

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

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Elizabeth A. Brown  
Clerk of Supreme Court

CHARLES JOSEPH MAKI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Sup. Ct. Case No. 84485

Case No. CR94-0345

Dept. 8

RECORD ON APPEAL

VOLUME 9 OF 10

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APPELLANT

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DEPUTY

Case No. CR94P0345

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE STEVEN KOSACH, DISTRICT JUDGE

--oOo--

CHARLES MAKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

TRANSCRIPT OF PROCEEDINGS

POST CONVICTION

July 18th, 1997

Reno, Nevada

## APPEARANCES:

For the Petitioner:

JOSEPH PLATER, ESQ.  
Attorney at Law  
Reno, Nevada

For the Defendant:

TERRENCE MCCARTHY  
Deputy District Attorney  
Washoe County Courthouse  
Reno, Nevada

Reported by:

STEPHANIE KOETTING, CCR #207, CP, RPR  
Computer-Aided Transcription

ORIGINAL

1 RENO, NEVADA, Friday, July 18th, 1997, 10:00 a.m.

2 --oOo--

3 THE COURT: We are on the record in CR94P0345, Charles  
4 Maki, who is present with counsel Joe Plater.

5 And Mr. McCarthy from the Washoe County District Attorney's  
6 Office.

7 This is a petition for post conviction relief. I'm ready  
8 to proceed. Go ahead, gentlemen.

9 MR. PLATER: Thank you, your Honor. Based on the petition  
10 that Mr. Maki has filed, your Honor, I would call him as the  
11 first witness.

12 THE COURT: Mr. Maki, come forward, please, to the witness  
13 stand. Face the clerk and raise your right hand to be sworn.

14 (The witness was sworn at this time.)

15 THE CLERK: Thank you. Please be seated in the witness  
16 chair.

17 THE WITNESS: Your Honor, I have hearing aids.

18 THE COURT: Okay. Any time there's a problem, just let us  
19 know.

20 MR. PLATER: I suppose we should invoke the rule of  
21 exclusion.

22 THE COURT: Okay. We will invoke the rule of exclusion.  
23 Any potential witness please be excused.

24 ///

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C H A R L E S   M A K I

called as a witness on behalf of the Defendant,  
being first duly sworn, was examined and  
testified as follows:

DIRECT EXAMINATION

BY MR. PLATER:

Q.     Would you state your name, please?

A.     Charles Joseph Maki.

Q.     Can you hear fine, Mr. Maki?   Can you hear okay?

A.     Kind of.

Q.     Is your hearing aid turned all the way up?

A.     I've got the right turned up.   The left one, it's up,  
but it doesn't really -- in this kind of atmosphere, it's kind  
of hard.   I'm over 60 percent deaf in both ears.

Q.     You're presently incarcerated in the Nevada State  
Prison?

A.     Ely State Prison, yes.

Q.     You were convicted in this court pursuant to a jury  
trial in 1994, correct?

A.     In 1994.

Q.     And you filed a petition for post conviction relief?

A.     Yes.

Q.     And one of the grounds that you allege is ineffective  
assistance of counsel?

1           A.     What are all the grounds?

2           Q.     You allege as one of the grounds ineffective  
3 assistance of counsel, right?

4           A.     Oh, yeah.

5           Q.     You understand that when you allege ineffective  
6 assistance of counsel, you're waiving the attorney-client  
7 privilege regarding those issues of ineffective assistance?

8           A.     I'm not sure I understand that. Could you come up  
9 here, please? I'm sorry. I'm trying to strain to hear him.  
10 I'm sorry, Judge.

11          MR. PLATER: Whatever is comfortable.

12          THE COURT: Exactly. Wherever is comfortable.

13          BY MR. PLATER:

14          Q.     Is this better, Mr. Maki?

15          A.     Yes.

16          Q.     In your petition, you allege ineffective assistance  
17 of counsel; is that correct?

18          A.     Yes.

19          Q.     Today you want to talk about some of the things you  
20 told your lawyer before trial, during trial and after trial?

21          A.     Right.

22          Q.     If you do that, you'll waive the attorney-client  
23 privilege.

24          A.     That's fine.

1 Q. All the discussions with your lawyer are no longer  
2 privileged and confidential.

3 A. That's fine.

4 Q. You want to bring those out?

5 A. Exactly. Exactly.

6 Q. To prove up your petition. Do you remember who  
7 represented you at trial?

8 A. Janet Cobb Schmuck, public defender.

9 Q. Okay. And you remember the jury trial in this case?

10 A. Yes, I do.

11 Q. Okay. You were charged with five counts of sexual  
12 assault and five counts of lewdness?

13 A. Correct.

14 Q. All with a minor under 14, correct?

15 A. Correct.

16 Q. One of your grounds in your petition alleges that you  
17 were refused the right to testify before a jury. Do you  
18 remember that ground?

19 A. Absolutely.

20 Q. In fact, I think Mr. Hardy put it in a supplemental  
21 petition.

22 A. Uh-huh.

23 Q. Was it your desire at trial to testify?

24 A. Was it mine?

1 Q. Was it your desire to testify at trial?

2 A. Positively. I absolutely wanted to testify.

3 Q. Did you have a discussion about that with your  
4 lawyer?

5 A. Many times, and I even wrote to the Judge that there  
6 was a conflict of interest, because she refused to let me  
7 testify.

8 Q. When did you make the decision that you wanted to  
9 testify?

10 A. Right from the beginning. I wanted somebody to hear  
11 my side of the facts.

12 Q. Okay. And did Miss Schmuck visit you in the Washoe  
13 County Detention Center and discuss with you your right to  
14 testify?

15 A. Wouldn't consider it really a right to testify or a  
16 right not to testify. She told me she didn't want me to  
17 testify, because she did not want to discredit the district  
18 attorney's case at the time.

19 Q. When did she tell you that?

20 A. What day?

21 Q. Was it during trial, before trial?

22 A. It was approximately -- it started approximately a  
23 month and a half before trial.

24 Q. And what was your response to that?

1           A.     I was extremely angry. I got -- I got angry and  
2 asked her, I had a deputy to ask her to be removed from my --  
3 moved away from me.

4           Q.     Where she was visiting you?

5           A.     Yes. That was in unit eight of the Washoe County  
6 Jail.

7           Q.     Did she discuss with you the dangers of testifying if  
8 you took the stand?

9           A.     Yes, she did.

10          Q.     What did she tell you?

11          A.     She told me if I took the stand that the jury would  
12 not believe me, that they would not be interested in anything I  
13 had to say, and that she doesn't want me to testify.

14          Q.     Did she talk about prior convictions?

15          A.     No.

16          Q.     You had prior convictions, right?

17          A.     Yes, I do, prior convictions.

18          Q.     Felony prior convictions?

19          A.     But not of sexual assault or anything in that  
20 respect.

21          Q.     And you knew if you took the stand that those could  
22 be used against you?

23          A.     Oh, sure.

24          Q.     You were willing to do that?

1           A.     Absolutely. I have nothing to hide. I'm not -- you  
2 know, I'm not -- it's not that -- I'm not proud of what I've  
3 done in the past, as far as felony convictions, but I'm not  
4 ashamed of my future or of my present either. I wanted people  
5 to see me as me.

6           Q.     Did you continue to tell Miss Schmuck during trial  
7 that you wanted to testify?

8           A.     I told Miss Schmuck numerous times in trial that I  
9 wanted to testify. I wrote it on paper, because the Court  
10 asked me to write notes to her. I was wearing hearing aids  
11 then. I was writing notes to her explaining that I would like  
12 to get up there and testify. All she did is just kept pushing  
13 my note paper away from me. And she would tell me -- I can't  
14 say exactly what she told me, because I'm in court, but she  
15 told me in so many words just to leave her alone, you know, so,  
16 and there's nothing I can do about it.

17          Q.     Did you ever agree with her that you should not  
18 testify?

19          A.     Absolutely not.

20          Q.     Now, on the record in this case -- well, let me start  
21 over. Did you ever tell the Court out loud you wanted to  
22 testify and your lawyer was not letting you do so?

23          A.     I don't recall.

24          Q.     It's not on the record, it's not on the trial

1 transcripts.

2 A. No. I don't recall.

3 Q. That you ever objected to the Court?

4 A. Miss Schmuck did pretty much everything. I mean, you  
5 know, the Court asked me to listen to her and let her do  
6 whatever for me. I tried to abide by the Court's rule, but to  
7 say, I've never been to trial, I've never been in a situation  
8 like this, and I knew she was doing me wrong and incorrectly,  
9 and I was trying to explain myself, but I was also listening to  
10 her and it just got to be a mix-up. The only thing I knew what  
11 to do was to write to the Court and say: Hey, you know, she's  
12 doing me wrong and I want somebody to help me. I need a new  
13 public defender to help me, because she's doing me totally  
14 wrong.

15 Q. How come you didn't stand up and tell the judge: I  
16 want to testify.

17 A. She told me I couldn't do that.

18 Q. And you followed her advice?

19 A. That's what I was told to do.

20 Q. Okay. You thought that's the way -- how the court  
21 system worked?

22 A. Apparently, yeah. I thought that's what normal  
23 procedures are.

24 Q. Did you ever write a little note to Judge Kosach

1 during trial saying you wanted to testify, but you were being  
2 prevented by your attorney?

