
 12 AINING A CONVICTION.

13 IN THE END, NO MATTER HOW A CASE IS ULTIMATELY PRESENTED, BE IT BY A
 14 TRIAL OR A GUILTY PLEA, IT ALL STARTS WITH A POLICE REPORT. A REPORT DET-
 15 ALLING HOW THE ALLEGATIONS WERE INVESTIGATED AND HOW IT LED TO THAT
 16 PARTICULAR DEFENDANT. WITHOUT THAT CONSTITUTIONAL STARTING PISTOL, HOW
 17 CAN THERE BE ANYTHING TO FOLLOW? THAT 'STARTING PISTOL' IS THE SOUND OF
 18 THE STATE OBTAINING JURISDICTION, THE RIGHT TO REPRESENT A VICTIM OF A
 19 REPORTED CRIME. BUT AS THE EVIDENCE AND RECORD SHOWS THAT STARTING PISTOL
 20 NEVER OCCURRED.

21 IF DIRECT JURISDICTION WAS NEVER LEGALLY / STATUTORIALLY OBTAINED, BY
 22 MEANS OF THE REQUIRED WRITTEN REPORT (NRS 171.083, 171.095) BY THE ALLEGED
 23 VICTIM AND THE SUBSEQUENT POLICE REPORT / INVESTIGATION, THE ENTRANCE OF THE
 24 GUILTY PLEA SHOULD BE VIEWED AS FAULTY. IT WAS NEVER SUPPORTED BY THE CLAIM-
 25 ED "EVIDENCE" OF ANY INVESTIGATION, STRONG ENOUGH TO PROVE GUILT BEYOND A
 26 REASONABLE DOUBT. THEREFORE, THE CONTROLLING GUILTY PLEA SHOULD BE VIEWED
 27 AS A DENIAL OF THIS DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCR-
 28 IMINATION. WHETHER THE LACK OF JURISDICTION WAS KNOWN BY THE STATE IS

1 IRRELEVANT, AS IS THE REASON. WHETHER THE STATE KNEW IT LACKED A POLICE
2 REPORT, OR CHOOSES TO CONTINUE TO ACT UNDER THE MISBELIEF THAT ONE EXISTS
3 DOES NOT MATTER IN DIRECT RELATION TO THE OBVIOUS DUE PROCESS VIOLATION,

4 CONCLUSION AND PRAYER FOR RELIEF

5 ONE OF THIS COURT'S PRIMARY DUTIES IS TO PROTECT THE CONSTITUTIONAL
6 PROCESS, AND TO BE CONFIDENT THAT THE CONVICTION BE A VALID ONE, FREE OF
7 EVEN A TRACE OF UNCONSTITUTIONAL CONDUCT. AS A GUILTY PLEA IS VIEWED
8 BY THE COURTS AS A WHOLE, IF ANY PART OF IT IS FOUND TO BE SUSPECT,
9 THEN IN THE INTREST OF INSURING THAT THE DEFENDANT RECEIVES A FAIR
10 AND JUST PROCEEDING, THE GUILTY PLEA MUST BE SET ASIDE. THE RECORD
11 CLEARLY SHOWS THAT PRIOR TO THE ENTRANCE OF THE GUILTY PLEA THERE WAS:

12 ① NEVER A STATUTORIALLY REQUIRED WRITTEN REPORT RECEIVED BY RENO
13 POLICE GENERATED BY THE ALLEGED VICTIM. (IT SHOULD BE NOTED THAT HAD
14 THE STATE DRAFTED A PHYSICAL REPORT DETAILING THE ALLEGATIONS AND
15 PRESENTED IT TO ASHLEY ON JULY 2, 2007 TO SIGN, THEN NRS 171.083 AND
16 171.095 WOULD HAVE BEEN STATUTORIALLY MET.) BUT THAT NEVER OCCURRED.

17 ② THERE WAS NEVER AN ACTUAL POLICE REPORT SPECIFICALLY GENERATED
18 TO INVESTIGATE ASHLEY'S ALLEGATIONS. (SIMPLY INCLUDING AN OVERVIEW OF
19 A PHONECALL WHERE THE ALLEGATIONS ARE MADE IN A SECONDARY REPORT
20 RPD 05-34027 THAT DOES NOT EVEN LIST ASHLEY AS A VICTIM) WITH NO
21 SUPPORTING EVIDENCE OF GUILT OR OF A CRIME, SINCE NO INVESTIGATION
22 WAS CONDUCTED.

23 ③ FINALLY, AS NEITHER 1 NOR 2 WERE MET BEFORE ASHLEY TURNED
24 TWENTY-ONE (21) ON AUGUST 13, 2007, THE STATUTE OF LIMITATION HAS SINCE
25 EXPIRED, AND IT WAS INCORRECTLY INCLUDED IN THE GUILTY PLEA OFFERED
26 AND ACCEPTED BY THIS COURT IN MARCH 2008.

27 IT IS ESSENTIAL TO NOTE THAT THIS MOTION TO CORRECT AN ILLEGAL SENTENCE
28 PERTAINS EXCLUSIVELY TO THE FIRST COUNT OF THE GUILTY PLEA RELATED TO

1 ASHLEY. THIS MOTION AND SUPPORTING EVIDENCE HAS NO CONNECTION TO NOR
2 ANY AUTHORITY OVER COUNT TWO FOR JESSICA. THE RECORD AND THE EVIDENCE
3 NOW SHOWS THAT THE STATE NEVER OBTAINED THE LEGAL JURISDICTION TO BE
4 A PARTY TO THIS CASE WITH REGARDS TO ASHLEY. FURTHER, AS NRS 171.095
5 HAS NOT BEEN MET (AND REMAINS UNCORRECTABLE) THE STATE IS THEREFORE
6 PROSECUTORIALLY BARRIED FROM PURSUING ASHLEY'S CHARGES.

7 NOW, DEFENDANT DUNCKLEY IS FULLY AWARE AND UNDERSTANDS THAT
8 ONCE THIS COURT RENDERS ITS DECISION ON THE JURISDICTIONAL VALIDITY OF
9 THE GUILTY PLEA, THE JUDICIAL PROCEDURES COULD START OVER. THE STATE
10 WILL BE FREE TO REINTRODUCE THE REMAINING CHARGE FOR JESSICA, AND
11 THE DEFENDANT WILL ALSO RETURN TO THE STATUS OF NOT GUILTY. IT IS NOW
12 NECESSARY TO SET ASIDE THE GUILTY PLEA AND ALLOW THIS DEFENDANT TO
13 PLEAD ANEW.

14 THEREFORE, THIS DEFENDANT PRESENTS /SUBMITS HIS MOTION TO CORRECT
15 AN ILLEGAL SENTENCE TO THIS COURT AND PRAYS FOR THE FOLLOWING RELIEF:

16 (1) GRANT THE MOTION TO CORRECT AN ILLEGAL SENTENCE, BY ENTERING AN
17 ORDER DETAILING THAT THE STATE FAILED TO STATUTORIALLY OBTAIN JURIS-
18 DICTION OVER THE CHARGE CONNECTED EXCLUSIVELY TO ASHLEY IN COUNT 1
19 OF THE CONVICTION UNDER ATTACK; AND

20 (2) AN ORDER DISMISSING ALL THE ORIGINAL CHARGES CONNECTED TO ASHLEY
21 WITH PREJUDICE FOR THE REASON OF (1) STATUTE OF LIMITATION'S EXPIRATION, AND (2)
22 STATE'S FAILURE TO ESTABLISH JURISDICTION; AND

23 (3) SPECIFY IN THE ORDER THAT THE GUILTY PLEA IS TO BE SET ASIDE, AND
24 THE SUBSEQUENT CONVICTION BE VACATED; AND

25 (4) AN ORDER DIRECTING THE NDOC TO PROCESS THE IMMEDIATE RELEASE FROM
26 CUSTODY THIS DEFENDANT, BRENDAN DUNCKLEY; AND

27 (5) FURTHER, IT IS REQUESTED THAT THE DEFENDANT BE RELEASED ON HIS OWN

28 RECOGNIZANCE, SINCE THE "REMAINING CHARGE" HAS ALREADY BEEN EXPIRED AND

1 ⑥ FURTHER, DUE TO THE CURRENT ENVIRONMENT OF THE COVID-19 PANDEMIC, IT
2 IS REQUESTED THAT ALL HEARINGS BE BOTH EXPEDITED AND CONDUCTED VIA
3 VIDEO CONFERENCE; AND

4 ⑦ AN ORDER DIRECTING THE WASHOE COUNTY DISTRICT ATTORNEY TO
5 MAKE CLEAR ITS INTENT TO EITHER ONCE AGAIN PURSUE THE REMAINING
6 CHARGE FOR JESSICA OR TO DISMISS THE CHARGE (AS THE DEFENDANT
7 HAS ALREADY SERVED THE ENTIRE SENTENCE AND EXPIRED IT FULLY); AND

8 ⑧ AS THIS DEFENDANT HAS NOW BEEN INCARCERATED FOR 13 YEARS (SIX OF
9 WHICH AS BEEN IN ADDITION TO THE SEVEN AND A HALF YEARS TO EXPIRE
10 COUNT 2) IT IS REQUESTED THAT THIS MOTION BE FULLY EXPEDITED AND
11 TO GRANT RELIEF IN THE MOST TIMELY MANNER. (JUSTICE DELAYED IS
12 JUSTICE DENIED) THIS DEFENDANT ONCE AGAIN GOES TO THE PAROLE BOARD
13 IN APRIL 2021 ON THIS CHARGE, IT IS THEREFORE REQUESTED THAT THIS
14 COURT RENDER ITS DECISION BEFORE THAT HEARING; AND.

15 ⑨ IF THIS COURT GRANTS THIS MOTION, IT IS FURTHER REQUESTED THAT HE
16 BE GRANTED RELEASE TO THE CARE AND CUSTODY OF HIS PARENTS, AWAITING
17 THE FINAL ADJUDICATION OF THIS CASE; AND

18 ⑩ AN ORDER OF APPOINTMENT OF COUNSEL TO REPRESENT THE DEFENDANT
19 IN THE NEW TRIAL PHASE; AND

20 ⑪ ANY AND ALL OTHER RELIEF THAT THIS COURT DEEMS NECESSARY TO
21 GRANT IN THE INTEREST OF JUSTICE.

22 IT IS HEREBY SUBMITTED TO THIS HONORABLE COURT FOR DECISION.

23 DATED THIS 18th DAY OF DECEMBER, 2020

24

25

26

27

28

Brendan Dunkley

BRENDAN DUNKLEY #1023236

DEFENDANT IN PRO PER.

CERTIFICATE OF SERVICE

THE UNDERSIGNED DOES HEREBY CERTIFY THAT A TRUE AND CORRECT
COPY OF THIS MOTION TO CORRECT AN ILLEGAL SENTENCE, HAS BEEN PLACED
INTO THE HANDS OF NDOC PRISON OFFICIALS TO THE FOLLOWING ADDRESSES
FOR MAILING, BY MEANS OF THE U.S. POSTAL SERVICE THIS 18th DAY OF DECEM-
BER, 2020.

WASHOE COUNTY DISTRICT ATTORNEY

CLERK OF THE COURT

% CHRIS HICKS

SECOND JUDICIAL DISTRICT

1 SOUTH SIERRA STREET

75 COURT STREET

RENO, NEVADA 89501

RENO, NEVADA 89501

WASHOE COUNTY DISTRICT ATTORNEY

HON. CONNIE STEINHEIMER

% CONVICTION INTEGRITY UNIT

SECOND JUDICIAL DISTRICT COURT

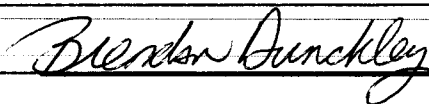
1 SOUTH SIERRA STREET

DEPT. 4

RENO, NEVADA 89501

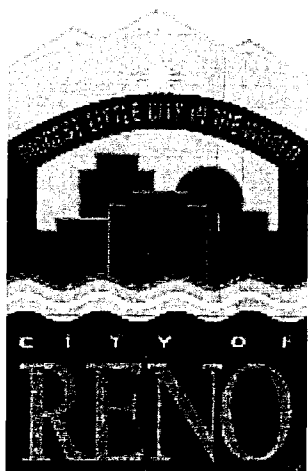
75 COURT STREET

RENO, NEVADA 89501

DATED THIS 18th DAY OF DECEMBER, 2020

BRENDAN DUNKLEY #1023236

DEFENDANT IN PRO PER



Dear James,

RE: Public Records Request Reference # P040077-050720.

The Reno Police Department received a public records request from you on May 07, 2020.

Your request mentioned:

Police Report or any search for listing Ashley Vanderby DOB 08/13/1986 as victim and Brendan Dunckley DOB 07/04/1976 as suspect or person of interest

Our office has reviewed its files and has determined there are no documents responsive to your request.

If you have any additional questions, please feel free to contact the Reno Police Department Records Division at 775-334-2155 x 0.

Thank you for contacting the City of Reno.