3 A. No, I never did that.

4 Q. How come?

5 A. Because the Judge at that time was, I guess, kind of  
6 upset with me, because I was making a commotion with my  
7 attorney trying to get myself up here and trying to let myself  
8 be heard to a degree and the district attorney got mad, because  
9 I was making too much of a commotion and asked the Judge to ask  
10 me to be quite and just to write notes. So that's -- I was  
11 trying to abide by the Court's wishes and just write her notes  
12 and they wouldn't go anywhere.

13 Q. Okay.

14 A. She just told me I had to do what I was told to do by  
15 her, and that was it.

16 Q. All right. Was there anything that you asked Miss  
17 Schmuck to do prior to trial that was not done?

18 A. In regards? I had to do a lot of things.

19 Q. Such as?

20 A. I get witnesses.

21 Q. What types of witnesses?

22 A. I had character witnesses that I wanted brought  
23 forth. There was people in the apartment complex that knew of  
24 incidents with the father and the two girls that I was accused

1 of. There was a guy whose son was involved directly with one  
2 of the girls or both of them.

3 MR. McCARTHY: Your Honor, I object here. I believe this  
4 witness has no personal knowledge of what any witnesses would  
5 testify to.

6 THE COURT: Let's ask. Go ahead, Mr. Plater, ask.

7 BY MR. PLATER:

8 Q. Well, let's say, other than those character witness,  
9 let's say, after -- or during and after the preliminary  
10 hearing, were you concerned about some of the statements the  
11 two girls had made against you, as you read the preliminary  
12 hearing transcript?

13 A. Was I concerned?

14 Q. Right.

15 A. Well, I guess anybody would be concerned, I mean,  
16 from the statements that somebody is being accused of something  
17 like that, yeah. But I knew that somewhere along the line,  
18 they were being coerced in what to say, because they kept  
19 changing their statements. They were trying to say it didn't  
20 happen.

21 MR. McCARTHY: Objection, again, personal knowledge as to  
22 who coerced the witnesses.

23 THE COURT: Mr. Maki, what the objection is, is whether or  
24 not you have personal knowledge yourself of what these

1 witnesses are going to say.

2 THE WITNESS: Oh.

3 THE COURT: That's what I meant when I said go ahead and  
4 ask.

5 THE WITNESS: Oh, I don't know exactly. I know  
6 approximately. I don't know exactly what anybody will say.

7 THE COURT: Objection is sustained.

8 BY MR. PLATER:

9 Q. Let me back up a moment. You said you noted  
10 inconsistencies regarding what the victim said?

11 A. Yes.

12 Q. Did you propose anything to Miss Schmuck regarding  
13 those inconsistencies that she should do in her representation  
14 to you?

15 A. Oh, absolutely.

16 Q. What did you tell her that she should do?

17 A. I told Miss Schmuck during the preliminary trial that  
18 when the older girl stated that she took showers with her  
19 father to keep on going to see where it would go. And she told  
20 me it had nothing to do with me.

21 Q. Did you tell her to do anything else?

22 A. I told her to ask about tattoos on me. I knew nobody  
23 knew about tattoos.

24 Q. Anything else besides that?

1           A.     Well, there was the discrepancies in their testimony  
2     that I asked her to follow up on and she addressed the Court  
3     and made a statement to the Court saying she knew there was  
4     discrepancies in their testimony. She wouldn't follow-up on  
5     it.

6           Q.     Did you know, regarding those discrepancies in  
7     testimony, of any legal procedure that she could have used  
8     before trial and during trial to help you with your defense?

9           A.     I'm not sure I understand how to answer that one.

10          Q.     Okay. Had you ever heard of an independent --

11          A.     A who?

12          Q.     Have you -- at that time, had you ever heard of an  
13     independent physical or psychological examination could have  
14     been done?

15          A.     I see where you're going. Absolutely, yeah. Before  
16     we went to preliminary, I wanted to have a -- not a  
17     psychological at the time, but I wanted to have a physical,  
18     medical doctor look at them. But I didn't have a public  
19     defender until the day I went to preliminary. When we went  
20     back there in this little room where I guess attorneys go with  
21     their clients, first thing I asked her was to have a doctor  
22     look at them and they could see that there was nothing wrong  
23     with them.

24          MR. MCCARTHY: Objection, your Honor.

1 THE COURT: Sustained.

2 BY MR. PLATER:

3 Q. So you made the suggestion to Miss Schmuck that an  
4 independent physical exam could be conducted?

5 A. You betcha.

6 Q. Was that ever done to your knowledge?

7 A. To my knowledge, it hasn't been, no.

8 Q. Did she tell you why she would not do it?

9 A. No. She never mentioned anything at all.

10 Q. Did she ever say anything whether she would do it?

11 A. All she told me is she was going to do things her way  
12 and that's what she was going to do. That was the first thing  
13 that came out of her mouth.

14 Q. Did you have problems getting along with Miss  
15 Schmuck?

16 A. Very much so.

17 Q. Why is that?

18 A. Can I put it bluntly?

19 THE COURT: Go ahead.

20 THE WITNESS: Miss Schmuck is two-faced.

21 BY MR. PLATER:

22 Q. Well, wait a second, Mr. Maki. I don't want your  
23 conclusions, okay, or your personal feelings about her. But  
24 why did you have a conflict with her?

1           A.     Miss Schmuck told me that when we were in unit eight,  
2     when I was in unit eight, excuse me, in the county jail, Miss  
3     Schmuck told me, I asked her to go and talk to people at the  
4     apartment complex. And what started it, which got me more  
5     pissed than anything else, she went over and she talked to the  
6     alleged victims and the father and came back and told me I was  
7     guilty.

8           And she tells me that I was guilty and she was sexually  
9     assaulted when she was a younger woman and I had to be guilty  
10    and it don't matter what.

11          And right there, it started the whole ball of wax. And I  
12    don't care who she is or what she is, she ain't got no right  
13    telling me that. She's supposed to defend me. She can't put  
14    her personal reasons. I don't care what happened to her way  
15    back when. And that's what started the whole thing. That's  
16    when me and her had very bad feelings and conflicts between  
17    each other.

18          Q.     Okay. So you felt that she was not defending you  
19    properly?

20          A.     Absolutely not.

21          Q.     Because what she said regarding her own past?

22          A.     Absolutely not.

23          Q.     And because she said you were guilty?

24          A.     She told me straight to my face I was guilty, that

1 the alleged victims are telling the truth and that's all there  
2 was to it and that there was nothing I could do. That she's  
3 going to go through the motions. Because I told her: Hey, I'm  
4 going to have you fired. There ain't no way I'm going to be  
5 able to do that, and she apparently was right.

6 Q. You attempt to have her removed or replaced by  
7 another lawyer?

8 A. I tried -- I went through Washoe Legal Services. I  
9 went to her boss at the time, Mike Specchio. I don't know if  
10 he's still the boss or not. I called and wrote him. I wrote  
11 to the Honorable Judge Kosach. I wrote to the Burr  
12 Association. And then I asked her herself to have herself  
13 removed and she told me along with everybody else that it  
14 couldn't be done.

15 Q. Do you remember the sentencing in this case?

16 A. Yes.

17 Q. Do you remember before sentencing a Jocelyn Coombs?

18 A. Coombs.

19 Q. Coombs?

20 A. Yeah.

21 Q. You knew before sentencing that she was going to come  
22 testify against you at sentencing?

23 A. Yes, I did.

24 Q. And did you have a discussion regarding that with

1 Miss Schmuck?

2 A. Yes, I did.

3 Q. Okay. And did you offer Miss Schmuck any proposed  
4 defense?

5 A. Any proposed defense?

6 Q. Any proposed defense in regard to Miss Coombs'  
7 anticipated testimony?

8 A. Oh, definitely.

9 Q. What did you tell her?

10 A. I told her I wanted to have my mother, I wanted Mike  
11 Fried aka Colonel. I wanted Bob Loyal, aka ACB. That I wanted  
12 those two people come down, because I've known her and my  
13 family for over 20 years. I wanted my school records to come  
14 to show because my sister prior, my other sister told me she  
15 was going to come and lie about all this stuff. So I wanted  
16 her to use my school records and the F.B.I. report on me to  
17 show that Jocelyn was lying.

18 And Miss Schmuck told me to write up a -- I don't know what  
19 you would call it, like a summary or something, I guess. I'm  
20 not sure how she put it, a background of myself and Jocelyn and  
21 the family and everything and that she would use that.

22 Well, I knew how she was doing it all right. What I did  
23 was I wrote it, but I addressed it to the Honorable Court,  
24 because I knew what she would do like she's done before.

1 That's like put the stuff in the briefcase like she did in  
2 trial when I asked her to do it. I addressed it to the court,  
3 she took it and stuffed everything in her briefcase that and  
4 said it didn't pertain to the sentencing. I turned around and  
5 I said it's like this, either you tell the judge that I have  
6 this for him or I will tell the judge I have this for him.  
7 Either way it's going to work. Finally she turned around and  
8 addressed the court. And said hey, Mr. Maki has a letter for  
9 you, and the judge looked at it and it was never put into my  
10 file, but he did look at it. But she told me that she would  
11 not bring in anybody to testify for me as far as Jocelyn is  
12 concerned either. And I had one of them sitting right there  
13 with me in the county jail. He was in my cell, it was Michael  
14 Fried.