Sincerely,

Records Division

Reno Police Department

Return Of NEF

Recipients

JENNIFER NOBLE, ESQ. - Notification received on 2020-12-24 12:54:37.703.
DIV. OF PAROLE & PROBATION - Notification received on 2020-12-24 12:54:37.728.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

12-24-2020:12:53:26

Clerk Accepted:

12-24-2020:12:54:07

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Mtn to Modify/Correct Sentence

Filed By:

Deputy Clerk BBlough

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

CODE No. 2526
CHRISTOPHER J. HICKS
#7747
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200
districtattorney@da.washoecounty.us
Attorney for Plaintiff

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

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR07-1728

v.

Dept. No. 4

BRENDAN DUNCKLEY,

Defendant.

_____ /

NOTICE OF CHANGE OF RESPONSIBLE ATTORNEY

COMES NOW, Plaintiff, by and through Kevin Naughton, Appellate Deputy, and hereby provides notice to the Court, all parties, and their respective counsel that Kevin Naughton, Appellate Deputy, has replaced Jennifer P. Noble, Chief Appellate Deputy, as the responsible attorney for Plaintiff in all future matters related hereto.

Plaintiff herein requests that the Court and all parties herein update their service list with Kevin Naughton's name and address in order to facilitate timely service of all documents in the matter.

///

///

///

///

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 4, 2021.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Kevin Naughton
KEVIN NAUGHTON
Appellate Deputy
Nevada Bar No. 12834

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on January 4, 2021, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Brendan Dunckley #1023236
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA

CODE No. 2645
CHRISTOPHER J. HICKS
#7747
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200
districtattorney@da.washoecounty.us
Attorney for Plaintiff

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

THE STATE OF NEVADA,

Plaintiff,

Case No. CR07-1728

v.

Dept. No. 4

BRENDAN DUNCKLEY,

Defendant.

_____ /

OPPOSITION TO MOTION TO CORRECT AN ILLEGAL SENTENCE

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS, District Attorney, and Kevin Naughton, Appellate Deputy, and hereby opposes the Motion to Correct an Illegal Sentence filed by Brendan Dunckley (hereinafter, "Defendant" or "Dunckley") on December 24, 2020. This Opposition is based on the pleadings and papers on file with this Court, and the following points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Procedural History

The Defendant was convicted of two counts, Lewdness with a Child Under the Age of Fourteen Years and Attempted Sexual Assault, as a result of his guilty pleas. See

Judgment filed August 11, 2008. The Defendant was sentenced to life imprisonment with parole eligibility after ten years on the Lewdness conviction and a concurrent term of 24 to 120 months on the Attempted Sexual Assault conviction. *Id.*

Dunckley has unsuccessfully spent the 12 years following his conviction attempting to get it overturned. His first effort, a direct appeal, resulted in an Order of Affirmance filed in Nevada Supreme Court docket number 52383 on May 8, 2009.

Dunckley filed a Motion for Modification of Sentence before this Court on July 8, 2009. Following briefing, the Court denied the Motion on February 10, 2010. He appealed and the Nevada Supreme Court affirmed this Court's denial on September 9, 2010, in Nevada Supreme Court docket number 55545.

Dunckley filed his first Petition for Writ of Habeas Corpus on July 21, 2009. The Court conducted an evidentiary hearing on June 3, 2011 and denied the Petition on December 29, 2011. Dunckley appealed and the Nevada Supreme Court entered an Order of Affirmance on January 16, 2013, in docket number 59958.

Dunckley filed a Motion for Withdrawal of Guilty Plea on March 3, 2010. Following briefing and oral argument, the Court denied the Motion on December 29, 2011. Dunckley appealed and the Nevada Supreme Court again affirmed this Court's denial of the Motion in an Order of Affirmance filed on January 16, 2013, in docket number 59957.

Dunckley filed a second, untimely, Petition for Writ of Habeas Corpus on November 7, 2016. The Court dismissed the second Petition as untimely, successive, and barred by the doctrine of laches on June 29, 2017. Following a familiar pattern, Dunckley appealed and the Nevada Court of Appeals entered an Order of Affirmance on April 11, 2018, in docket number 73095.

Dunckley now avers that his efforts to overturn his conviction in federal court have failed. See Motion to Correct an Illegal Sentence (“Motion”), pp. 1-2. He filed the instant Motion on December 24, 2020. This Opposition follows.

Argument

The Nevada Supreme Court has held that a motion to correct an illegal sentence “address[es] only the facial legality of a sentence.” Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “An ‘illegal sentence’ ... [is] one at variance with the controlling sentencing statute, or illegal in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided....” *Id. quoting Allen v. United States*, 495 A.2d 1145, 1149 (D.C. 1985) (internal quotations omitted). A court can correct a sentence that is facially illegal at any time. Edwards, 112 Nev. at 708, 918 P.2d at 324 (1996).

In his Motion, Dunckley alleges, *inter alia*, that the Court lacked jurisdiction to because his parents received a response from the Reno Police Department’s Records Division that indicated they did not have any police report listing the child victim of his lewdness conviction as a victim and himself as a suspect. Motion, pp. 3-4. The Defendant cites NRS 171.083 for the premise that the victim was required to file a police report prior to her twenty-first birthday for the statute of limitations not to have lapsed. However, Dunckley ignores that another statute controls the filing period for sexual crimes committed against children.

NRS 171.095(1)(b)(1), as it existed between 1998 and 2000 (the time period alleged in Dunckley’s lewdness conviction), provided that an information or complaint must be filed “for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is: (1) Twenty-one years old if he

discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age....” 1997 Statutes of Nevada, Page 891; 1999 Statutes of Nevada, Page 3525. NRS 432B.100(2) defined (and still defines) “Lewdness with a child under NRS 201.230” as sexual abuse. The victim’s date of birth, as recited in the Amended Information to which Dunckley pled guilty, is August 14, 1986. Thus, she would have turned 21 on August 14, 2007. The original Information was filed before this Court on July 12, 2007, before the victim turned 21. Therefore, the Information was timely filed and this Court did not exceed its jurisdiction by proceeding on the charges properly and timely filed against Dunckley.

Conclusion

For all of the reasons stated above, Dunckley has failed to demonstrate that this Court acted without jurisdiction in sentencing him to prison for charges to which he pled guilty. Dunckley’s parents’ failure to receive a police report in response to a records request from the Reno Police Department is insufficient to overcome the specific statutory authority set forth at NRS 171.095(1)(b)(1) setting forth the statute of limitations for allegations constitution lewdness with a child. Moreover, there is a separate and more specific statute controlling the filing period for sexual crimes perpetrated against a child - a statute that was properly adhered to in this case. As a result, his Motion fails and must be dismissed.

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///

///

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 4, 2021.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Kevin Naughton
KEVIN NAUGHTON
Appellate Deputy

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on January 4, 2021, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Brendan Dunckley #1023236
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-01-04 08:49:41.777.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-01-04 08:49:41.753.
DIV. OF PAROLE & PROBATION - Notification received on 2021-01-04 08:49:41.8.

******* IMPORTANT NOTICE - READ THIS INFORMATION *******

PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

01-04-2021:08:08:22

Clerk Accepted:

01-04-2021:08:49:07

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Notice of Change of Attorney
Opposition to Mtn

Filed By:

Kevin Naughton

You may review this filing by clicking on the following link to take you to your cases.

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-

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

The following people were served electronically:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

CR07-1728 DC-09900089252-516
STATE VS. BRENDAN DUNKLEY 6 Pages
District Court 01/26/2021 03:15 PM
Washoe County 3980

1 BRENDAN DUNKLEY #1023236

2 N.N.C.C.

3 P.O. Box 7000

4 CARSON CITY, NEVADA 89701

5 DEFENDANT IN PRO PER

FILED

JAN 26 2021

JACQUELINE BRYANT, CLERK
By: *[Signature]*
DEPUTY CLERK

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE

8 OF NEVADA IN AND FOR THE COUNTY OF WASHOE

10 STATE OF NEVADA,

11 PLAINTIFF,

CASE No. CR07-1728

12 VS.

DEPT. No. 4

13 BRENDAN DUNKLEY,

14 DEFENDANT,

RESPONSE TO STATE'S OPPOSITION

16 COMES NOW, DEFENDANT BRENDAN DUNKLEY TO FILE HIS RESPONSE TO
17 THE STATE'S OPPOSITION. THIS RESPONSE IS BASED UPON ALL THE PAPERS, PLEADINGS
18 AND DOCUMENTS ON FILE HEREIN AND THE FOLLOWING POINTS AND AUTHORITIES.

19 POINTS AND AUTHORITIES

20 THE STATE'S ENTIRE ARGUMENT CAN BE SUMMED UP BY THIS SIMPLE 'OVERVIEW':
21 NRS 171.095(1)(b)(1) STATED THAT AS LONG AS AN INFORMATION OR CRIMINAL COM-
22 PLAIN IS FILED BY THE DISTRICT ATTORNEY BEFORE THE VICTIM TURNED 21 THEN
23 THERE IS NO QUESTION ON THE LEGALITY OF THIS CONVICTION, RESPECTFULLY, MR.
24 NAUGHTON IS INCORRECT. IT IS NOT AS CUT AND DRY AS THAT.

25 TO FILE A COMPLAINT YOU ACTUALLY NEED TO HAVE A COMPLAINANT. NRS 171.
26 083 CLEARLY REQUIRES THAT A WRITTEN REPORT MUST BE RECEIVED FROM A VICTIM.
27 EXCEPT, IN THIS CASE, WHERE THE ONLY SUPPORTING INFORMATION WAS SUBMITTED
28 BY DETECTIVE TOM BROOME. NOW UNLESS HE PERSONALLY OBSERVED THE ALLEGED

1 INCIDENT, THEN HIS 'REBURGATION' OF AN UNVERIFIED, UNDOCUMENTED PHONE CALL
 2 IS HERESAY. INADMISSABLE, UNTIL WHICH TIME THAT HE PERFORMS AN INDEPENDENT
 3 INVESTIGATION INTO THE SPECIFIC ALLEGATION, VERIFYING THE CLAIMS BY MEANS OF
 4 INDEPENDENT SOURCES OF SUPPORTING EVIDENCE. (THAT NEVER OCCURRED)

5 IT IS OF INTEREST THAT IN THE STATE'S OPPOSITION THEY FAILED TO ANSWER
 6 THE ACTUAL 'ISSUE' THE LACK OF A POLICE REPORT OR EVIDENCE OF ANY
 7 DILIGENT POLICE INVESTIGATION. WHATS MORE THEY FAILED TO CITE ANY AUTHORITY
 8 THAT SUPPORTS THEIR MISGUIDED BELIEF THAT A CONVICTION DOES NOT NEED TO
 9 HAVE ANY SUCH FRIVOLOUS THINGS AS A POLICE REPORT/INVESTIGATION.

10 SO HOW IMPORTANT IS THE INITIAL COMPLAINANT'S WRITTEN REPORT AND THE
 11 SUBSEQUENT POLICE REPORT AND INVESTIGATION. WELL THE ABA STANDARD 3-3.1(a)
 12 STATES "A PROSECUTOR ORDINARILY RELIES ON POLICE AND OTHER INVESTIGATIVE
 13 AGENCIES FOR THE INVESTIGATION OF ALLEGED CRIMINAL ACTS." THAT INVESTIGA-
 14 TION IS WHAT THE PROSECUTION RELIES UPON WHEN PROCEEDING TO TRIAL. WHAT
 15 IS UNCOVERED DURING THE INVESTIGATION GIVES THE PROSECUTION THE ACCURATE
 16 PERSPECTIVE OF THE STRENGTH OF THE CASE. WITHOUT THAT INVESTIGATION THE
 17 STATE'S CASE IS LITERALLY DEAD IN THE WATER. "THE INDIVIDUAL PROSECUTING
 18 ATTORNEY HAS A DUTY TO LEARN OF ANY FAVORABLE EVIDENCE KNOWN TO OTHERS
 19 ACTING ON BEHALF OF THE GOVERNMENT IN THE CASE, INCLUDING THE POLICE."
 20 KYLES V. WHITLEY, 514 U.S. 419, 433, 115 S. CT. 1555, 131 L. ED 2D 440 (1995)

21 THE AMENDED CRIMINAL COMPLAINT IS THE DOCUMENT THAT GIVES THE COURT
 22 THE AUTHORITY TO HEAR THE 'DISPUTED MATTER'. BUT IT IS THE ORIGINAL FILING OF
 23 A WRITTEN REPORT BY THE COMPLAINANT THAT GIVES THE STATE THE AUTHORITY TO
 24 FILE THE CRIMINAL COMPLAINT ON THE VICTIM'S BEHALF. WITHOUT THAT INITIAL
 25 FOUNDATION CORNERSTONE THE STATE'S CASE IS LACKING IN LEGAL SUFFICIENCY.
 26 IF THERE IS ONLY ONE PARTY THERE CAN BE NO DISPUTED MATTER NEEDING THE COURT
 27 TO DECIDE. THEREFORE, THE FILED CHARGES IN THE AMENDED CRIMINAL COMPLAINT IS
 28 FATUALLY DEFECTIVE, AND CONSTITUTIONALLY FAULTY. THE ONLY FAIR AND JUST REMEDY

1 THAT THIS COURT SHOULD RENDER IS TO SET ASIDE THE GUILTY PLEA AND TO VACATE
2 THE CONVICTION.

3 "CRIMINAL STATUTES OF LIMITATIONS ARE TO BE CONSTRUED IN FAVOR OF THE
4 ACCUSED." MURPHY V. STATE, 871 P.2d 916, 110 NEV.194 (1994), NRS 171.083 IS A
5 SPECIFIC STATUTE PERTAINING TO THE TOLLING OF STATUTE OF LIMITATIONS, SO IT IS
6 THEREFORE RELEVANT AND NECESSARY. THE STATE'S AMENDED CRIMINAL COMPLAINT
7 CHARGING THE CURRENT CHARGE OF WEAPONS, CONTAINS NO VALID, STATUTORIALLY
8 REQUIRED SUPPORTING AFFIDAVITS OR FACTUAL AVERTMENTS FROM THE ALLEGED
9 VICTIM TO ESTABLISH PROBABLE CAUSE. THE INITIAL DEPUTY DISTRICT ATTORNEY
10 VIOLATED THE STATUTORY DUTY TO ENSURE THAT ALL THE DUE DILIGENCE WAS
11 PERFORMED ENOUGH TO RISE TO THE CONSTITUTIONALLY REQUIRED LEVEL OF DUE
12 PROCESS TO PROCEED TO TRIAL.

13 THIS RAISES A SERIOUS QUESTION, IN ADDITION TO THE ISSUE OF JURISDICTION,
14 IT RAISES QUESTIONS ABOUT THE CONFIDENCE IN THIS CONVICTION. IF THE DEFENSE
15 HAD KNOWN (OR THIS COURT FOR THAT MATTER) THAT THERE HAD BEEN NO INVESTIGATION
16 OR POLICE REPORT FOR THIS CASE BEING GENERATED, WOULD THE OUTCOME OF THIS CASE
17 BEEN DIFFERENT? AS A MATTER OF FIRST IMPRESSION THIS INFORMATION IS MATER-
18 IAL. DANIELS V. STATE, 956 P.2d 111, 114 NEV.261 (1998) MAKES IT CLEAR THAT SUCH
19 CONDUCT GOES FAR BEYOND HARMLESS ERROR. THE STATE'S FAILURE TO BRING THIS
20 INFORMATION FORWARD WAS NOT MERELY GROSS NEGLIGENCE, BUT WAS EXTENDED TO
21 BAD FAITH. A PROSECUTOR'S VIOLATION OF A DEFENDANT'S DUE PROCESS RIGHTS IS
22 UNACCEPTABLE, EVEN WHEN MADE INADVERTENTLY IN A GOOD FAITH PURSUIT OF A
23 JUST OUTCOME.

24 BY THE DETECTIVE MISLEADING THE DISTRICT ATTORNEY AS TO THE STRENGTH OF
25 HIS CASE AND THE DEPTH OF HIS INVESTIGATION, HE WAS INTENTIONALLY ATTEMPTING
26 TO PROVIDE A 'FALSE NARRATIVE.' "IF A PROSECUTOR KNOWINGLY USES PERJURED TESTIM-
27 ONY OR KNOWINGLY FAILS TO DISCLOSE THAT TESTIMONY IS FALSE, THE CONVICTION MUST
28 BE SET ASIDE IF THERE IS ANY REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY

1 AFFECTED THE DECISION OF THE COURT "U.S. V. ALLI, 344 F.3d 1002, 1006 (9th Cir. 2003).
 2 THE BELIEF THAT A POLICE REPORT EXISTED AND THAT A FULLY DILIGENT INVESTIGATION
 3 WAS PERFORMED CLEARLY WAS INFLUENTIAL ON THE COURT'S DECISION. IF THE
 4 COURT KNEW OF THE DUE PROCESS VIOLATION OCCURRING THERE IS NO DOUBT
 5 THE DECISIONS WOULD HAVE BEEN DIFFERENT. THEY WOULD HAVE REALIZED THEY
 6 HAD ABSOLUTELY NO JURISDICTION OR AUTHORITY TO INFRINGE UPON, LET ALONE TO
 7 DEPRIVE AN INNOCENT CITIZEN OF HIS CIVIL LIBERTIES. SUCH CONDUCT EVEN
 8 RISES TO A BRADY VIOLATION AS STRICKLER V. GREENE, 119 S.Ct. 1936, 527 U.S. 263,
 9 141 L. Ed. 2d 286 (1999) STATES: 'UNDER BRADY AN INADVERTANT NONDISCLOSURE HAS
 10 THE SAME IMPACT ON THE FAIRNESS OF THE PROCEEDINGS AS DOES DELIBERATE
 11 CONCEALMENT."

12 CONSTITUTIONAL ERROR HAS OCCURRED TO FRAUDULENTLY ALLOW THE COURT
 13 TO CONTINUE TO BELIEVE THAT ALL THE ELEMENTS OF THE CHARGE ARE PRESENT
 14 AND SUPPORTED BY ACTUAL EVIDENCE TO SUPPORT THE CHARGE AND THE ULTIM-
 15 ATE CONVICTION. THIS MANIFEST ERROR REQUIRES THAT THE GUILTY PLED BE SET
 16 ASIDE. THE REVELATION OF THE LACK OF ANY POLICE REPORT OBTAINED BY ASHLEY,
 17 OR ANY RESULTING INVESTIGATION NOT BEING PERFORMED IS NOT AN ISOLATED
 18 'ISSUE' THAT SHAKE'S THIS COURT'S CONFIDENCE. SUCH CONDUCT IS NO SURPRISE
 19 TO THOSE OF US FAMILIAR WITH THIS CASE. WITHHOLDING DNA, ALIBI DOCUMENTS,
 20 PERJURED TESTIMONY, ALTERED POLICE REPORTS, FALSELY TESTIFIED TO PHOTO LINE-UPS.

21 WHEN CAN THIS COURT SAY ENOUGH IS ENOUGH? AT WHAT POINT WILL THE
 22 CONFIDENCE IN THIS CONVICTION BE SHAKEN? THE STATE'S CASE AS A WHOLE IS
 23 NOTHING MORE THAN AN ILLUSION A PICTURE OF A HOUSE OF CARDS. THIS DEFEN-
 24 DANT HAS NOW SERVED 130% OF THE SENTENCE. THIRTEEN YEARS FOR A
 25 CHARGE THAT HAS ONCE AGAIN BEEN SHOWN TO BE A LEGAL IMPOSSIBILITY.
 26 THE IRREVERSABLE DEVASTATION TO THIS DEFENDANT'S LIFE DICTATES THAT
 27 THIS COURT USE ITS INHERENT POWER, AUTHORITY AND DUTY TO CORRECT THIS
 28 EGREGIOUS ERROR.

CONCLUSION

THIS DEFENDANT THEREFORE ONCE AGAIN STATES THAT WITHOUT THE STATUTORY REQUIREMENT OF THE WRITTEN REPORT FROM A COMPLAINANT, NO INVESTIGATION, THE AMENDED CRIMINAL COMPLAINT INCLUDING ANY OF THE CHARGES PERTAINING TO ASHLEY WAS FAULTY AND FATAALLY DEFECTIVE. AS SUCH THE COURT NEVER LEGALLY OR CONSTITUTIONALLY RECEIVED THE PROPER SUBJECT MATTER JURISDICTION OVER THIS DEFENDANT FOR THESE SPECIFIC CHARGES.

ENOUGH IS ENOUGH, HOW MANY MORE 'ISSUES' DOES THIS DEFENDANT NEED TO BRING FORWARD IN ORDER TO SHOW THAT THERE CAN BE ABSOLUTELY NO CONFIDENCE THAT THIS CONVICTION IS A VALID LEGAL ONE, FREE OF ANY QUESTIONABLE CONDUCT. THIS DEFENDANT IS FULLY AWARE THAT THE WASHOE COUNTY DISTRICT ATTORNEY WOULD BE FREE TO PROCEED TO PROSECUTE ALL THE BOUND OVER CHARGES. BUT IF THIS COURT CHOOSES TO GRANT THE MOTION, THE DEFENDANT WILL ONCE AGAIN BE PRESUMPTIVELY INNOCENT OF ALL CHARGES.

THE RELIEF REQUESTED BY THIS COURT IN THE INITIAL MOTION TO CORRECT IS ONCE AGAIN BEING SOUGHT. ALL ELEVEN (11) REMEDIES OF RELIEF.

THEREFORE, THIS MOTION IS BEING SUBMITTED TO THIS COURT FOR AN ADJUDICATION IN A TIMELY MANNER.

DATED THIS 14th DAY OF JANUARY, 2021

Brendan Dunkley

BRENDAN DUNKLEY #1025236

DEFENDANT IN PRO PER

CERTIFICATE OF SERVICE

THE UNDERSIGNED DOES HEREBY CERTIFY THAT A TRUE AND CORRECT COPY
OF THIS RESPONSE TO THE STATE'S OPPOSITION HAS BEEN MAILED TO THE ADDRESSEE
BELOW, BY USE OF U.S. MAIL THROUGH THE PRISON LAW LIBRARY STAFF ON THIS
14th DAY OF JANUARY, 2021.

APPELLATE DEPUTY

CLERK OF THE COURT

KEVIN NAUGHTON

SECOND JUDICIAL DISTRICT COURT

ONE SOUTH SIERRA STREET

75 COURT STREET

RENO, NEVADA 89501

RENO, NEVADA 89501

HON. CONNIE STEINHEIMER

SECOND JUDICIAL DISTRICT COURT

DEPT 4.

75 COURT STREET

RENO, NEVADA 89501

DATED THIS 14th DAY OF JANUARY, 2021

Brendan Duncley

BRENDAN DUNCLEY #1023236

DEFENDANT IN PRO PER

* NOTE: DEFENDANT RECEIVED THE STATE'S OPPOSITION ON 01/09/21
AT NACC, SO DCR 13 TIME FRAME IS MET. *

1 CODE 3860
2
3
4
56 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
89 STATE of NEVADA,

10 Plaintiff,

11 vs.

Case No. CR07-172812 BRENDAN DUNCKLEY,Dept. No. 413 Defendant.
14

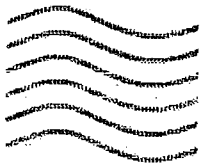
15 REQUEST FOR SUBMISSION OF MOTION

16 It is requested that the motion for TO CORRECT AN ILLEGAL SENTENCE
17 STATE'S OPPOSITION & THE RESPONSE TO STATE'S OPPOSITION18 _____, which was filed on the 26th day of
19 January, 2021, in the above-entitled matter be submitted to the Court
20 for decision.21 The undersigned certifies that a copy of this request has been mailed to all
22 counsel of record.23 DATED this 1st day of February, 2021.
24
25
26
27
28

B. DUNCKLEY #1023236
I.N.C.C.
P.O. Box 7000
Carson City, Nevada 89702

RENO NV 895

02 FEB 2021 PM 3 T



RECEIVED

FEB 04 2021

MAIL DESK

Clerk of the Court
Second Judicial District
75 Court Street
Reno, Nevada 89501

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-02-08 09:19:39.225.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-02-08 09:19:39.191.
DIV. OF PAROLE & PROBATION - Notification received on 2021-02-08 09:19:39.259.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

02-08-2021:09:18:37

Clerk Accepted:

02-08-2021:09:19:09

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Request for Submission

Filed By:

Deputy Clerk KHudson

You may review this filing by clicking on the following link to take you to your cases.

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

The following people were served electronically:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

CODE 3347

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.

Case No. CR07-1728

Dept. No. 4

ORDER

On December 24, 2020, the Defendant, in pro per, filed a Motion to Correct an Illegal Sentence. On January 4, 2021, the State of Nevada, by and through counsel, Christopher J. Hicks, Washoe County District Attorney, and Kevin Naughton, Deputy District Attorney, filed an Opposition to Motion to Correct an Illegal Sentence. On January 26, 2021, the Defendant filed a Response to State's Opposition and formally submitted the Motion to the Court for decision on February 8, 2021.

The Court having reviewed the pleadings filed herein, finds that oral argument on the Motion to Correct an Illegal Sentence would assist the Court in deciding the Motion.

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Therefore, with good cause appearing and in the interests of justice,

IT IS HEREBY ORDERED that the State of Nevada shall contact Department Four's Court Clerk within 30 days of the date of this Order to set oral arguments on the Motion to Correct Illegal Sentence. Once oral arguments on the Motion are set with the State and confirmed with the Nevada Department of Corrections, the Defendant will be notified of the hearing date by Order of the Court.

Dated this 12 day of APRIL, 2021.


DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 12th day of April, 2021, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Kevin Naughton, Esq.
Deputy District Attorney

 X **Deposited in the mail a sealed envelope for postage and mailing with the United States Postal Service in Sparks, Nevada:**

Brendan Dunckley
Inmate No. 1023236
NNCC
P.O. Box 7000
Carson City, NV 89702-7000

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Via E-Mail – **[NONE]**

DATED this 12th day of April, 2021.



Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-04-12 14:54:15.957.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-04-12 14:54:15.93.
DIV. OF PAROLE & PROBATION - Notification received on 2021-04-12 14:54:15.983.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

04-12-2021:14:53:09

Clerk Accepted:

04-12-2021:14:53:45

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord to Set

Filed By:

Court Clerk MTrabert

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
KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA
JENNIFER P. NOBLE, 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

CODE 3347

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.

Case No. CR07-1728

Dept. No. 4

ORDER

On December 24, 2020, the Defendant, in pro per, filed a Motion to Correct an Illegal Sentence. On January 4, 2021, the State of Nevada, by and through counsel, Christopher J. Hicks, Washoe County District Attorney, and Kevin Naughton, Deputy District Attorney, filed an Opposition to Motion to Correct an Illegal Sentence. On January 26, 2021, the Defendant filed a Response to State's Opposition and formally submitted the Motion to the Court for decision on February 8, 2021. On April 12, 2021, an Order to Set oral arguments on the Motion to Correct an Illegal Sentence was entered allowing thirty (30) days of the State of Nevada to set the oral arguments with the Court.

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Therefore, with good cause appearing and in the interests of justice,

IT IS HEREBY ORDERED that oral arguments on the Defendant's Motion to Correct Illegal Sentence are set for June 25, 2021 at 10:00 a.m. This hearing shall be by audiovisual means.

Dated this 17 day of MAY, 2021.


DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 19th day of May, 2021, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Kevin Naughton, Esq.
Deputy District Attorney

 X **Deposited in the mail a sealed envelope for postage and mailing with the United States Postal Service in Sparks, Nevada:**

Brendan Dunckley
Inmate No. 1023236
NNCC
P.O. Box 7000
Carson City, NV 89702-7000

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Via E-Mail – **[NONE]**

DATED this 19th day of May, 2021.



Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-05-19 15:51:35.196.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-05-19 15:51:35.168.
DIV. OF PAROLE & PROBATION - Notification received on 2021-05-19 15:51:35.223.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-19-2021:15:50:28

Clerk Accepted:

05-19-2021:15:51:02

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord Setting Hearing

Filed By:

Court Clerk MTrabert

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

CODE #1260
CHRISTOPHER J. HICKS
#7747
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200
districtattorney@da.washoecounty.us
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BRENDAN DUNCKLEY,

Petitioner,

Case No. CR07-1728

v.

Dept. No. 4

THE STATE OF NEVADA,

Respondent.

_____ /

APPLICATION FOR ORDER TO PRODUCE PRISONER

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS,
District Attorney of Washoe County, by KEVIN NAUGHTON, Appellate Deputy, and
alleges as follows:

1. That the petitioner, BRENDAN DUNCKLEY #1023236, is presently
incarcerated at Northern Nevada Correctional Center, Carson City, Nevada.

2. That it is requested that the petitioner appear for an audio/visual hearing on
the June 25, 2021 at 10:00 a.m.

///

///

WHEREFORE, Applicant prays that an Order be made ordering the audio/visual appearance of the said BRENDAN DUNCKLEY #1023236 before the Second Judicial District Court, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises and directing the execution of said Order by the Warden of the Northern Nevada Correctional Center, Carson City, Nevada.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: May 20, 2021.

CHRISTOPHER J. HICKS
District Attorney

By /s/KEVIN NAUGHTON
KEVIN NAUGHTON
12834
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on May 20, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Brendan Dunckley #1023236
Northern Nevada Correctional Center
P.O Box 7000
Carson City, NV 89701

/s/Celina Gonzalez-Valenzuela
CELINA GONZALEZ-VALENZUELA

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-05-20 09:19:36.581.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-05-20 09:19:36.556.
DIV. OF PAROLE & PROBATION - Notification received on 2021-05-20 09:19:36.605.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-20-2021:09:14:52

Clerk Accepted:

05-20-2021:09:19:02

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Application Produce Prisoner

Filed By:

Kevin Naughton

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

1 CODE #3340
CHRISTOPHER J. HICKS
2 #7747
One South Sierra Street
3 Reno, Nevada 89501
(775) 328-3200
4 districtattorney@da.washoecounty.us
Attorney for Respondent

6 IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 ***

9 BRENDAN DUNCKLEY,

10 Petitioner,

Case No. CR07-1728

11 v.

Dept. No. 4

12 THE STATE OF NEVADA,

13 Respondent.

14 _____/
15 ORDER TO PRODUCE PRISONER VIA SIMULTANEOUS AUDIO/VISUAL TRANSMISSION

16 IT APPEARING to the satisfaction of the above-entitled Court that it is necessary
17 that the Petitioner above named, BRENDAN DUNCKLEY #1023236, presently
18 incarcerated in the Northern Nevada Correctional Center, Carson City, Nevada, be
19 brought before the Second Judicial District Court for a post-conviction hearing in the
20 above-entitled action.

21 NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Northern
22 Nevada Correctional Center, Carson City, Nevada, with cooperative assistance from the
23 Nevada System of Higher Education bring the said BRENDAN DUNCKLEY #1023236
24 before the Second Judicial District Court via simultaneous audio/visual transmission

means on June 25, 2021, at 10:00 a.m. for a post-conviction hearing in the above-entitled action.

IT IS FURTHER ORDERED that it is not necessary for said BRENDAN DUNCKLEY #1023236 to be physically located in Washoe County, Nevada, during the post-conviction hearing.

DATED this 20 day of MAY, 2021.


DISTRICT JUDGE

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-05-20 16:27:44.841.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-05-20 16:27:44.817.
DIV. OF PAROLE & PROBATION - Notification received on 2021-05-20 16:27:44.865.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

05-20-2021:16:26:33

Clerk Accepted:

05-20-2021:16:27:11

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord to Produce Prisoner

Filed By:

Court Clerk MTrabert

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

2021-06-01 04:21:39 PM

Alicia L. Lerud
Clerk of the Court

Transaction # 8472060 : khudson

1 BRENDAN DUNCKLEY #1023236

2 NORTHERN NEVADA CORRECTIONAL CENTER

3 P.O. Box 7000

4 CARSON CITY, NEVADA 89701

5 DEFENDANT IN PRO PER

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE
8 OF NEVADA IN AND FOR THE COUNTY OF WASHOE9
10 STATE OF NEVADA,

11 PLAINTIFF,

CASE No: CR07-1728

12 VS.

DEPT. No: 4

13 BRENDAN DUNCKLEY,

14 DEFENDANT,

MOTION FOR SUBMISSION BASED UPON

15 THE MOTIONS ON FILE

16
17 COMES NOW, DEFENDANT, BRENDAN DUNCKLEY, AND SUBMITS TO THIS COURT HIS
18 MOTION FOR SUBMISSION BASED UPON THE MOTIONS ON FILE, IN THE ABOVE REFERENCED
19 CASE. THIS MOTION IS SUPPORTED BY ALL THE PAPERS, PLEADINGS, FILINGS, POINTS AND
20 AUTHORITIES ON FILE HEREIN.21 POINTS AND AUTHORITIES22 ON DECEMBER 24, 2020 THE DEFENDANT IN PRO PER, FILED A MOTION TO CORRECT AN
23 ILLEGAL SENTENCE. ON JANUARY 4, 2021, THE STATE OF NEVADA, FILED AN OPPOSITION TO THE
24 DEFENDANT'S MOTION. ON JANUARY 26, 2021, DUNCKLEY FILED HIS RESPONSE TO THE
25 STATE'S OPPOSITION, AND FORMALLY SUBMITTED THIS MOTION TO THE COURT FOR DECISION ON
26 FEBRUARY 8, 2021. THE COURT ENTERED THE CURRENT ORDER FOR ORAL ARGUMENTS ON
27 APRIL 12, 2021.

28 IN THAT ORDER THIS COURT: "ORDERED THAT THE STATE OF NEVADA SHALL CONTACT

1 DEPARTMENT FOUR'S COURT CLERK WITHIN 30 DAYS OF THE DATE OF THIS ORDER TO
 2 SET ORAL ARGUMENTS ON THE MOTION TO CORRECT ILLEGAL SENTENCE. ONCE ORAL
 3 ARGUMENTS ON THE MOTION ARE SET WITH THE STATE AND CONFIRMED WITH THE
 4 NEVADA DEPARTMENT OF CORRECTIONS THE DEFENDANT WILL BE NOTIFIED OF THE
 5 HEARING DATE BY ORDER OF THE COURT."

6 THE DEADLINE FOR COMPLIANCE OF THE ORDER WAS MAY 12, 2021. TO DATE PER
 7 A MAY 19, 2021 PRINTOUT OF THE CRO7-1728 CASE HISTORY SHOWS THAT THE LAST
 8 ACTION FOR FILING WAS THE APRIL 12, 2021 ORDER. THE STATE HAS NOT REQUESTED A
 9 CONTINUANCE / EXTENSION OF TIME TO FILE AND AS SUCH HAS FAILED TO COMPLY
 10 WITH THIS COURT'S REASONABLE ORDER. THEIR FAILURE TO DO SO IS THE REASON / BASIS
 11 FOR THIS MOTION. "WHERE RESPONDENT (STATE) HAS FAILED TO ANSWER BRIEF / MOTION
 12 (OR TO COMPLY WITH COURT ORDER) AND OFFERED NO EXPLANATION FOR FAILURE TO DO SO
 13 SUCH UNEXPLAINED OMISSION WOULD BE TREATED AS A CONFESSION OF ERROR." (KRESS
 14 MAN V. SHANGLE, 548 P.2D 691, 92 NEV. 216) (NEV. 1976).

15 BLACK'S LAW DICTIONARY (5TH EDITION) DEFINES ADMISSION BY SILENCE: AS "IF A
 16 STATEMENT IS MADE BY ANOTHER PERSON IN THE PRESENCE OF A PARTY TO THE ACTION,
 17 CONTAINING ASSERTIONS OF FACT WHICH, IF UNTRUE, THE PARTY WOULD UNDER ALL
 18 THE CIRCUMSTANCES NATURALLY BE EXPECTED TO DENY, HIS FAILURE TO SPEAK HAS
 19 TRADITIONALLY BEEN RECEIVABLE AGAINST HIM AS AN ADMISSION."

20 THE STATEMENTS WERE MADE IN THE MOTION FILED BY THE DEFENDANT. THE CHANCE
 21 TO "SPEAK" IN DISPUTE WAS WHAT THIS COURT LITERALLY ORDERED THE STATE TO SCHED-
 22 UAL. THE STATE CHOSE TO STAND SILENT. IT CAN ALSO BE TAKEN ONE STEP FARTHER
 23 THAN THEIR SILENCE BEING VIEWED AS THE UNDISPUTED CLAIM BEING MERITORIOUS.
 24 (COLTON V. MURRAY, 71 NEV. 71, 72) THIS COURT COULD ALSO LOOK AT THE STATE'S CHOICE
 25 NOT TO COMPLY WITH THE COURT ORDER AND SCHEDULE THE HEARING, AS A CLEAR SHOWING
 26 OF ABANDONMENT OF ITS CLAIM TO OPPOSE THE MOTION BEING GRANTED.

27 WE CAN NEVER BE SURE OF THE REASON FOR THE STATE'S DISREGARD FOR THIS COURT'S
 28 ORDER. MR. NAUGHTON MAY NOT BE ABLE TO ETHICALLY DEFEND A CONVICTION HE MAY VIEW

1 AS BEING OBTAINED BY MEANS OF UNETHICAL "BACKDOOR" PROCEDURES. KNOWING
 2 THAT HE HAS BEEN UNABLE TO EXPLAIN HOW THERE IS A CONVICTION WITHOUT ANY R.P.D.
 3 INVESTIGATION. HE MIGHT EVEN BELIEVE THAT THE STATE WOULD NOT HAVE HAD ENOUGH
 4 EVIDENCE TO PRESENT THIS CHARGE THROUGH A LEGAL "FRONT DOOR." MR. NAUGHTON
 5 MAY EVEN BE EXERCISING HIS DISCRETION PER ABA STANDARD 3-8.1 DUTY TO DEFEND
 6 CONVICTION NOT ABSOLUTE, KNOWING THAT IT IS PROSECUTORIAL MISCONDUCT FOR
 7 THE STATE TO INTENTIONALLY MISSTATE THE EVIDENCE OR TO MISLEAD THE COURT
 8 DURING THEIR PRESENTATION. HE MAY ALSO BELIEVE THAT IT IS ESSENTIAL THAT
 9 EVIDENCE TENDING TO EXONERATE THIS DEFENDANT BE AIRED AS FULLY IN A CRIM-
 10 INAL PROCEEDING AS DOES EVIDENCE THAT TENDS TO IMPLICATE HIM. AGAIN HIS
 11 CHOICE AND REASONS FOR FAILURE TO COMPLY MAY NEVER BE KNOWN.