15 Q. Okay. Are there any other things you want to bring  
16 to the Court's attention regarding your petition?

17 A. Well, I don't know. What am I supposed to do? I  
18 don't know.

19 Q. Okay.

20 A. I guess that's why I have an attorney, because I  
21 don't know how to address this stuff.

22 MR. PLATER: That's all the questions I have at this time,  
23 your Honor.

24 THE COURT: Thank you. Mr. McCarthy?

1 BY MR. MCCARTHY:

2 Q. Mr. Maki, how did you learn that Jocelyn was going to  
3 be at your sentencing hearing?

4 A. How did I know that Jocelyn was going to be at my  
5 sentencing hearing?

6 Q. Right.

7 A. Two ways, my sister Ester Chong, who is the sibling  
8 between myself and Jocelyn, came up here to the jail -- the  
9 jail and told me during visiting and Miss Coombs -- or Miss  
10 Schmuck told me about two days before Jocelyn actually came.

11 Q. How long before your sentencing hearing was it that  
12 your sister came up to the jail and told you that Jocelyn was  
13 coming to the sentencing hearing?

14 A. It's hard to remember. I would say approximately  
15 three weeks, maybe.

16 Q. So at that time, you immediately sat down and wrote a  
17 letter to Janet Schmuck and told her about that, is that right?

18 A. No. No.

19 Q. You called her on the phone to tell her?

20 A. I called Janet Schmuck, yeah. And told her that I  
21 believe that Jocelyn was on her way.

22 Q. So when Janet Schmuck later told you that Jocelyn was  
23 coming, you both already knew that?

24 A. Pretty much, yeah.

1 Q. And that's why she felt it necessary to tell you, do  
2 you think?

3 A. I can't answer for that. I don't really know.

4 Q. Did you give Miss Schmuck a letter at your sentencing  
5 hearing?

6 A. Yes.

7 Q. That has some names in it?

8 A. Yes.

9 Q. People that could help you?

10 A. Yes.

11 Q. Did you give her that before your sentencing hearing?

12 A. No. She told me not to. She told me to bring it  
13 during the sentencing hearing, because I talked to her on a  
14 Friday, and I believe the sentencing was on a Monday, and she  
15 told me during the weekend to write it out and bring it to her  
16 during the hearing and she would do appropriately what was to  
17 be done, but she didn't.

18 Q. That's not the same letter you sent to Judge Kosach?

19 A. That's the same letter I gave to Judge Kosach.

20 Q. Now, did you send it to Judge Kosach because you  
21 believe that Miss Schmuck was going to stuff it under her  
22 briefcase or because she told you to?

23 A. No. No. She did stuff up underneath her briefcase  
24 like she did my other paper work during trial saying it did not

1     pertain to anything. But yet she told me to write this out. I  
2     knew because of prior experience with her that she was going to  
3     do this, so I addressed it to Judge Kosach and made a fuss  
4     about it. Either she will give it to him so he can see it  
5     personally or I'll be asked to give it to him. So she turned  
6     around and finally did give it to him.

7           Q.     Okay. I understand. Did you read your petition,  
8     sir, before you signed it?

9           A.     Yes. I'm not really good. I've got a fifth grade  
10    reading level, but I read it.

11          Q.     Did you know you were swearing it was all true?

12          A.     I was swearing what I was reading was supposed to be  
13    true, yeah.

14          Q.     Okay. Did Janet Schmuck tell you what she was going  
15    to do to prevent you from testifying?

16          A.     Did she tell me what she was going to do to prevent  
17    me from testifying?

18          Q.     Right.

19          A.     She told me she wasn't going to put me up on the  
20    witness stand.

21          Q.     And she told you that regardless of what you wanted  
22    to do, she had the authority to prohibit you from testifying?

23          A.     Exactly.

24          Q.     Okay. Did Judge Kosach tell you that, too?

1 A. No, he did not, not that I recall.

2 Q. Did he tell you that you had the right to testify?

3 A. Judge Kosach never told me anything that I can  
4 remember.

5 Q. Okay.

6 A. We're speaking during trial?

7 Q. Yeah.

8 A. No. He never -- no, not that I can recall he never  
9 said nothing.

10 Q. Okay.

11 MR. McCARTHY: May I have this marked, please, as A?

12 THE CLERK: State's Exhibit A marked.

13 MR. McCARTHY: I'm sorry, your Honor. I didn't make  
14 copies.

15 THE COURT: Is that a copy of the transcript?

16 MR. McCARTHY: The transcript speaks for itself. I don't  
17 feel a need to introduce it.

18 BY MR. McCARTHY:

19 Q. Mr. Maki, I'll show you what's been admitted as  
20 Exhibit A. Would you look at that, please?

21 A. You want me to read the whole thing?

22 Q. My question is, Mr. Maki, does that look familiar to  
23 you?

24 A. Not really.

1 Q. You've never received that letter?

2 A. I can't say if I have or not. I don't recall that  
3 letter. I couldn't have, not this long. She's never written  
4 me anything this long since I known her.

5 Q. Is it your testimony that Exhibit A was not sent to  
6 you or not received by you?

7 A. As far as I can remember, no.

8 Q. Okay.

9 A. No. I can't recall something like this, no.

10 Q. Sir, is it that you don't recall or is that you never  
11 saw that letter before?

12 A. I say I don't recall. It's a possibility. You're  
13 talking three and a half years ago.

14 Q. You recall when she called you, that you do not have  
15 a right to testify over her objections, is that right?

16 A. Oh, yeah.

17 Q. You recall that in some detail?

18 A. Pretty much so, you bet.

19 Q. If she had said something to the contrary, would you  
20 recall that?

21 A. Define "this."

22 Q. Skip it.

23 THE COURT: May I see it, please?

24 MR. MCCARTHY: I can't offer it. I'll authenticate it

1 later. Unless there's an offer to stipulate.

2 MR. PLATER: Probably. Did she write it?

3 MR. MCCARTHY: Yeah.

4 MR. PLATER: Sure.

5 BY MR. MCCARTHY:

6 Q. Did I hear you correctly when I said that Janet  
7 Schmuck told you that the reason you would not be allowed to  
8 testify, because she didn't want to hurt the prosecutor's case?

9 A. Exactly what she told me.

10 Q. She was afraid if you testified, that you might be  
11 acquitted, is that right?

12 A. I couldn't give you her reason.

13 Q. But that's the reason she told you?

14 A. She didn't tell me that.

15 Q. She told you if you testified, it might hurt the  
16 government's ability to prosecute you, is that right?

17 A. No, you're changing it around.

18 Q. Tell me.

19 A. She told me that she didn't want to discredit the  
20 case, the district attorney's case.

21 Q. She wanted the DA's case to be a good, strong case,  
22 is that what she said?

23 A. She told me that she would not discredit the State's  
24 case. She didn't go any farther, no less, no more.

1 Q. Did she tell you any other ways in which she did not  
2 want to discredit the DA's case?

3 A. She said the jury wouldn't be interested in what I  
4 had to say.

5 Q. I don't quite understand.

6 A. Neither do I. I didn't understand none of it.

7 Q. Did she tell you things like she would refuse to  
8 present evidence, because it might help you?

9 A. No, she did not say that.

10 Q. Did she tell you that she would refuse to present  
11 evidence, because she didn't want to hurt the DA's case?

12 A. She stated that she would not discredit the district  
13 attorney's case.

14 Q. Did she give you any other ways in which she would  
15 not discredit the District Attorney's Office?

16 A. She told me just like she told me. I'm not telling  
17 you any differently. I'm telling how she told me.

18 Q. Was it only that the one time, when it was the  
19 question of whether you would testify?

20 A. She told me two times that I can recall.

21 Q. Both dealing with the question of whether you would  
22 testify or was there something else?

23 A. Well, it was basically with testifying, yes.

24 Q. Okay. Where did this conversation take place, sir?

1           A.     One of them took place in the County Jail and the  
2 other one took place at that table right there.

3           Q.     In the trial?

4           A.     During the trial.

5           Q.     Do you remember at what stage of the trial?

6           A.     I think it was before I asked her to bring the  
7 pictures out. She refused to bring the photographs out of me.  
8 When the trial was just about over with and the two alleged  
9 victims did there thing up on the stand, I felt that it was  
10 time for her to bring out the photographs that I wanted taken  
11 of myself. And she told me then, even, that she refused to  
12 bring the photographs out, because I'm the one that wanted them  
13 taken. Okay. So I told her again I wanted, you know, her to  
14 bring them out or I'll ask the judge or make some kind of a  
15 fuss about it because I want these photographs brought out, so  
16 she brought them out.

17          Q.     Was there a witness on the stand when that happened?

18          A.     I think. Oh, gosh, it's hard to say. I think that  
19 the witnesses were pretty well done. I think so. I can't  
20 really recall.

21          Q.     Was that before or after Mike O'Brien testified?

22          A.     That would be after Michael O'Brien.

23          Q.     He's the guy who took the photographs, right?

24          A.     Yes.

1           Q.     It would be after him? So after Mike O'Brien  
2 testified, then you and Miss Schmuck had a dispute about  
3 whether or not to introduce photographs in evidence?

4           A.     Right. Maybe before. It's sometime during that. I  
5 can't be sure. But it's sometime during that period, yeah.

6           Q.     Okay. Was it that you wanted the girls to see the  
7 photographs while they were testifying? Is that what you told  
8 her?

9           A.     I wanted her to get up and ask the girls about the  
10 tattoos, because the detective stated there was no tattoos.  
11 The girl stated there was no tattoos. I knew nobody knew about  
12 tattoos and I wanted the evidence brought out that in fact  
13 there were tattoos.

14          MR. McCARTHY: I move to strike everything after the word  
15 "no" as nonresponsive.

16          THE COURT: I'll strike it.

17          BY MR. McCARTHY:

18          Q.     If you could just try to answer what I'm asking you.

19          A.     I thought I was.

20          Q.     Was it that you and Miss Schmuck had a dispute about  
21 the best time in the trial to introduce the photographs?

22          A.     Say again, now?

23          Q.     Did you and Janet Schmuck have a dispute about what  
24 was the best time to present the photographs?

1           A.     That's a tricky question. I wouldn't say the best  
2 time. I would just say we had a dispute that she was going to  
3 introduce the photographs or not.

4           Q.     Okay. So until you told her you were going to make a  
5 fuss, she had told you that she had no intention of introducing  
6 those photographs in evidence, is that right?

7           A.     Pretty close. Pretty close.

8           Q.     Can you make it closer?

9           A.     Well, there was a time when I wanted her to bring the  
10 photographs out, she told me that -- your Honor, I have this  
11 stuff wrote down that when I was in trial, and going through  
12 trial, I took notes, very specific notes. May I get them?

13          THE COURT: Yes.

14          MR. PLATER: You want the other package?

15          MR. McCARTHY: It might be easier if one of his hands was  
16 loose.

17          THE COURT: That's fine with me.

18          THE WITNESS: Okay. I'm getting close here. It takes me a  
19 second to go over it. Okay. Now, what was your question  
20 again? I wanted to make sure I got the part here about the  
21 tattoos.

22          MR. McCARTHY: I have no idea what the question was. Can  
23 you tell me?

24                   (Whereupon the reporter read the record.)

1 BY MR. McCARTHY:

2 Q. Did you hear that?

3 A. Excuse me. It sounded like mumbles.

4 (Whereupon the reporter read the record.)

5 BY MR. McCARTHY:

6 Q. So we're trying to get it clear that Janet Schmuck  
7 told you she had no intention of introducing those photographs  
8 into evidence and that's the way it was until you made a fuss  
9 about it?

10 A. Right.

11 Q. When was it that you made that fuss?

12 A. Okay. It was, according to my notes, it was after  
13 Desiree Came back or was in there. It was sometime after  
14 Desiree testified, I asked Janet to say something, because she  
15 tells me why you're the one that wanted the pictures taken.  
16 That's what Janet said to me right there.

17 Q. Do you remember what it was you said that inspired  
18 the response why you're the one who wanted the pictures taken?

19 A. That I can't answer, really.

20 Q. Was it something you said?

21 A. Was it something that I said? Well, probably I told  
22 her. I haven't gotten that part wrote down. When I told her  
23 that I seen that the two alleged victims could not identify and  
24 the detective could not identify the tattoo, I wanted the

1 pictures brought out so that the identity could be shown.

2 Q. Okay. Well, the photographs of your tattoos were in  
3 fact admitted into evidence, were they not?

4 A. They were in evidence. I guess you call it evidence.

5 Q. Did the judge get it?

6 A. Janet Schmuck had them.

7 Q. Did the jury get to see the pictures?

8 A. Yes. She stated here is the pictures of my client.  
9 As you see, he has tattoos all over. Girls said no tattoos in  
10 penis area. You can see there is. So apparently, yes, she did  
11 show the jury that, yes.

12 Q. Okay. But you thought she should have done it at  
13 some different point in the trial, is that right?

14 A. Well, no. I thought that she should have done it on  
15 her own. She wasn't going to do it until I made a mention of  
16 it.

17 Q. Okay. I understand. Do you recall what witnesses  
18 you asked her to try to get on your behalf at trial?

19 A. Yes. Pretty much all of them, yes.

20 Q. Can you give us some names, please?

21 A. Give you all of them.

22 Q. All those that you told Janet Schmuck that you wanted  
23 to hear from?

24 A. I wanted Paul Grubbs, Linda Stalling, Gail Thomas or

1 this is during trial only.

2 Q. Yeah.

3 A. There was a guy named Jay downstairs. I don't know  
4 what his name. Daniel Johnson, Ken Daniels,

5 Q. I'm sorry. What are you reading from, sir?

6 A. My notes. You can look at them.

7 Q. That's all right. Those are the notes you took at  
8 trial?

9 A. These are the notes I took from the day I was  
10 arrested to the day I went to prison. It's like a diary. You  
11 might say of everything, every conversation, phone call, person  
12 who visited me, everything that took place, I wrote it all down  
13 so I wouldn't forget.

14 Q. Great. Perhaps you can tell us, then, if you gave  
15 these names to Janet Schmuck.

16 A. Okay. April 2nd to April 4th, 1994 was the one that  
17 I got down here also. It was April 1st and March 26th and  
18 that's basically it.

19 Q. When did you prepare this diary that you have?

20 A. From -- if you'd look to see it. I have no objection  
21 to you looking at it.

22 Q. Thank you. May I approach?

23 A. These are other notes right there of when I was in  
24 prison. Now, the dates might be a day or two off, but because

1 I didn't have no calendar.

2 Q. So you wrote this diary that you're reading from like  
3 each day. You would sit down and say today Janet Schmuck came  
4 to visit me?

5 A. It wasn't just Janet Schmuck. It was other attorneys  
6 that came to seen me. Janet Schmuck, my sister, anybody that  
7 visited me in jail. The conversation I had with the police  
8 after I was arrested, when I didn't have an attorney present,  
9 everything and anything, what happened between myself and the  
10 judge, what happened in the courtrooms, everything.

11 Q. Okay. So, for instance, conversation you had with  
12 the police, later that day, you sat down with the paper and  
13 pencil and you wrote down, today I had a conversation with the  
14 police, something along those lines?

15 A. Something along those lines.

16 Q. It wasn't later, right?

17 A. No. It was within the reasonable time that I had. I  
18 mean, if I was here, of course, I couldn't do it, so I had to  
19 wait until I got back to my little cell back there and took out  
20 pencil and paper and start scratching notes.

21 Q. Can I see that once again, please? When did you  
22 write down the part at the top, page one, side one?

23 A. Oh, probably about a year after I've had this.

24 Q. Okay. So that wasn't written there in the beginning?

1           A.     Oh, no. I sent a copy of this to my sister and I  
2 sent a copy of this to my attorney and my appeal attorney,  
3 David Hardy. I sent a copy of this also to Robin Wright, but  
4 in case this got lost in transit. My sister on the street had  
5 a copy and so did Daniel Johnson.

6           Q.     Now, did you give us the whole list of names that  
7 you'd asked Janet Schmuck to acquire, people you'd asked her to  
8 bring in for you?

9           A.     Well, you want the whole list? I got pretty much all  
10 of them, I think. Ken Daniels, Linda Stallings, Carla Scarpa,  
11 Daniel Johnson, Gail Thomas. Those are the people I wanted at  
12 trial initially, plus I wanted -- I knew that Paul Grubbs  
13 wouldn't be able to come.

14          Q.     Why not?

15          A.     Because he moved.

16          Q.     Okay. I'm sorry. Go ahead. Was there more?

17          A.     There was a guy named Jay, I don't know his last  
18 name. Miss Schmuck told me that he wouldn't come unless he  
19 was, what do you call it, subpoenaed. Yeah, I would say that's  
20 basically about it, yeah.

21          Q.     How about your sister Jackie? Did you suggest to  
22 Janet Schmuck that your sister Jackie should come to the trial?

23          A.     Yeah. I wanted her to come, but Janet told me that  
24 the district attorney had a tape in his possession of Jackie,

1 my sister you're speaking of, threatening Jocelyn that if  
2 Jackie came, as you call her, her real name is Ester, but if  
3 she came, that the district attorney would probably arrest her.

4 Q. Now, that supposed tape of Ester threatening Jocelyn?

5 A. Right.

6 Q. That was after the trial and before sentencing, was  
7 it not?

8 A. I assume.

9 Q. Okay. For trial purposes, did you suggest to Janet  
10 Schmuck that she have your sister Ester come to the hearing?

11 A. Yes. Yes, I did.

12 Q. Okay.

13 A. Yes, I did.

14 Q. Did Janet Schmuck tell you that she would not do  
15 that?

16 A. Well, I know she did, but I'm trying to see the  
17 reason why.

18 Q. So she told you that she refused?

19 A. You wanted me, to put it bluntly, Janet Schmuck told  
20 me that my family was fucked up if the ladies will excuse my  
21 words.

22 Q. All right.

23 A. Yeah.

24 Q. Now, tell me also, this conversation where Janet

1 Schmuck told you that you were guilty?

2 A. Uh-huh.

3 Q. Do you recall if the word "credibility" entered into  
4 that conversation at all?

5 A. Did -- and which part now?

6 Q. The word "credibility," did that arise in that  
7 conversation?

8 A. On whose part?

9 Q. I'll rephrase it. When Janet Schmuck told you that  
10 she was guilty, that you were guilty, excuse me, did she do  
11 that by telling you she had met with the girls and she found  
12 them to be credible?