12 WHAT WE DO KNOW IS THE STATE'S INACTION SHOULD BAR THEM FROM ANY
 13 EXTENSION OR EXCEPTION, AS THIS DEFENDANT WOULD BE KEPT TO THE STRICT
 14 TIME FRAMES, THE STATE MUST BE HELD TO AN EVEN HIGHER STANDARD OF ITS
 15 COMPLIANCE. THIS MATTER SHOULD BE ADJUDICATED IN FAVOR OF THE DEFENDANT.

16 THIS CASE AND ITS QUESTIONS OF JURISDICTION, DUE PROCESS VIOLATIONS, THE
 17 POSSIBLE BRADY VIOLATION DUE TO THE STATE'S KNOWINGLY WITHHOLDING THE FACT
 18 THAT THERE WAS NO INDEPENDENT INVESTIGATION OF THESE ALLEGATIONS, OR THE LACK
 19 OF THE SUBSEQUENT POLICE REPORT ALL OF THESE CUMULATIVE "ISSUES" ARE
 20 ALL DIRECTLY CONNECTED TO THIS DEFENDANT'S CONSTITUTIONALLY PROTECTED
 21 RIGHTS AND LIBERTY INTERESTS.

22 CONCLUSION

23 THIS DEFENDANT'S CONTINUED INCARCERATION FOR A CRIME THAT IS LOOKING
 24 MORE AND MORE LIKELY TO BE ONE THAT THIS COURT HAD INADVERTENTLY
 25 ASSUMED JURISDICTION OVER, ERRONIOUSLY, IS A CLEAR VIOLATION OF HIS DUE
 26 PROCESS RIGHTS. TO CLAIM THAT THERE WAS A DILIGENT POLICE INVESTIGATION, BASED
 27 UPON A FILED POLICE REPORT, AND TO ALLOW THE COURT TO BELIEVE THAT SUCH MATERIAL
 28 EVIDENCE WAS SUPPORTED BY PROBABLE CAUSE (NON-EXISTING) WAS ACCOMPLISHED FOR

1 THE SOLE PURPOSE OF PREJUDICING THE DEFENDANT'S CASE, IN THIS COURT
2 EYES. SUCH MALICIOUS ACTIONS OF BAD FAITH SHOULD NEVER BE REWARDED.

3 THIS DEFENDANT IS FULLY AWARE THAT THE GRANTING OF THIS MOTION
4 DOES NOT SHELTER HIM FROM FURTHER PROSECUTION. THE STATE WILL STILL BE
5 ABLE TO PROCEED FORWARD WITH THE REMAINING CHARGE OF JESSICA, ALSO SINCE
6 NRS 201.230 (CURRENT CHARGE) IS MUTUALLY EXCLUSIVE TOWARDS THE ORIGINAL
7 CHARGE OF NRS 200.366 THE STATE COULD TECHNICALLY PROCEED FORWARD
8 WITH A CHARGE OF NRS 200.366 FOR ASHLEY, UNLESS THIS COURT DEEMS IT
9 NECESSARY TO DISMISS ALL COUNTS FOR ASHLEY WITH PREJUDICE. ALL THIS
10 DEFENDANT IS ASKING FOR IS THAT THE PROCEEDINGS BE FREE OF THE TAINT
11 OF MISCONDUCT, IRRESPECTIVE OF THE SOURCE.

12 THEREFORE, THIS DEFENDANT, HUMBLY FILES THIS MOTION FOR SUBMISSION.
13 FURTHER, SINCE THE FREEDOM OF THE DEFENDANT IS A KEY MATTER AT BAR, AND
14 HIS INFRINGED UPON LIBERTY INTERESTS ARE APPARENT, A SPEEDY DECISION IS
15 REQUESTED. AS STATED PRIOR JUSTICE DELAYED IS JUSTICE DENIED. A WRIT OF
16 MANDAMUS HAS ALSO BEEN DRAFTED AND WILL BE FILED IF A DECISION IS NOT
17 RENDERED IN A REASONABLE AND TIMELY MANNER.

18 FOURTEEN YEARS OF INCARCERATION FOR THIS CASE HAS BEEN LONG ENOUGH.
19 (EIGHT YEARS OF WHICH SINCE THE EXPIRATION OF COUNT 2). TO ALLOW AN INNOCENT
20 (OR WRONGFULLY / ILLEGALLY) INCARCERATED MAN TO BE HELD FOR ONE DAY MORE
21 THAN IS NECESSARY IS A CLEAR VIOLATION OF HIS CONSTITUTIONAL RIGHTS. LET
22 US NOT COMPOUND THE HARM ALREADY DONE TO MR. DUNKLEY BY ANY FURTHER
23 UNNECESSARY DELAY.

24 THIS MOTION IS HEREBY SUBMITTED TO THIS COURT FOR A RULING IN FAVOR OF
25 THE DEFENDANT BASED UPON THE MERITS OF THE MOTIONS, AND THE STATE'S
26 DECISION TO 1) ABANDON THEIR CLAIM OF OPPOSITION DUE TO ITS FAILURE TO COMPLY
27 WITH THIS COURT'S ORDER; 2) ITS CHOICE TO STAY SILENT SHOULD BE VIEWED AS THIS
28 DEFENDANT'S CLAIMS TO BE MERITORIOUS.

1 THEREFORE, FOR THE ABOVE REFERENCED REASON THIS DEFENDANT'S
 2 MOTION TO CORRECT AN ILLEGAL SENTENCE SHOULD BE GRANTED.

3 SUBMITTED TO THIS COURT FOR DECISION THIS 26th DAY OF MAY, 2021

4
 5 Brendan Dunchley

6 BRENDAN DUNCHLEY #1023236

7 DEFENDANT IN PRO PER

8
 9 CERTIFICATE OF SERVICE

10 THE UNDERSIGNED DOES HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THIS
 11 MOTION FOR SUBMISSION BASED UPON THE MOTIONS ON FILE HAS BEEN PLACED INTO THE
 12 HANDS OF NDOC PRISON OFFICIALS TO THE FOLLOWING ADDRESSES FOR MAILING BY
 13 MEANS OF THE U.S. POSTAL SERVICE THIS 26th DAY OF MAY, 2021

14
 15 WASHOE COUNTY DISTRICT ATTORNEY

CLERK OF THE COURT

16 % ADA MR. NAUGHTON

SECOND JUDICIAL DISTRICT

17 1 SOUTH SIERRA STREET

75 COURT STREET

18 RENO, NEVADA 89501

RENO, NEVADA 89501

19
 20 HON. CONNIE STEINHEIMER

21 SECOND JUDICIAL DISTRICT COURT

22 DEPT. 4

23 75 COURT STREET

24 RENO, NEVADA 89501

25 DATED THIS 26th DAY OF MAY, 2021

26 Brendan Dunchley

27 BRENDAN DUNCHLEY #1023236

28 DEFENDANT IN PRO PER

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-06-01 16:23:07.071.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-06-01 16:23:07.047.
DIV. OF PAROLE & PROBATION - Notification received on 2021-06-01 16:23:07.095.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

06-01-2021:16:21:39

Clerk Accepted:

06-01-2021:16:22:33

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Motion

Filed By:

Deputy Clerk KHudson

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

v.

BRENDAN DUNCKLEY,

Defendant.

Case No.: CR07-1728

Dept. No.: 4

NOTICE OF AND ORDER FOR AUDIO/VISUAL HEARING

**ORAL ARGUMENTS ON MOTION TO CORRECT ILLEGAL SENTENCE IN THIS
MATTER IS SET FOR JUNE 25, 2021 AT 10:00 A.M.**

Consistent with the Declaration of Emergency in Nevada and to effectuate resulting Directives issued by Governor Steve Sisolak, as renewed and extended¹, and Second Judicial District Court Administrative Orders ("AOs"), as amended and extended, and to support the Washoe County Health Districts efforts to decrease the opportunity for transmission of COVID-19, the hearing in this matter shall be held by audio/visual platform. The hearing will be conducted pursuant to the Nevada Supreme Court Rules Governing Appearance by Simultaneous Audiovisual Transmission Equipment, Part IX.

Details for the Zoom Webinar/Zoom Meeting hearing are attached as Exhibit 1 to this Notice/Order. Counsel, parties, and the public (unless the hearing is closed to the public by rule, statute, or order) may utilize the Zoom link by accessing

¹ The Declaration of Emergency for COVID-19 and all Directives issued are available at: <https://nvhealthresponse.nv.gov/state-information/governor-directives-and-declarations> (last visited 5/3/2021). The AOs are available at: washoecourts.com/Main/AdminOrders (last visited 4/20/2021).

1 www.washoecourts.com, clicking on “Online-Hearings-Click here to select the
2 department”, scrolling down to Department 4, and clicking on the link for this matter
3 to view and hear the proceedings. The hearing may also be accessed by accessing
4 Zoom.com and typing the webinar/meeting number.

5 Pursuant to issued AOs, the parties are reminded that although conducted on an
6 audio/visual platform, a hearing is a formal proceeding and shall be conducted with proper
7 decorum. Appropriate attire is required.

8 If any party intends to introduce exhibits during the hearing, the exhibits shall be E-
9 filed with the Court **twenty-four (24) hours** prior to the hearing. The exhibits will include a
10 cover sheet with the case caption and document title, “PROPOSED EXHIBIT[S]
11 SUBMITTED BY [PARTY] FOR [DATE] HEARING.” The proposed exhibits shall be
12 sequentially numbered. E-filing documents for the hearing does not operate to admit the
13 evidence nor does it preclude objections by any party, both of which will be addressed
14 during the hearing.

15 Any party who objects to this hearing proceeding by audio/visual means, must E-file
16 an objection entitled “[PARTY]’s OBJECTION TO CONDUCTING HEARING BY
17 AUDIO/VISUAL PLATFORM,” with a contemporaneously E-filed Request for Submission
18 of the objection not later than **twenty-four (24) hours** prior to the hearing. The Court may
19 or may not vacate the hearing based on the objection. Unless and until an order is
20 entered vacating or continuing this hearing, the matter will proceed as noticed and
21 ordered.

22 IT IS SO ORDERED.

23 DATED this 17 day of June, 2021.

24
25 
26 DISTRICT JUDGE
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EXHIBIT 1

ZOOM WEBINAR/ZOOM MEETING INFORMATION:

Join Zoom Meeting

<https://washoecourts.zoom.us/j/97630278103?pwd=TSs4aXFBdnBXU3B3am0vaXo2RFo5dz09>

Meeting ID: 976 3027 8103

Passcode: 238423

CERTIFICATE OF SERVICE

1 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
2 STATE OF NEVADA, COUNTY OF WASHOE; that on the 17th day of
3 June, 2021, I filed the attached document with
4 the Clerk of the Court.

5 I further certify that I transmitted a true and correct copy of the foregoing document
6 by the method(s) noted below:

7
8 **Personal delivery to the following: [NONE]**

9 X **Electronically filed with the Clerk of the Court, using the eFlex system which**
10 **constitutes effective service for all eFiled documents pursuant to the efile User**
11 **Agreement:**

12 Kevin Naughton, Esq.
13 Deputy District Attorney

14 X **Deposited in the mail a sealed envelope for postage and mailing with the United**
15 **States Postal Service in Sparks, Nevada:**

16 Brendan Dunckley
17 Inmate No. 1023236
18 NNCC
19 P.O. Box 7000
20 Carson City, NV 89702-7000

21 **Placed a true copy in a sealed envelope for service via:**

22 Reno/Carson Messenger Service – **[NONE]**

23 Federal Express or other overnight delivery service – **[NONE]**

24 Via E-Mail – **[NONE]**

25 DATED this 17th day of June, 2021.

26
27 
28

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-06-17 12:10:09.464.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-06-17 12:10:09.428.
DIV. OF PAROLE & PROBATION - Notification received on 2021-06-17 12:10:09.497.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

06-17-2021:12:08:45

Clerk Accepted:

06-17-2021:12:09:37

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord Re: Hearing Procedure

Filed By:

Court Clerk MTrabert

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-

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NEVADA

KEVIN P. NAUGHTON, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

BRENDAN DUNCKLEY

CODE 3347

**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.****Case No. CR07-1728****Dept. No. 4**

ORDER

On December 24, 2020, the Defendant, in pro per, filed a Motion to Correct an Illegal Sentence. On January 4, 2021, the State of Nevada, by and through counsel, Christopher J. Hicks, Washoe County District Attorney, and Kevin Naughton, Deputy District Attorney, filed an Opposition to Motion to Correct an Illegal Sentence. On January 26, 2021, the Petitioner filed a Response to State's Opposition and formally submitted the matter to the Court for decision on February 8, 2021. On May 19, 2021, an Order was entered setting the Motion to Correct Illegal Sentence for oral arguments on June 25, 2021 at 10:00 a.m.

On June 25, 2021, oral arguments were held by audiovisual means. The Defendant was present representing himself and the State of Nevada was represented by Kevin Naughton, Deputy District Attorney. At the conclusion of hearing the argument by both the Defendant and the State, the Court took the matter under advisement.