13 A. Yes.

14 Q. Okay. Did she tell you that she thought a jury would  
15 believe them?

16 A. Yes.

17 Q. Did she tell you that because of that, she would not  
18 defend you to the best of her abilities?

19 A. In part.

20 Q. Explain if you would "in part?"

21 A. She told me she went and talked to the two girls and  
22 their dad. When I asked her to go talk to other people in the  
23 apartment complex, she stated that she talked to them, that she  
24 felt that they were telling the truth, that I was lying and a

1 jury would not find me, as you put it, credible, and that I was  
2 guilty. Period.

3 Q. But did she go on to say, because you were guilty she  
4 would not put forth her best efforts?

5 A. No. She would find a way, yeah, she told me she was  
6 assaulted prior to sometime in her lifetime, she didn't get  
7 into the details, and the girls had to be telling the truth and  
8 that's all basically how it goes.

9 Q. Okay.

10 A. That I had to be the guilty party.

11 Q. Okay. And speaking of Desiree Summer, the girls, as  
12 we call them, can you recall, sir, if it was ever a time when  
13 they could have seen the tattoos on your abdomen?

14 A. My stomach?

15 Q. Yes.

16 A. Hundreds of times. Everybody sees them. I've got  
17 them on my back, my stomach and my arms. I take out my  
18 garbage, I'm sitting in my house, I work on my truck, I go next  
19 door, I'm sitting on the front porch, you know, enjoying a cool  
20 drink of cool aid or something or a cold beer on a summer  
21 night. Hundreds of times, thousands of people could see it. I  
22 play baseball.

23 Q. Now, are there some tattoos they never would have  
24 seen on you?

1 A. Absolutely.

2 Q. And what tattoo is that?

3 A. At that time to down below my penis area, from my  
4 belly button down to my scrotum.

5 MR. McCARTHY: May I have just a moment, your Honor?

6 May I have these marked, your Honor?

7 THE CLERK: State's Exhibit B1 and B2 marked for  
8 identification.

9 BY MR. McCARTHY:

10 Q. Mr. Maki, I'll show you what's been marked as  
11 Exhibits B1 and about B2, are these photographs of you, sir?

12 A. Yes. Kind of rough looking, aren't I? Yeah, that's  
13 me.

14 MR. McCARTHY: I'll offer B1 and B2.

15 THE COURT: Any objection?

16 MR. PLATER: No.

17 THE COURT: B1 and B2 will be admitted.

18 BY MR. McCARTHY:

19 Q. Now, those photographs show two photographs, two  
20 tattoos, is that right?

21 A. Yes.

22 Q. And it's your belief that thousands of people might  
23 have seen the upper tattoo, but very few people were ever going  
24 to see that lower tattoo, is that right?

1           A.     You can see the head of the upper tattoo, but,  
2     basically, you're correct.

3 MR. McCARTHY: Be just a moment, your Honor. I think I'm  
4 done. I have nothing further.

5 THE COURT: Any redirect?

6 BY MR. PLATER:

7 Q. Mr. Maki, when you said -- when there was this  
8 testimony that -- you testified that Miss Schmuck told you that  
9 the girls in her opinion were credible?

10	A. Yes.
----	---------

11 Q. Okay. Did she tell you that you were -- did she  
12 actually use the word that you were guilty or simply that the  
13 State's case with its witnesses was more credible than your  
14 defense?

15 | A. No. She told me point blank I was guilty.

16 MR. PLATER: That's all I have.

17 THE COURT: Anything else, Mr. McCarthy.

18 MR. McCARTHY: No, thank you.

19 THE COURT: You can resume your seat at the counsel table,  
20 Mr. Maki.

21 MR. PLATER: I'm sorry. I had one other question.

22 THE COURT: One other question. Go ahead and set down.

23 | *///*24 | *///*

## REDIRECT EXAMINATION

BY MR. PLATER:

Q. Mr. Maki, Mr. McCarthy went through a list of witnesses you gave to Miss Schmuck?

A. Uh-huh.

Q. And what was the purpose of giving those witnesses to Miss Schmuck for?

A. I wanted them to testify. Most of those people have kids have known me, I've dated them, I've known them for years and all of them have kids and I wanted the jury to see that I not this animal that the State has made me out to be, that I've been around kids all my life. I've got kids of my own. They're grown up a little bit now. I still have kids of my own. I wanted them to be able to see through someone else's eyes besides the State's eyes of who I was.

Q. You wanted to present witnesses to show the jury that you had been around children and you never molested them or assaulted them?

A. All my life I've been around them.

Q. You presented one witness at trial to testify to that?

A. Excuse me?

Q. You presented of a witness at trial to testify to that?

1 A. Yes, Daniel Johnson.

2 Q. And that was not sufficient in your mind?

3 A. Absolutely not.

4 Q. Why not?

5 A. Daniel Johnson, I haven't seen for six years and she  
6 lived 400 miles away and when she found out that I was in  
7 trouble up here, she came to my rescue, so to speak, because  
8 she knew what type of person I was and who I was. She traveled  
9 400 miles out of her way to come up here and testify for my  
10 behalf.

11 Q. She had not seen you for six years?

12 A. She had not seen me for six years.

13 Q. At the time of the trial?

14 A. At the time of the trial.

15 Q. So these other witnesses would have presented more  
16 recent testimony about your relationship with their children?

17 A. Absolutely.

18 Q. So these were going to be used as character  
19 witnesses?

20 A. I guess that's what you call them, yes.

21 Q. And what were their names?

22 A. It was Linda Stalling, I dated her. She has two  
23 young boys. There's a -- I've known Linda when I was in the  
24 hospital. I met her there. I knew her for approximately a

1 year and a half, two years. Up to date at the time of the  
2 trial, as a matter of fact, I just seen her a few weeks prior  
3 to my arrest.

4 Carla, I've known Carla for approximately up to the date of  
5 the trial, about 18 years. Ken, I knew him, God, years. Ken  
6 Daniels, I've known him 15 years up to the date of the trial.  
7 He's got two young girls.

8 Linda Stallings, I've known her for two years, plus dated  
9 her five months. She's got two young boys. Carla Scarpa, I've  
10 known 15 years plus dated a couple of months. She's got one  
11 boy I've known since two years old. Daniel Johnson, I lived  
12 with her for nine months. I helped her baby sit a couple of  
13 kids off and on.

14 Gail Thomas, I knew her for two years, dated her off and  
15 on. She has two kids and three grand kids and those are my  
16 character witnesses that I wanted to come to testify about me,  
17 about what I was like, who I am, who I really am, not what the  
18 State thinks I am.

19 Q. And you also mentioned that there was a person or  
20 that you knew of some prior sexual activity of the little girls  
21 in this case?

22 A. Yes.

23 Q. You gave that to Miss Schmuck?

24 A. I told Miss Schmuck, positively, I told Miss Schmuck,

1 more than once, my sister told her also.

2 Q. Did you ever personally observe any sexual activity  
3 of the young children?

4 A. Truthfully, no. I can't say that I did. No. I wish  
5 I could say that, but I can't.

6 Q. Did you ever see the young children in inappropriate  
7 circumstances or behavior yourself?

8 A. Yes.

9 Q. What was that?

10 A. I caught the young girl and the older girl both in  
11 compromising positions with young boys

12 Q. Let's take Desiree first. What did you see?

13 A. The first time was with Summer, the younger girl, and  
14 that was with little John downstairs. That was approximately  
15 November of 1993. They were in her bedroom with the older  
16 girl. John was what they call playing doctors, both, you know,  
17 all kids do it, you know, when they're that age, I guess. They  
18 were playing doctors, as I they called it. I told the dad that  
19 night when he got home from work and he said it was no big  
20 deal.

21 Q. What did you see?

22 A. John had his pants to the ankles, Summer had no pants  
23 on and he was on top of her trying to have sex with her.

24 Q. And you saw that?

1 A. Positively.

2 Q. And what did you do about it?

3 A. I pulled John up by his arm, kind of out of my way,  
4 scolded him to a degree, took him down stairs to his -- it  
5 wasn't really his stepfather. It was to be stepfather. And I  
6 told him about it and I told the mother about it and he was  
7 restricted from seeing the girls at that point, to my  
8 knowledge, anyway. And I waited until later that night and  
9 told Gary, the father, Gary Mineese of what was going on with  
10 Summer and John and he told me, it was no big deal, this  
11 happened before, you know, they're just kids.

12 Q. Regarding Desiree, you saw something else also?

13 A. Desiree, it was a few weeks later, I think it was  
14 school time when they had, what do you call it, school  
15 vacation.

16 Q. Thanksgiving break or Christmas?

17 A. Summer or Christmas break or whatever it is. Anyway,  
18 it was a big kid up there, he's wearing what I believe to  
19 have -- I always heard as these gang clothes, those were  
20 Oakland Raiders things. I assumed he was one of these gang  
21 member things. I've never really seen one so I don't know.

22 He was up there. Anyway, he was a big kid. He was almost  
23 my size. He looked like 17 years old. He was in there with  
24 Desiree on the bed. He had her pretty well depants and he was

1     trying to do things with her.

2           I grabbed that boy by his hair, threw him down the stairs  
3     and that's when I told Jay, the guy downstairs, of what I've  
4     done, because he seen the guy tumbling down the stairs and I  
5     told Jay what happened. And asked Jay his opinion if I should  
6     tell the father about this, because apparently the dad just  
7     don't give a hoot.