The Court having reviewed the pleadings filed herein and considered the oral arguments presented, finds that the Motion to Correct Illegal Sentence shall be denied for all the reasons plead in the State's Opposition to the Motion and orally argued by the State during the hearing on June 25, 2021.

Therefore, with good cause appearing and in the interests of justice,

IT IS HEREBY ORDERED that the State of Nevada shall prepare a draft Order Denying the Motion to Correct Illegal sentence within forty-five (45) days of the date of this order.

Dated this 10 day of SEPTEMBER, 2021.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10th day of September, 2021, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Kevin Naughton, Esq.
Deputy District Attorney

 X **Deposited in the mail a sealed envelope for postage and mailing with the United States Postal Service in Sparks, Nevada:**

Brendan Dunckley
Inmate No. 1023236
NNCC
P.O. Box 7000
Carson City, NV 89702-7000

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Via E-Mail – **[NONE]**

DATED this 10th day of September, 2021.



Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-09-10 09:11:29.99.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-09-10 09:11:29.959.
DIV. OF PAROLE & PROBATION - Notification received on 2021-09-10 09:11:30.02.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

09-10-2021:09:10:19

Clerk Accepted:

09-10-2021:09:10:55

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Order...

Filed By:

Court Clerk MTrabert

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NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

CASE NO. CR07-1728

**TITLE: THE STATE OF NEVADA VS. BRENDAN
DUNCKLEY****DATE, JUDGE
OFFICERS OF****COURT PRESENT****APPEARANCES-HEARING****CONT'D TO**

6/25/2021

MOTION TO CORRECT ILLEGAL SENTENCE

HONORABLE

CONNIE

STEINHEIMER

DEPT. NO.4

M. Stone

(Clerk)

T. Amundson

(Reporter)

Deputy District Attorney Kevin Naughton, appearing from Washoe County, Nevada, represented the State. Defendant, Brendan Dunckley, appearing from Carson City, Nevada, present representing himself.

This hearing was held remotely because of the closure of the courthouse at 75 Court Street in Reno, Washoe County, Nevada due to the National and Local emergency caused by COVID-19. The Court and all the participants appeared via simultaneous audiovisual transmission. The Court was physically located in Reno, Washoe County, Nevada which was the site of the court session. Counsel acknowledged receipt of Notice that the hearing was taking place pursuant to Nevada Supreme Court Rules- Part 9 relating to simultaneous audiovisual transmissions and all counsel stated they had no objection to going forward in this manner.

Motion to Correct Illegal Sentence by Defendant; presented argument; objection and argument by State's counsel; reply argument by Defendant. State's counsel presented further argument.

COURT took the Motion to Correct Illegal Sentence under advisement.

Court recessed.

The Defendant was remanded to the custody of the Warden.

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-10-04 14:25:26.246.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-10-04 14:25:26.203.
DIV. OF PAROLE & PROBATION - Notification received on 2021-10-04 14:25:26.284.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

10-04-2021:14:21:55

Clerk Accepted:

10-04-2021:14:24:42

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

***Minutes

Filed By:

Court Clerk MTrabert

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

4185

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

STATE OF NEVADA,

Dept. No. 4

Plaintiff,

Case CR07-1728

vs.

BRENDAN DUNCKLEY,

Defendant.

Pages 1 to 21, inclusive.

TRANSCRIPT OF PROCEEDINGS

MOTION TO CORRECT ILLEGAL SENTENCE

Friday, June 25, 2021

A P P E A R A N C E S:FOR THE PLAINTIFF: KEVIN NAUGHTON
DEPUTY DISTRICT ATTORNEY
1 So. Sierra St., So. Tower
Reno, NV 89502

FOR THE DEFENDANT: BRENDAN DUNCKLEY, IN PRO PER

REPORTED VIA ZOOM: Christina Amundson, CCR #641
Litigation Services, 323.3411

1 RENO, NEVADA -- 6/25/21 -- 10:00 A.M.

2 -o0o-

3 THE COURT: Thank you. Please be seated.

4 Let the record reflect that this hearing of
5 the court is taking place on June 25th, 2021, at
6 10:00 a.m. It is being held remotely because of the
7 closure of the courthouse at 75 Court Street, Reno,
8 Washoe County, Nevada, due to the national and local
9 emergency caused by COVID-19. The court and all
10 participants are appearing through simultaneous
11 video transmission. I'm physically located in Reno,
12 Washoe County, Nevada, which is the site of today's
13 court session.

14 I'd ask the court personnel to identify
15 themselves at this time.

16 THE CLERK: Marci Stone, Court Clerk,
17 appearing from Washoe County, Nevada.

18 THE REPORTER: Tina Amundson, Court
19 Reporter, Washoe County, Nevada.

20 THE COURT: Thank you.

21 This session of the court is open to the
22 public for viewing and listening to the proceedings
23 through the video-audio link found at
24 Washoecourts.com website. If anyone cannot see or

1 hear the participants during the hearing, you must
2 notify me. I ask that each participant state their
3 name and physical location and whether they received
4 notice that this hearing is taking place pursuant to
5 Nevada Supreme Court Rules Part 9 and let me know if
6 you have any objection to proceeding in this manner.

7 We are here on Case No. CR07-1728, State of
8 Nevada v. Brandon Dunckley.

9 Good morning, Mr. Dunckley.

10 THE DEFENDANT: Good morning, your Honor.
11 This is Brendan Dunckley. I'm new to the Zoom
12 thing. Brendan Dunckley appearing as the defendant
13 for this case located in Carson City at Northern
14 Nevada Correctional Center currently.

15 THE COURT: Okay. And you heard that we
16 were going to do this?

17 THE DEFENDANT: Yes, ma'am. I did receive
18 notification and I have no objection.

19 THE COURT: Okay. Great. Thank you.
20 Counsel for the state.

21 MR. NAUGHTON: Kevin Naughton on behalf of
22 the state presently located in Reno, Washoe County,
23 Nevada, and I've received all appropriate
24 notifications and I have no objection to proceeding

1 in this manner.

2 THE COURT: Thank you. So, Mr. Dunckley,
3 this is your motion to correct illegal sentence,
4 and so you may proceed with the first argument.

5 THE DEFENDANT: Thank you, your Honor. I
6 appreciate you having this hearing. I appreciate
7 you being here as well, Mr. Naughton.

8 This hearing is not based upon whether or
9 not the Washoe County District Attorney's Office
10 filed a complaint referring to the current matter
11 before Ashley turned 21, as Mr. Naughton had
12 attested to in his answer. The fact -- that's not
13 in dispute. They did file within the statutory time
14 of the NRS requiring it.

15 What is being asked is could there be an
16 amended complaint adding the charges for Ashley and
17 ultimately also Michelle two weeks after the initial
18 complaint was filed lacking the jurisdiction, is my
19 question.

20 The reason I ask that is that this case
21 lacked any probable cause, due process, or any
22 evidence whatsoever of a crime, a police report, or
23 any investigation being conducted. So, the question
24 I had for the Court was, if there's never been an

1 investigation, there's never been any due process
2 for this case, how can the Court have ever actually
3 received jurisdiction on this case specifically?

4 Now, as I stated in the record and in the
5 motion, I'm not discussing or arguing the Court's
6 legal jurisdiction on the remaining count in regards
7 to Jessica. The courts have received jurisdiction
8 on the legal matter because the state and the police
9 department filed all the constitutional and legal
10 proceedings. They had a due process, they did their
11 due process, due diligent police investigation, a
12 police report. They had a probable cause affidavit.
13 They presented all that.

14 What my argument is is that they failed to
15 do any of those proper procedures that are required
16 for due process in Ashley's case. A phone
17 conversation and a testimony doesn't give evidence,
18 is not enough to support a crime without supporting
19 evidence, i.e. an investigation by the police
20 department, we have no corroboration. It's simply
21 hearsay.

22 At that point I'm asking the courts whether
23 or not the state unknowingly and prematurely filed
24 these charges in the amended complaint without

1 following the proper procedures that Detective Broom
2 had followed in the 2005 allegation and the 2007
3 allegation. To show equal protection under the law,
4 I should have had the right to be questioned,
5 interrogated or at least given my side of the story.

6 And as I stated in the motion, you can't
7 file a complaint representing a victim unless
8 there's a reported crime and it's investigated to
9 show that there's enough evidence to support, not
10 only charging the person, but then to go further and
11 to convict the person.

12 I've given evidence to this Court over the
13 last 13 years to show that the allegations could
14 never have happened, and had an investigation been
15 properly conducted, they would have shown that I
16 wasn't even here for that. And we're not gonna
17 discuss the evidence or the documentation that I
18 presented because that's outside the aspect and the
19 scope of the case.

20 I'd like to discuss about whether or not
21 failure to file a police report and establish
22 probable cause and failure to show the proper
23 procedure of due process this court is -- I'm asking
24 whether or not this court legally obtained the

1 jurisdiction to hear the matter, let alone
2 adjudicate it. So, when I was looking at this
3 information, I had done some research to look into
4 just what it would have done. Because when we
5 looked under the state law of Daniels v. State,
6 which is the cite of 956 Pacific 2d., page 111, it
7 states the fact the state cannot knowingly fail to
8 gather evidence in a criminal case. The state chose
9 to ignore that, and by that I mean Detective Broom,
10 who was the lead investigator.

11 He chose to not look into this case. He
12 had time. He allegedly spoke to Ashley on
13 March 29th, 2007. The state filed the charges for
14 this -- for CR07-CR07-1728, which is the one that
15 we're currently here, on April 5th of 2007, but,
16 yet, they didn't include the charges for Ashley and
17 Michelle. They waited until two weeks later, until
18 April 16th, to file an amended complaint.

19 The first original charges were supported
20 by probable cause affidavits, as is noted in the top
21 corner of all the documents, Reno Police Department
22 reports, the detective's narrative. We see a clear
23 aspect of due process as to how the detective and
24 ultimately the district attorney's office arrived at

1 the necessity to charge me with the crimes on August
2 5th.

3 We don't see, however, any of those
4 probable cause affidavits, any of those due process
5 requirements and documentation to support the
6 April 16th information. The Court cannot -- or, my
7 apologies, your Honor. The state can't be allowed
8 to simply bypass constitutional norms and
9 protections to introduce new charges that have no
10 connection to the original charges that are not part
11 of the same scheme or plan, nor are supported by any
12 affidavits, evidence, documentation, or in any way,
13 shape, or form investigation.

14 When I was reviewing this, would it
15 surprise the state to find that when I contacted the
16 property management company for the apartment
17 complex that Ashley testified she was living at on
18 Longley Lane, they verified her family did not even
19 move to that apartment complex until October of
20 2000. When she testified that she was attending
21 Dilworth Middle School during this time frame, as
22 she testified at the preliminary hearing, that was
23 correct, but the address showed she was living on
24 the apartments at Prater and McCarran.

1 So, the crime is alleged to have occurred
2 on Longley Lane in Reno, Nevada, while she's living
3 at Bristle Point Apartments in the fall or the
4 summer of 1998, when in actuality all the
5 documentation has shown and a due diligence
6 investigation would have uncovered that this is
7 impossible to have occurred, and that's the point of
8 Edwards. When the state fails to gather evidence
9 for whatever reason, mere negligence, gross
10 negligence, bad faith, the excuses amount to
11 nothing.

12 The fact is that, if due process and
13 constitutional norms are not followed, then at what
14 point do we stop? If this is viewed, as Mr.
15 Naughton had suggested -- not directly inferred but
16 suggested, that a police report's not important
17 here, we filed the complaint in time, well, yes, he
18 did -- or they did, actually, but on whose behalf?
19 The district attorney has only the authority to
20 represent a victim of a reported crime, to come
21 before your Honor and to state on behalf of a
22 victim. But if you don't have a police report and
23 you don't have due process and you don't have
24 probable cause and you never had a reported crime,

1 on whose behalf did they file it?

2 We can't have a complaint without a
3 complainant, and that's what they lacked here. And
4 I've never argued the fact that, had they simply
5 followed the rules of NRS 171.083, which would stop
6 the timeline for 095, the statute of limitations,
7 Detective Broom could have easily contacted as every
8 prison has, peace officers that would meet the bar
9 of law enforcement under that statute. Had he
10 contacted them and said, Do us a favor, we just got
11 off the phone with Inmate Ashley V, if you could
12 please give us a copy of her statement.

13 Once that officer had received that
14 statement, it would automatically stop the statute
15 of limitation. Then the state would have been free
16 to build a case according to the evidence, finding
17 evidence. Especially if we're dealing with a case
18 at that time was close to ten years old. We're now
19 dealing with a case that's 24 years old, your Honor.
20 Twenty-four years old. And if the state didn't have
21 the probable cause then, then they certainly don't
22 have it now.

23 And so my argument is, if they didn't have
24 it to start with, then any case or charge is viewed

1 -- should be or could be -- I don't want to take
2 that -- that's for the Court to determine, obviously
3 -- to be viewed as a fraud. It wasn't intentional
4 on behalf of the district attorney's office. I
5 believe they acted in good faith. I believe Mr.
6 Naughton is acting in good faith here. But I can
7 also guarantee that Mr. Naughton, I can assume, did
8 not read all 3,687 pages of this case.

9 He took the word and the credibility of the
10 diligent officers that came before him and believed
11 with confidence that he could sit here and say this
12 is a valid conviction. And I believe that the
13 initial writing DA -- ADA did the same. I believe
14 they thought that they were acting in good faith,
15 that Detective Broom had done his job, had done what
16 his title talks about. He detected the evidence, he
17 gathered corroboration so that when he goes on the
18 stand it's not simply Ashley regurgitating or
19 stating facts. The detective can honestly sit there
20 and testify saying, Here's what she told us and
21 here's how we verified that what she's saying is,
22 not only credible and plausible, but actual. They
23 failed to do this, and by doing that they failed to
24 establish any due process or probable cause to

1 support it by having no police report.

2 And, as a result of that, it shows that
3 they never really attained jurisdiction and,
4 unfortunately, the justice court and your Honor
5 erroneously believed that it did, because we were
6 believing that the officers of the court that came
7 before us were presenting it in a full, transparent,
8 legal, appropriate manner, that all the
9 constitutional hurdles and protections that the
10 judicial oversight requires were met and,
11 unfortunately, it was never the case in this
12 specific instance.

13 THE COURT: Thank you, Mr. Dunckley.
14 Mr. Naughton.

15 MR. NAUGHTON: In this case I think
16 there's a couple fundamental misunderstandings.
17 Mr. Dunckley appears to have blended a variety of
18 legal concepts including due process -- I'm sorry,
19 Ms. Clerk. Okay. Wanted to make sure we didn't
20 lose you, your Honor.

21 THE COURT: I'm here.

22 MR. NAUGHTON: Thank you, Judge.

23 Mr. Dunckley blends a variety of legal
24 concepts here, all to suggest that somehow the Court

1 lacked jurisdiction. Jurisdiction is an entirely
2 separate concept from due process, from the statute
3 of limitations, from an investigation by a detective
4 in this case.

5 This Court had jurisdiction by virtue of
6 the fact that Mr. Dunckley committed his crimes
7 within Washoe County, Nevada. The statute he refers
8 to in his motion, NRS 171.083, is a statute of
9 limitations statute. That statute would provide for
10 the elimination of the statute of limitations set
11 forth in 171.0945 as long as a police report is
12 filed by a certain date.

13 Today now we're hearing that this is not
14 necessarily what Mr. Dunckley's wanting to argue.
15 He's wanting to argue that Detective Broom didn't
16 actually conduct a thorough investigation and,
17 therefore, deprived him of his due process. Those
18 would have been excellent arguments for a petition
19 for writ of habeas corpus after preliminary hearing
20 or at trial. Mr. Dunckley relieved the state of the
21 burden of proving this case beyond a reasonable
22 doubt by pleading guilty in this case.

23 Additionally, there's plenty of evidence in
24 the record that there were, in fact, police reports

1 completed by Detective Broom in this case. The
2 presentence investigation report refers to them and
3 summarizes them.

4 (Zoom difficulty.)

5 The psychosexual evaluation that was
6 completed refers to those police reports and
7 describes the allegations against Mr. Dunckley, and
8 they really are outside of the scope of a motion to
9 correct an illegal sentence.

10 A motion to correct an illegal sentence is
11 very limited. It can be raised for two purposes.
12 The one that Mr. Dunckley got this Court's attention
13 with was that this court might have acted beyond its
14 jurisdiction based on some issue with the statute of
15 limitations. As I pointed out in my opposition to
16 the motion, that's simply not correct. The
17 information in this case and additionally the
18 earlier charging documents at the justice court were
19 filed well within that statute of limitations
20 ensuring that this court had jurisdiction over these
21 charges.

22 Any of the allegations or any of the
23 complaints about Detective Broom's investigation or
24 lack of investigation are moot at this point and

1 they are beyond the scope of this particular
2 hearing, and for those reasons the defendant's
3 motion should be denied.

4 THE COURT: Mr. Dunckley, did you have
5 something more you wanted to say?

6 THE DEFENDANT: Yes. I understand Mr.
7 Naughton and I appreciate what he's saying in this,
8 but here's the problem: Statement of facts or
9 simply regurgitating information does not amount to
10 a due process investigation, Mr. Naughton.

11 It's also important to remember that when
12 in the first motion I filed I was very clear when I
13 stated that Nevada courts recognize under Bates v.
14 State that a guilty plea, when we're talking about
15 jurisdiction, never makes it legal. You can't turn
16 around and put the cart before the horse. You can't
17 charge someone before you investigate it.

18 If we allowed that, at what point does it
19 then become okay with the police department,
20 thinking someone may be guilty of this crime,
21 knowing they can't prove it or create any probable
22 cause and they certainly would never survive a
23 magistrate to present a probable cause affidavit,
24 but then they say Oh, wait a second. I saw them

1 spit towards someone in public, so they file a legal
2 charge of assault.

3 But then turn around and they back-door an
4 amended complaint to add murder. We don't need to
5 investigate it, we don't need to actually have any
6 due process or need to have probable cause. I
7 understand where you try to argue with the fact that
8 the state is trying to say that I'm jumbling it up,
9 but you can't -- sorry, your Honor? Oh.

10 But you can't. It's not separating. You
11 can't separate the requirement of due process when
12 it comes down to jurisdiction. If you never had a
13 case and you never investigated it to support the
14 case, then had you gone to trial -- had the state
15 gone to trial, what evidence would they have
16 supported and presented?

17 The guilty plea agreement means nothing
18 more than a regurgitation of facts and it has no
19 weight of guilt if the jurisdiction is in dispute,
20 and that's what Bates v. State says. But, more,
21 importantly it brings up the question at what point
22 do we say, You didn't have it. If you agree to the
23 fact that the statute of limitations was met, then
24 at what point -- there's no attorney I know of in

1 the prosecuting office that would ever look and say,
2 Huh, we have zero evidence. Rule No. 1 in law is
3 you never ask a question of a witness you don't know
4 the answer to, but yet you think that this is going
5 to survive. If you don't have the factual basis to
6 support the case, i.e., evidence corroborating the
7 victim -- alleged victim's testimony, it mounts to
8 nothing but hearsay.

9 Further --

10 THE COURT: Mr. Dunckley, you don't need
11 to corroborate a complaining a witness' testimony.
12 Had you gone to trial, the witness could have
13 testified and no corroboration of that testimony
14 would have been required. You could have put a
15 defense on that maybe she wasn't where she should
16 have been.

17 MR. NAUGHTON: I could have, had I known.
18 Absolutely, your Honor. But here's the issue, your
19 Honor: Had I known 13 years ago -- or 12 years
20 ago, I found out last year -- that there was never
21 a police report in this case, never an
22 investigation, had my attorney actually done that
23 and realized, Well, wait a second, we have a
24 problem here, the question then rises, if you never

1 had -- taking the statement out of the way, if you
2 never had the police investigation or police report
3 and actually complainant filing a complaint, which
4 she herself testified she's never gone to the
5 police about this, they found this by part of a
6 third-party, third-party hearsay, and said, Hey, we
7 need your help to put Brendan behind bars where he
8 belongs.

9 If anything, it was a solicited testimony
10 that we look at from someone who has already been
11 convicted of multiple drug charges. And at that
12 point the witness' testimony is not as credible when
13 you look at the fact that another witness testified
14 with documentation and verification to contradict
15 this. So, the investigation was crucial and that's
16 why I'm asking whether or not the Court ever
17 received the jurisdiction to hear this specific
18 matter.

19 Now, I know this affects everything and it
20 doesn't change the other convictions and it also
21 allows the state because they met the burden to
22 recharge and restart from square one. I understand
23 that. I'm just asking if they're gonna attack and
24 charge, I would like to have it where it's fully

1 done and everything's there.

2 THE COURT: Okay.

3 THE DEFENDANT: I'm sorry, your Honor. I
4 have so much stuff in my head, your Honor.

5 THE COURT: That's fine. You're doing
6 great. You're doing fine.

7 Mr. Naughton, did you have anything else?

8 MR. NAUGHTON: Yes, your Honor. I did
9 want to briefly respond.

10 If Mr. Dunckley's allegation now is that
11 his plea was not entered knowingly and voluntarily
12 and intelligently by virtue of his lack of
13 information regarding the police reports, that's a
14 separate issue and not one that can be raised in a
15 motion to correct an illegal sentence.

16 If his counsel was ineffective for failing
17 to inform him of the breadth and scope of the police
18 department investigation, that is a separate issue
19 and one that is also beyond the scope of a motion to
20 correct an illegal sentence.

21 Either way, the arguments that are raised
22 today are beyond the scope of this particular
23 proceeding and the motion should be denied.

24 THE COURT: So, it is difficult for the

1 procedural pieces to always fit what the oral
2 arguments are, and it is an interesting argument,
3 Mr. Dunckley, that you are providing the court. At
4 one point you saw me looking to my right. I just
5 want you to know that I have your whole electronic
6 file on my right and so it's on --

7 THE DEFENDANT: I understand.

8 THE COURT: -- the computer, so that's
9 what I was looking at when I wasn't looking you in
10 the eye.

11 THE DEFENDANT: I know, your Honor.

12 THE COURT: I was referring to some of the
13 pleadings in the case.

14 I'm going to take what you've argued today
15 into consideration and I will notify you of my
16 decision, but I'll take it under submission at this
17 time. Thank you very much. Thank you, both.
18 Appreciate your attendance at today's hearing.

19 THE DEFENDANT: Thank you, your Honor.

20 MR. NAUGHTON: Thank you, your Honor.

21 (End of proceedings at 10:27 a.m.)
22
23
24

1 STATE OF NEVADA)

2) ss.

3 COUNTY OF WASHOE)

4
5 I, CHRISTINA MARIE AMUNDSON, a Certified Court
6 Reporter in and for the states of Nevada and
7 California, do hereby certify:

8 That I was present via Zoom Video Conference
9 for the purpose of acting as Certified Court
10 Reporter in the matter entitled herein;

11 That said transcript which appears hereinbefore
12 was taken in verbatim stenotype notes by me and
13 thereafter transcribed into typewriting as herein
14 appears to the best of my knowledge, skill, and
15 ability and is a true record thereof.

16
17 DATED: At Reno, Nevada, this 4th day of November
18 2021.

19
20 /S/ Christina M. Amundson

21 Christina Marie Amundson, CCR #641

22 -o0o-
23
24

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-11-04 15:47:21.845.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-11-04 15:47:21.811.
DIV. OF PAROLE & PROBATION - Notification received on 2021-11-04 15:47:22.489.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

11-04-2021:15:40:50

Clerk Accepted:

11-04-2021:15:46:38

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Transcript

Filed By:

Christina Marie Amundson

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

1 CODE No. 2840
2
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5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7
8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 THE STATE OF NEVADA,

11 Plaintiff,

Case No. CR07-1728

12 v.

Dept. No. 4

13 BRENDAN DUNCKLEY,

14 Defendant.
15 _____/

16 ORDER DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE

17 Statement of Proceedings

18 On December 24, 2020, the Defendant, in pro per, filed a Motion to Correct an Illegal
19 Sentence. The State filed an Opposition to Motion to Correct an Illegal Sentence on January 4,
20 **2021. The Defendant filed a Response to State's Opposition on January 26, 2021, and formally**
21 submitted the matter to the Court for decision on February 8, 2021. The Court entered an
22 Order on May 19, 2021, setting the matter for oral arguments on June 25, 2021, at 10:00 a.m.

23 On June 25, 2021, the Court conducted oral arguments by audiovisual means. Both
24 parties presented oral argument in support of their positions and the Court took the matter
25 under advisement.

26 / / /

1 Findings of Fact and Conclusions of Law

2 A motion to correct an illegal sentence “address[es] only the facial legality of a
3 sentence.” Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “An ‘illegal
4 sentence’ ... [is] one at variance with the controlling sentencing statute, or illegal in the sense
5 that the court goes beyond its authority by acting without jurisdiction or imposing a sentence
6 in excess of the **statutory maximum provided....**” *Id. quoting Allen v. United States*, 495 A.2d
7 1145, 1149 (D.C. 1985)(internal quotations omitted). A court can correct a sentence that is
8 facially illegal at any time. Edwards, 112 Nev. at 708, 918 P.2d at 324 (1996).

9 The **Defendant’s Motion alleged that this Court lacked jurisdiction** to preside over his
10 **case because his parents received a response from the Reno Police Department’s Records**
11 Division that indicated they did not have any police report listing the child victim of his
12 lewdness conviction as a victim and himself as a suspect. Motion, pp. 3-4. The Defendant
13 cited NRS 171.083 for the premise that the victim was required to file a police report prior to
14 her twenty-first birthday for the statute of limitations not to have lapsed.

15 However, this Court finds that another statute controls the filing period for sexual
16 crimes committed against children.