8           And he said, yeah, he thought it would probably be better  
9     if I told him and he would back me up on it. And I said fine.  
10    And I went up there and told Desiree. I'm going to have to  
11    tell your dad about what I saw. And Desiree got upset, called  
12    me names, told me it was none of my business. It was her boy  
13    friend and got upset about everything and I just-- that's how  
14    it has to be.

15          So Gary come home that night fairly intoxicated about 9:30.  
16    I pulled him up. I told him: This time I caught Desiree in  
17    there with a young boy. She says it's her boyfriend. And Gary  
18    acknowledged the fact that he knew this kid, that he was from  
19    the neighborhood somewhere and he's been up there before. And,  
20    again, it was no big deal.

21          Q.     And what was your purpose in telling Miss Schmuck  
22    about these incidents?

23          A.     Well, Gary told me when I first met Gary  
24    approximately three months after I met Gary Mineese, he told me

1 when we were drinking, we were having a couple of beers on the  
2 porch that night one night. He told me he was pulled up by the  
3 Reno Police Department and the welfare department for taking  
4 showers and running around the house nude with his daughters.

5 MR. McCARTHY: Your Honor, if this is offered for the truth  
6 of the matter asserted, then I object.

7 BY MR. PLATER:

8 Q. I'm asking why did you want -- why did you bring  
9 these incidents to Miss Schmuck's attention?

10 A. Oh, you mean about the kids?

11 Q. Right.

12 A. Because I wanted her to know what kind of girls these  
13 were. I wanted her to know. I mean, everybody is painting  
14 them as these two angels. These are no angels by no means.  
15 When the DA had them sitting up here in white dresses with  
16 little teddy bears and stuff, you know, I asked Miss Schmuck  
17 what's going on. She said: It's a DA's trick to make them  
18 look innocent. They're not innocent by no means. Let's get to  
19 the heart of the matter. Let's show what they really are.

20 Q. Okay. That's all I have.

21 THE COURT: Anything else?

22 MR. McCARTHY: If I may.

23 ///

24 ///



1 adult pizza joint where the college kids hang out. The kids  
2 are coming up to the house when he's not home. His buddy  
3 Frances takes them out when he didn't know where they are.

4 I catch boys in the room having sexual activities with the  
5 girls, and they tell me it don't matter. I'm the one that  
6 called the welfare. I told them. Again, I put my nose where  
7 it didn't belong. I think they were sexually active. You're  
8 doggone right. I seen they're sexually active. To what  
9 degree, I couldn't tell you for sure. But they were  
10 definitely, what do you call it, exploring. I'll put it that  
11 way.

12 Q. Do you think they were seductive?

13 A. Do I think they were seductive?

14 Q. Yeah.

15 A. Hell if I know.

16 Q. Did you have an opinion about who is the initiator  
17 in this sexual activity?

18 A. I couldn't tell you.

19 Q. What you saw, did it appear to be voluntary?

20 A. It appeared to be.

21 Q. Ever try to seduce you?

22 A. No.

23 Q. They never did?

24 A. Never.

1 Q. Never wanted to have sex with you?

2 A. Who.

3 Q. They never wanted to have sex with you?

4 A. No, absolutely not.

5 Q. Those girls ever see you naked?

6 A. Absolutely not.

7 Q. Never saw you in the shower?

8 A. One of them did, yes. I can't lie about that. She  
9 seen my back of my butt.

10 Q. She -- could she have seen your genitals?

11 A. Absolutely not.

12 Q. Could any of them ever see you getting in or out of  
13 the shower?

14 A. No.

15 Q. Any of those girls ever see you getting dressed?

16 A. Absolutely not.

17 Q. Were you ever wearing a bathrobe in the presence of  
18 Summer and Desiree?

19 A. Oh, probably. Yeah. But I would have something  
20 underneath it. It wasn't like I would go out there and just,  
21 you know, wear a bathrobe. I would have short pants or my  
22 drawers on or something. I'm lounging around in my house,  
23 sure. Is there something wrong with laying around with having  
24 bathrobe on closed.

1 Q. When you say "drawers" on, you mean briefs?

2 A. Boxers, I usually wear.

3 MR. MCCARTHY: That's all I have.

4 MR. PLATER: Nothing else.

5 THE COURT: You can step down, Mr. Maki.

6 THE COURT: Take a short break.

7 (A short break was taken at this time.)

8 THE COURT: Okay. Mr. Maki is present with counsel, Mr.  
9 Plater. Mr. McCarthy is present. You can call your next  
10 witness.

11 MR. PLATER: Call Mr. Fried, your Honor.

12 THE CLERK: Raise your right hand to be sworn.

13 THE CLERK: Thank you. Be seated.

14 M I C H A E L R. F R I E D

15 called as a witness on behalf of the Defendant,  
16 being first duly sworn, was examined and  
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. PLATER:

20 Q. Would you state your name, please?

21 A. Michael Ray Fried.

22 Q. Mr. Fried, you're an inmate at NNCC in Carson City?

23 A. Correct.

24 Q. Do you know Mr. Maki?

1 A. Yes, I do.

2 Q. And do you know a Jocelyn Coombs?

3 A. Yes, I do, but the name wasn't Coombs when I knew  
4 her.

5 Q. Okay. Was it Maki at that time?

6 A. Yes.

7 Q. And you went out with her?

8 A. Yes, I did.

9 Q. Okay. And that was some time ago?

10 A. Yes.

11 Q. When was that?

12 A. I believe it to be 1979 or 1980.

13 Q. Okay. And at that time, did you have problems  
14 regarding her credibility?

15 A. As far as problems, I don't know. I've heard some  
16 tails that I don't say I could believe, but I've had no proof  
17 to back them up either.

18 Q. Were you aware of her reputation regarding  
19 credibility?

20 A. Yes, I was.

21 Q. What was that?

22 A. She was very, how would you say, I don't know if I  
23 want to say insecure -- let's see if I can explain. How about  
24 her word wasn't to be trusted, because she liked to manipulate

1 male people for favors or whatever she could get out of  
2 somebody.

3 Q. And that was during a time that you went out with  
4 her?

5 A. Yes.

6 Q. That you knew of her reputation?

7 A. Right.

8 Q. Did you ever see her under the influence of  
9 controlled substances?

10 A. Yes, I have.

11 Q. How often?

12 A. Well, every time I seen her, which probably would be  
13 once or twice weekly for the span we were together.

14 Q. What type of substances did she take?

15 A. Usually marijuana and speed.

16 Q. Speed being methamphetamine?

17 A. Right.

18 Q. And what was she like under the influence?

19 A. Happy-go-lucky, want to go party some more,  
20 carefully.

21 Q. Did it affect her memory or --

22 A. It's really hard for me to say on that one, because  
23 it's a short span that I was with her.

24 MR. PLATER: That's all I have, your Honor.

1 THE COURT: Mr. McCarthy, questions?

2 CROSS EXAMINATION

3 BY MR. MCCARTHY:

4 Q. Do you recall where you were living, sir, in the  
5 Summer of '94?

6 A. Pardon me?

7 Q. Do you recall where you were living in the Summer of  
8 1994?

9 A. Virginia Motor, I believe.

10 Q. Did you spend any time in the county jail that year?

11 A. Yes, four months.

12 Q. Were you in the county jail at the time Charles Maki  
13 was sentenced?

14 A. Yes.

15 MR. MCCARTHY: That's all I have.

16 MR. PLATER: That's all.

17 THE COURT: Thank you, Mr. Fried. You can step down.

18 MR. PLATER: Your Honor, I will call -- what is your  
19 calendar like today?

20 THE COURT: I'll go until about noon, then I have a 1:30.  
21 Then we can resume this after approximately half an hour of  
22 that 1:30. We can start up at about 2:00. But we've got  
23 roughly half an hour to go this morning.

24 MR. PLATER: It might be quicker if I called Miss Schmuck

1 right now and we can go right through that.

2 THE CLERK: Thank you, please be seated.

3 J A N E T C O B B S C H M U C K

4 called as a witness on behalf of the Defendant,

5 being first duly sworn, was examined and

6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. PLATER:

9 Q. Would you state your name, please?

10 A. Janet Cobb Schmuck.

11 Q. Miss Schmuck, you're a licensed attorney, is that  
12 correct?

13 A. That's correct.

14 Q. You have a license to practice law in the State of  
15 Nevada?

16 A. Yes.

17 Q. Are you licensed in the Federal Court District of  
18 Nevada also?

19 A. Yes.

20 Q. You're a lawyer in the Washoe County Public  
21 Defender's Office?

22 A. That's correct.

23 Q. You've been a lawyer there for how many years?

24 A. It will be seven years in October.

1 Q. Okay. When did you pass the bar?

2 A. 1990.

3 Q. And you went straight to work for the Public  
4 Defender's Office?

5 A. That's right.

6 Q. You know Charles Maki?

7 A. Yes, I do.

8 Q. And you represented him at trial?

9 A. That's correct.

10 Q. And that was in 1994?

11 A. Yes.

12 Q. When did you start doing trial work for the Public  
13 Defender's Office?

14 A. I think I went into the trial division in November of  
15 1993.

16 Q. Okay.

17 A. I know it was just when Mr. Specchio had started as  
18 the public defender.

19 Q. Okay. Prior to that time, what were you doing?

20 A. I was in the appellate division.

21 Q. Okay.

22 A. And prior to that, I had been in the municipal court  
23 doing trial work.

24 Q. Okay. With the Public Defender's Office?

1 A. That's correct.

2 Q. Okay. So in November of '93, you started doing  
3 felony trial work?

4 A. That's right.

5 Q. Okay. So do you remember when you first received  
6 this case regarding Charles Maki?

7 A. I believe it would have been in February, probably  
8 around the first of February or late January, since I think  
9 that's when the preliminary hearing was conducted.

10 Q. Of 1994?

11 A. That's right.

12 Q. Okay. Now, I take it you had numerous conversations  
13 and meetings with Mr. Maki?

14 A. That's correct.

15 Q. Okay. And during the process of representing him,  
16 it -- you eventually had going to trial, right?

17 A. That's right.

18 Q. And in the beginning, you conducted a preliminary  
19 hearing, right?

20 A. That's right.

21 Q. And he was arraigned in district court after that?

22 A. That's right.

23 Q. And you then you began to file pretrial motions,  
24 right?

1 A. That's right.

2 Q. And one of the pretrial motions you filed was a  
3 motion to suppress statements that he had made to RPD officers,  
4 right?

5 A. That's right.

6 Q. Do you remember that motion that you filed?

7 A. Yes, I do.

8 Q. Do you remember the grounds that you raised in the  
9 motion?

10 A. I believe the grounds for the motion was his  
11 indication of his rights not to continue the questioning that  
12 he wanted to speak with an attorney.

13 Q. Right. And I'll represent to you, I've reviewed the  
14 motion and maybe you can look at it if you want to.

15 MR. PLATER: May I approach, your Honor?

16 BY MR. PLATER:

17 Q. You recognize that document?

18 A. Yes.

19 Q. Okay. That's the motion you filed on behalf of Mr.  
20 Maki?

21 A. That's right.

22 Q. To suppress statements that he made to officers?

23 A. That's correct.

24 Q. Is it accurate to say that you raised, I believe, two

1 grounds in that motion to suppress his statement? One was that  
2 he was entitled to a Miranda warning, because at the very  
3 beginning of the interview with the officers, he was -- it was  
4 in your argument a custodial interrogation. And, secondly, you  
5 wanted to suppress all statements he made after he told  
6 officers he didn't want to talk to them anymore?

7 A. That's correct.

8 Q. Okay. So you raised two grounds?

9 A. That's right.

10 Q. Okay. Now, you did that because you were a lawyer  
11 who was appointed to represent Mr. Maki and you were doing that  
12 in your best professional judgment, right?

13 A. That's correct.

14 Q. What did you see your -- what was your role as Mr.  
15 Maki's counsel?

16 A. My role as his counsel was to represent him in all  
17 court proceedings, to zealously advocate his position, to  
18 protect his constitutional rights, to make sure that he had a  
19 fair and sound representation and that he was defended  
20 properly.

21 THE COURT: I'm sorry? What?

22 THE WITNESS: That he was defended properly.

23 BY MR. PLATER:

24 Q. That's why you filed the motion, right?

1           A.     I filed that motion for those reasons and because I  
2     thought there was a rule issue as far as the tapes that he had  
3     made and there was an issue presented to the Court in terms of  
4     those statements being suppressed.

5           Q.     And you filed other motions on behalf of Mr. Maki  
6     also, right?

7           A.     That's right.

8           Q.     You did that because you understand your duty as his  
9     attorney to protect his constitutional rights and zealously  
10    advocate all issues that might favor the outcome, or that might  
11    be favorable to his particular case, right?

12          A.     Yes.

13          Q.     And you also filed those motions because, is it fair  
14    to say, you sensed this case might be going to trial?

15          A.     That's very true, yes.

16          Q.     In other words, you don't -- as a trial lawyer, even  
17    though you have a potentially meritorious motion, you don't  
18    file every motion, even if it's potentially meritorious, if you  
19    don't see the case going to trial. Is that a fair statement?

20          A.     That's a fair statement.

21          Q.     Because sometimes during plea negotiations, the State  
22    will recognize it has a weak issue and as a defense you have a  
23    strong issue and you agree to waive filing of a certain motion  
24    and the State will give you something in return for your not

1 pursuing the defense by motion or otherwise and so you don't  
2 file all of the motions that are possible in every case?

3 A. That's true.

4 Q. But in this case, is it fair to say that based on  
5 your relationship with Mr. Maki, you saw that this case was  
6 probably going to trial?

7 A. Yes.

8 Q. That's one of the reasons you filed the motion to  
9 suppress statements that he made?

10 A. Yes.

11 Q. And you raised two issues in the motion to suppress  
12 that were basically based both on the Miranda decision,  
13 correct?

14 A. Correct.

15 Q. And can you quickly tell us what Miranda provides?

16 MR. MCCARTHY: Your Honor, I'm going to object. Not to the  
17 question, but to the line of questioning. The motion to  
18 suppress was litigated in this court and in the Supreme Court.  
19 There's been a judgment on the merits. It's a res judicata,  
20 your Honor. So the admissibility alone of the statements has  
21 been decided by the Court of final -- the final court in this  
22 state.

23 THE COURT: I don't think that's where he's going with it.  
24 It's more tactics, I think.

1 MR. PLATER: Well, Mr. McCarthy is right in that the habeas  
2 provisions provide that if something has been litigated to the  
3 Court, especially of highest appeal, that issue is barred from  
4 post conviction relief, and it's true that Miranda and/or it's  
5 true that the voluntariness of his statements as they were  
6 presented by his trial counsel were litigated and decided  
7 against him, but I'm going to a different area that was not  
8 used by his trial counsel.

9 THE COURT: I'll let you go into the different area.  
10 That's what I meant. So overruled.

11 BY MR. PLATER:

12 Q. Okay. Could you tell us what you understand Miranda  
13 to be real briefly. We don't need an expert, full, broad  
14 definition?

15 A. Particularly with respect to this, my understanding  
16 is that someone who is the subject of an investigation should  
17 be warned that the subject of an investigation and told you --  
18 everything you say can be used against you. If you want a  
19 lawyer, you should let us know, and if you can't afford a  
20 lawyer, one will be appointed to represent you.

21 Q. And Miranda does not apply to every scenario of  
22 investigations, does it?

23 A. No.

24 Q. Under what circumstances of investigation does it

1 talk about generally speaking?

2 A. Usually, we're talking about a custodial -- custodial  
3 interrogation when someone is not free to leave.

4 Q. Okay. And you raised the fact that in your mind,  
5 based on what you saw in the transcript of the interview  
6 between officers and Mr. Maki, you thought that there was an  
7 issue that that was a custodial interrogation from the very  
8 beginning, right?

9 A. Yes.

10 Q. And you raised that despite the fact that the  
11 officers told Mr. Maki he was free to leave, he was voluntarily  
12 coming with them, and that he didn't have to do anything with  
13 them, right?

14 A. Yes.

15 Q. And why did you think it was custodial at that time,  
16 at that very outset when Mr. Maki was down at the police  
17 station answering their questions?

18 MR. McCARTHY: Your Honor, that is the precise question  
19 that has a res judicata effect. He is not custodial as a  
20 matter of law.

21 MR. PLATER: I agree with that. It's been litigated. I'm  
22 leading into something.

23 THE COURT: I'll give you some leeway.

24 MR. PLATER: Maybe I'm taking too long.

1 THE WITNESS: Could I hear the question again?

2 BY MR. PLATER:

3 Q. Let me try it a different way. Okay. You thought  
4 that -- you thought that Mr. Maki's answering questions from  
5 the very beginning with the police officers at the police  
6 station was a custodial interrogation, right?

7 A. Yes.

8 Q. And you lost the issue?

9 A. That's right.

10 Q. Filed a motion, had a hearing, Judge Kosach ruled  
11 against you, right?

12 A. Right.

13 Q. And the Supreme Court agreed with Judge Kosach on  
14 that issue, do you know that?

15 A. I do.

16 Q. It's a matter of record. Okay. The order dismissing  
17 appeal rules that way. Okay. I guess I'll get straight to the  
18 issue. Did you ever consider when you were filing your  
19 suppression motion to add a third ground and say in the  
20 alternative if Mr. Maki was not in custody while he's being  
21 interrogated at the beginning of the interview, he certainly  
22 was in a custodial interrogation at some point later during the  
23 interview, but before the officers themselves decided it was  
24 custodial and gave Miranda warnings?

1           MR. McCARTHY: Your Honor, I think now that we have what  
2 the issues all about, I repeat, the Supreme Court has decided  
3 this individual is not subject to custodial interrogation. As  
4 the law of the case is a res judicata effect, as a matter of  
5 law, he could not have prevailed on that prong.

6           THE COURT: Yes, but the question was alternatively, so  
7 I'll overrule it as far as for the purposes of this question.

8           THE WITNESS: Let me make sure. Did I consider raising in  
9 the alternative that he was in custody before the police  
10 officers knew he was in custody?

11 BY MR. PLATER:

12           Q.     Okay. I'll try to phrase it better.

13           A.     Okay.

14           Q.     Do you remember during the interrogation, at one  
15 point the officers advised Mr. Maki of his Miranda rights?

16           A.     Yes.

17           Q.     And do you remember the officers testifying they did  
18 that because they thought they had probable cause to arrest him  
19 at that point?

20           A.     Yes.

21           Q.     And you based part of your motion -- well, strike  
22 that. Did you think that or did it ever cross your mind that  
23 if this was not a custodial interrogation at the very  
24 beginning, it may have become a custodial interrogation at some

1 other point during the interview especially before the officers  
2 read Miranda rights to Mr. Maki?