17 NRS 171.095(1)(b)(1), as it existed between 1998 and 2000 (the time period alleged in
18 the Information), provided that **an information or complaint must be filed “for any offense**
19 **constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the**
20 **sexual abuse is: (1) Twenty-one years old if he discovers or reasonably should have discovered**
21 **that he was a victim of the sexual abuse by the date on which he reaches that age....” 1997**
22 **Statutes of Nevada, Page 891; 1999 Statutes of Nevada, Page 3525. NRS 432B.100(2) defined**
23 **“Lewdness with a child under NRS 201.230” as sexual abuse.**

24 **The victim’s date of birth**, as recited in the Amended Information to which the
25 Defendant pled guilty, is August 14, 1986. Thus, she would have turned 21 on August 14, 2007.
26 The original Information was filed before this Court on July 12, 2007, before the victim turned

1 21. Therefore, the Information was timely filed and this Court did not exceed its jurisdiction by
2 proceeding on the charges properly and timely filed against the Defendant.

3 Having considered all of the papers and pleadings on file herein, and the arguments of
4 the parties, the **Defendant's** Motion to Correct an Illegal Sentence is DENIED.

5 DATED this 4 day of NOVEMBER, 2021.

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8 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 5th day of November, 2021, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Kevin Naughton, Esq.
Deputy District Attorney

 X **Deposited in the mail a sealed envelope for postage and mailing with the United States Postal Service in Sparks, Nevada:**

Brendan Dunckley
Inmate no. 1023236
NNCC
P.O. Box 7000
Carson City, Nevada 89702-7000

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Via E-Mail – **[NONE]**

DATED this 5th day of November, 2021.



Return Of NEF

Recipients

JENNIFER NOBLE, ESQ. - Notification received on 2021-11-05 13:44:07.865.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-11-05 13:44:07.84.
DIV. OF PAROLE & PROBATION - Notification received on 2021-11-05 13:44:07.891.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

11-05-2021:13:43:01

Clerk Accepted:

11-05-2021:13:43:35

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Ord Denying Motion

Filed By:

Court Clerk MTrabert

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

CODE 2540

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

STATE OF NEVADA,

Plaintiff,

Case No: CR07-1728

vs.

Dept. No: 4

BRENDAN DUNCKLEY,

Defendant.

_____ /

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on November 5, 2021, the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

Dated November 8, 2021.

ALICIA LERUD

Clerk of the Court

/s/N. Mason

N. Mason-Deputy Clerk

CERTIFICATE OF SERVICE

Case No. CR07-1728

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court; that on November 8, 2021, I electronically filed the Notice of Entry of Order with the Court System which will send a notice of electronic filing to the following:

JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION
KEVIN P. NAUGHTON, ESQ. for STATE OF NEVADA

I further certify that on November 8, 2021, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addressed to:

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Brendan Dunckley (#1023236)
N. Nevada Correctional Center
P. O. Box 7000
Carson City, NV 89702

The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the preceding document does not contain the personal information of any person.

Dated November 8, 2021.

/s/N. Mason
N. Mason- Deputy Clerk

1 CODE No. 2840
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7
8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 THE STATE OF NEVADA,

11 Plaintiff,

Case No. CR07-1728

12 v.

Dept. No. 4

13 BRENDAN DUNCKLEY,

14 Defendant.
15 _____/

16 ORDER DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE

17 Statement of Proceedings

18 On December 24, 2020, the Defendant, in pro per, filed a Motion to Correct an Illegal
19 Sentence. The State filed an Opposition to Motion to Correct an Illegal Sentence on January 4,
20 **2021. The Defendant filed a Response to State's Opposition on January 26, 2021, and formally**
21 submitted the matter to the Court for decision on February 8, 2021. The Court entered an
22 Order on May 19, 2021, setting the matter for oral arguments on June 25, 2021, at 10:00 a.m.

23 On June 25, 2021, the Court conducted oral arguments by audiovisual means. Both
24 parties presented oral argument in support of their positions and the Court took the matter
25 under advisement.

26 / / /

1 Findings of Fact and Conclusions of Law

2 A motion to correct an illegal sentence “address[es] only the facial legality of a
3 sentence.” Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “An ‘illegal
4 sentence’ ... [is] one at variance with the controlling sentencing statute, or illegal in the sense
5 that the court goes beyond its authority by acting without jurisdiction or imposing a sentence
6 in excess of the **statutory maximum provided....**” *Id. quoting Allen v. United States*, 495 A.2d
7 1145, 1149 (D.C. 1985)(internal quotations omitted). A court can correct a sentence that is
8 facially illegal at any time. Edwards, 112 Nev. at 708, 918 P.2d at 324 (1996).

9 The **Defendant’s Motion alleged that this Court lacked jurisdiction** to preside over his
10 **case because his parents received a response from the Reno Police Department’s Records**
11 Division that indicated they did not have any police report listing the child victim of his
12 lewdness conviction as a victim and himself as a suspect. Motion, pp. 3-4. The Defendant
13 cited NRS 171.083 for the premise that the victim was required to file a police report prior to
14 her twenty-first birthday for the statute of limitations not to have lapsed.

15 However, this Court finds that another statute controls the filing period for sexual
16 crimes committed against children.

17 NRS 171.095(1)(b)(1), as it existed between 1998 and 2000 (the time period alleged in
18 the Information), provided that **an information or complaint must be filed “for any offense**
19 **constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the**
20 **sexual abuse is: (1) Twenty-one years old if he discovers or reasonably should have discovered**
21 **that he was a victim of the sexual abuse by the date on which he reaches that age....” 1997**
22 **Statutes of Nevada, Page 891; 1999 Statutes of Nevada, Page 3525. NRS 432B.100(2) defined**
23 **“Lewdness with a child under NRS 201.230” as sexual abuse.**

24 **The victim’s date of birth**, as recited in the Amended Information to which the
25 Defendant pled guilty, is August 14, 1986. Thus, she would have turned 21 on August 14, 2007.
26 The original Information was filed before this Court on July 12, 2007, before the victim turned

1 21. Therefore, the Information was timely filed and this Court did not exceed its jurisdiction by
2 proceeding on the charges properly and timely filed against the Defendant.

3 Having considered all of the papers and pleadings on file herein, and the arguments of
4 the parties, the **Defendant's** Motion to Correct an Illegal Sentence is DENIED.

5 DATED this 4 day of NOVEMBER, 2021.

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8 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 5th day of November, 2021, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the efile User Agreement:**

Kevin Naughton, Esq.
Deputy District Attorney

 X **Deposited in the mail a sealed envelope for postage and mailing with the United States Postal Service in Sparks, Nevada:**

Brendan Dunckley
Inmate no. 1023236
NNCC
P.O. Box 7000
Carson City, Nevada 89702-7000

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Via E-Mail – **[NONE]**

DATED this 5th day of November, 2021.



Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-11-08 11:57:22.371.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-11-08 11:57:21.436.
DIV. OF PAROLE & PROBATION - Notification received on 2021-11-08 11:57:24.466.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

11-08-2021:11:55:22

Clerk Accepted:

11-08-2021:11:56:19

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Notice of Entry of Ord

Filed By:

Deputy Clerk NMason

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

BRENDAN DUNCKLEY

(Name)

1023236

(I.D. No.)

Northern Nevada Correctional Center
 Post Office Box 7000
 Carson City, Nevada 89702

FILED

2021 NOV 29 PM 1:28

ALICIA L. LIND
 CLERK OF THE COURT
 BY [Signature]
 DEPUTY

IN THE 2nd JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF Washoe

STATE of NEVADA

Petitioner/Plaintiff,

vs.

BRENDAN DUNCKLEY

Respondent/Defendant

Case No.: CR07-1728Dept. No. 4NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that I, BRENDAN DUNCKLEY appeal the
 Judgment / Order entered on the 5th day of NOVEMBER, 2021 by this
 court.

Dated this 19th day of November, 2021.

Brendan Dunckley

(Signature)

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5(b), I hereby certify that I am the Defendant named herein and that on this 19th day of November, 2021, I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the following:

WASHOE County District Attorney

ONE SOUTH SIERRA STREET

RENO, NEVADA 89501

SECOND JUDICIAL DISTRICT COURT
75 COURT STREET

RENO, NEVADA 89501

Brenda J. Sunkles

(Signature)

AFFIRMATION PURSUANT TO NRS 239B.030

** I certify that the foregoing document DOES NOT contain the social security number of any persons.

11/19/21
(Date)

Brenda J. Sunkles
(Signature)

Code 1310

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

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No. CR07-1728

BRENDAN DUNCKLEY,

Dept. No. 4

Defendant.

CASE APPEAL STATEMENT

This case appeal statement is filed pursuant to NRAP 3(f).

1. Appellant is Brendan Dunckley.
2. This appeal is from an order entered by the Honorable Judge Connie Steinheimer.
3. Appellant is representing himself in Proper Person on appeal. The Appellant's address is:

Brendan Dunckley #1023236
NNCC
P.O. Box 7000
Carson City, NV 89702

4. Respondent is the State of Nevada. Respondent is represented by the Washoe County District Attorney's Office:

Jennifer P. Noble, Esq., SBN: 9446
P.O. Box 11130
Reno, Nevada 89520

5. Respondent's attorney is not licensed to practice law in Nevada: N/A

6. Appellant is not represented by appointed counsel in District Court.
7. Appellant is not represented by appointed counsel on appeal.
8. Appellant was not granted leave to proceed in forma pauperis in the District Court
9. Proceeding commenced by the filing of an Information on July 12th , 2021.
10. This is a criminal proceeding and the Appellant is appealing the ORDER DENYING
MOTION TO CORRECT AN ILLEGAL SENTENCE on November 5th 2021.
11. The case has been the subject of a previous appeal to the Supreme Court.
Supreme Court No.: 52383, 55545, 59957, 59958 73095
12. This case does not involve child custody or visitation.
13. This is not a civil case involving the possibility of a settlement.

Dated this 30th day of November, 2021.

Alicia L. Lerud
Clerk of the Court
By: /s/ azamora
Amanda Zamora
Deputy Clerk

Code 1350

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.

Case No. CR07-1728

Dept. No. 4

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 30TH day of November, 2021, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 30th day of November , 2021.

Alicia L. Lerud
Clerk of the Court
By /s/azamora
Amanda Zamora
Deputy Clerk

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-11-30 15:18:46.361.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-11-30 15:18:46.041.
DIV. OF PAROLE & PROBATION - Notification received on 2021-11-30 15:18:46.936.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

11-30-2021:15:17:33

Clerk Accepted:

11-30-2021:15:18:14

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Case Appeal Statement
Certificate of Clerk

Filed By:

Deputy Clerk AZamora

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

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

Supreme Court No. 83867
District Court Case No. CR071728

RECEIPT FOR DOCUMENTS

TO: Brendan Dunckley
Washoe County District Attorney \ Jennifer P. Noble
Alicia L. Lerud, Washoe District Court Clerk ✓

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

12/06/2021 Appeal Filing Fee waived. Criminal. (SC)

12/06/2021 Filed Notice of Appeal/Proper Person. Appeal docketed in the
Supreme Court this day. (SC)

DATE: December 06, 2021

Elizabeth A. Brown, Clerk of Court
lh

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-12-10 08:55:40.527.
KEVIN NAUGHTON, ESQ. - Notification received on 2021-12-10 08:55:40.496.
DIV. OF PAROLE & PROBATION - Notification received on 2021-12-10 08:55:40.558.

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

-

A filing has been submitted to the court RE: CR07-1728

Judge:

HONORABLE CONNIE J. STEINHEIMER

Official File Stamp:

12-10-2021:08:54:35

Clerk Accepted:

12-10-2021:08:55:09

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Court Receipt for Doc

Filed By:

Deputy Clerk AZamora

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:

JENNIFER P. NOBLE, ESQ. for STATE OF
NEVADA

DIV. OF PAROLE & PROBATION

KEVIN P. NAUGHTON, 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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 83867

FILED

DEC 10 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK*ORDER DIRECTING TRANSMISSION OF RECORD
AND REGARDING BRIEFING*

Having reviewed the documents on file in this pro se appeal, this court has concluded that its review of the complete record is warranted. See NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 30 days from the date of this order to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. See NRAP 11(a)(2). The record shall include copies of documentary exhibits submitted in the district court proceedings, but shall not include any physical, non-documentary exhibits or the original documentary exhibits. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. See NRS 176.156(5).

Within 120 days, appellant may file either (1) a brief that complies with the requirements in NRAP 28(a) and NRAP 32; or (2) the "Informal Brief Form for Pro Se Parties" provided by the supreme court clerk. NRAP 31(a)(1). If no brief is submitted, the appeal may be decided on the record on appeal. NRAP 34(g). Respondent need not file a response to any brief filed by appellant, unless ordered to do so by this court. NRAP

46A(c). This court generally will not grant relief without providing an opportunity to file a response. *Id.*

It is so ORDERED.

1. Jandeshy, C.J.

cc: Brendan Dunckley
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2021-12-16 16:13:00.662.
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Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. BRENDAN DUNCKLEY (D4)

Document(s) Submitted:

Supreme Ct Order Directing

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