3 A. I can't say that I recall thinking of it that way.

4 Q. Do you remember during the interview in the beginning  
5 Mr. Maki denied allegations of any wrongdoing with the girls?

6 A. Yes.

7 Q. Okay. And this was before officers read Miranda to  
8 him, is that right?

9 A. That's right.

10 Q. Before they read Miranda to him at a later point, but  
11 at the beginning of the interview, he did admit to bathing with  
12 Summer, do you remember that?

13 A. Yes.

14 Q. He admitted she washed his back and maybe she touched  
15 his genitalia?

16 A. Uh-huh.

17 Q. Do you remember that he admitted that he was guilty  
18 with Summer, that he had a buzz and I did something wrong?

19 A. Yes, I do remember that.

20 Q. Okay. At that point, had Mr. Maki committed --  
21 admitted that he had committed a crime?

22 A. I think so.

23 Q. And that would have been at least lewdness?

24 A. Yes.

1           Q.     Okay. Did the officers have probable cause to arrest  
2 him at that point, after he had made those admissions about  
3 Summer and the lewdness?

4           A.     Based upon the comments that he made, at that point I  
5 would think that the officers had probable cause to Mirandize  
6 him at that point, at least.

7           Q.     Okay. When he was Mirandized, he invoked his right  
8 to remain silent, right?

9           A.     My -- I can't remember exactly. I know he invoked in  
10 such a way. I don't remember exactly if he said, I don't want  
11 to talk anymore, or if he actually said, I want a lawyer. It  
12 may have been that I don't want to talk to him.

13          Q.     That's what he said. He said I don't want to talk.  
14 Okay. So after he made those statements that we referred to,  
15 you believe there was probable cause to arrest him for  
16 lewdness, right?

17          A.     Well, I didn't say probable cause to arrest. I said  
18 that I think there was a -- at that point, there would have  
19 been a reason for the officers to Mirandize him.

20          Q.     Because it would have been -- because he would have  
21 been in custody at that point?

22          A.     I'm hesitating because I'm trying to remember from  
23 reading the police reports. It was at the time when I was  
24 going through all this and developing the motion to suppress,

1     it was my opinion that Mr. Maki was the subject of the  
2     investigation when the police officers went over to the  
3     apartment house and asked him to accompany them down to the  
4     police station. And that basically he was in custody at that  
5     point.

6           Q.     You believed that the officers had probable cause to  
7     arrest him for sexual assault and lewdness, even before the  
8     interview began, right?

9           A.     Yes.

10          Q.     Now, assuming that -- I guess my question is: Why  
11     did you not argue that assuming Miranda did not have to be  
12     followed at the beginning of the interrogation, why did you not  
13     argue that it should have been followed by officers earlier  
14     than they actually gave the warning such as when Mr. Maki  
15     admitted to being guilty with Summer, having committed lewdness  
16     with her and the officers had probable cause to arrest him for  
17     sexual assault?

18          MR. MCCARTHY: Your Honor, I have a different objection at  
19     this point. I was just looking, I can't find where this issue  
20     was pleaded, either in the petition or in the supplement. If  
21     it's appropriate at all, it ought to be in the successive  
22     petition.

23          MR. PLATER: I think there is a Fifth Amendment right filed  
24     in there.

1 MR. MCCARTHY: It's very lengthy and wordy and it's hard to  
2 say, but I looked and I can't find it in there.

3 THE COURT: I'm going to overrule the objection. We can  
4 proceed with that.

5 BY MR. PLATER:

6 Q. Do you remember my question?

7 A. Is your question that I should have -- did I consider  
8 arguing that he should have been Mirandized immediately.

9 Q. No. You argued that, right?

10 A. That's what I --

11 Q. Okay. And did you consider that if that argument  
12 were not successful, that Miranda -- he should have been  
13 Mirandized, even if it were later, at an earlier time than the  
14 officers actually did it, for example, after he confessed to  
15 lewdness with Summer, and he said he was guilty, he said he  
16 knew he did something wrong, and the officers have probable  
17 cause to arrest him right there. In your mind, shouldn't they  
18 have -- isn't that -- everything after that a custodial  
19 interrogation?

20 A. I don't remember -- I don't remember considering that  
21 when I was writing this.

22 Q. Would that have been a reasonable consideration?

23 A. I would say that at this point, listening to the  
24 questioning this morning, it doesn't sound like an unreasonable

1 thing to do, but I'm also trying to recall a time what I was  
2 considering as reasonable and I -- I just don't remember  
3 thinking that as a reasonable argument to bring up.

4 Q. You don't remember whether it was a reasonable  
5 argument?

6 A. I don't remember thinking of it as a reasonable  
7 argument.

8 Q. Okay. You're not saying that you thought it was an  
9 unreasonable argument?

10 A. No.

11 Q. You probably don't remember the specific counts in  
12 the information in this case, but do you remember the first  
13 five counts were counts of Sexual Assault against Mr. Maki?

14 A. Yes.

15 Q. The next five were Lewdness counts against him with a  
16 person under 14 years old?

17 A. Yes.

18 Q. I'll represent to you that Count Four in the  
19 information charged Mr. Maki with sexual assault against a  
20 minor under 14 years of age and that was Desiree, and it  
21 alleged that he sexually assaulted her with his finger. There  
22 was testimony at the preliminary hearing that Desiree said this  
23 occurred during another sexual assault when he was sexually  
24 assaulting her with his penis. In essence, she said she

1 assaulted me with his finger and his penis during the same  
2 time. Do you remember that testimony at all?

3 A. I remember at the preliminary hearing?

4 Q. Right.

5 A. I can't say right now that I actually remember the  
6 testimony. I mean, I've reviewed the preliminary hearing  
7 transcript to say I actually remember the testimony, no.

8 Q. And if Desiree had said during the preliminary  
9 hearing testimony that she was sexually assaulted by Mr. Maki's  
10 finger, during the time that she was sexually assaulting her  
11 with his penis, do you think it would have been a reasonable  
12 argument that that constituted one offense as opposed to two?

13 A. No. Because what you've described to me is if there  
14 was a sexual assault using the penis and there was a sexual  
15 assault using the finger, I would see it as two separate or two  
16 different incidents.

17 Q. Okay. And what if they occurred simultaneously?

18 A. I don't remember anything about that being said.

19 Q. Okay. If it were simultaneous, would that be  
20 considered in your opinion one criminal act as opposed to two?

21 A. That's possible. But, I mean, I possibly would have  
22 considered that and done some research on it.

23 Q. Well, let's talk about Count V. That was a Sexual  
24 Assault count against Mr. Maki where he alleged -- where it was

1       alleged that he assaulted Summer?

2           A.       Yes.

3           Q.       She was the youngest of the two girls. And she  
4 testified to that at trial in front of a jury. Do you remember  
5 that she was sexually assaulted by him?

6           A.       Yes.

7           Q.       Do you remember during the preliminary hearing where  
8 Summer said that she was never sexually assaulted by Mr. Maki?

9           A.       No.

10          Q.       Maybe it would refresh your recollection if I gave  
11 you a transcript?

12          A.       Sure.

13          MR. McCARTHY: Your Honor, as far as I can tell, this is  
14 the third area we're getting into that hasn't been pleaded. I  
15 don't know how I respond if I'm not put on notice.

16          MR. PLATER: Well, it's relevant because it shows  
17 inconsistencies in the victim's statements that should have put  
18 counsel on notice to file a request that the Court order a  
19 mental health and a physical and psychological examination of  
20 the victim.

21          MR. McCARTHY: That's pleaded.

22          MR. PLATER: That's pleaded.

23          THE COURT: Well, yeah. We can pursue that.

24          MR. McCARTHY: Okay. I didn't understand that.

1 THE COURT: You didn't know where we were going.

2 MR. MCCARTHY: What is your direct is a question of, for  
3 instance, ineffective assistance or failure to pursue a  
4 pretrial writ. I would object to any argument concerning any  
5 such assertion.

6 THE COURT: I understand. Let's take the lunch break. I'd  
7 say be back here at 2:00. I have a 1:30. So let's go ahead  
8 and be back at 2:00 o'clock.

9 (A lunch break was taken at this time.)

10 THE COURT: Okay. We're on the record. Mr. Maki is  
11 present with counsel. State's represented. Miss Schmuck is on  
12 the stand. We can proceed.

13 BY MR. PLATER:

14 Q. Miss Schmuck, before Mr. Maki went to trial, were you  
15 aware that you could file a motion to the Court seeking the  
16 Court to order an independent physical and/or psychological  
17 evaluation of the victims in this case?

18 A. Yes.

19 Q. And did you make a decision one way or the other to  
20 file such a motion?

21 A. Yes, I did.

22 Q. What was the -- what decision was that?

23 A. I decided not to.

24 Q. And why is that?

1           A.       Specifically, for the psychological exam, I had been  
2 informed by the State that they were not calling witnesses who  
3 would or experts who would testify as far as psychiatric  
4 testimony was concerned.

5           Also, in this particular case, there was no indication or  
6 any information that I had the children had received any sort  
7 of counseling. If memory serves me correctly, the incidents  
8 were alleged to have occurred in December of that year and the  
9 reports were made very soon thereafter to the police and there  
10 was no indication at all that the children had been seen by any  
11 psychiatrist.

12           As far as a physical exam is concerned, I believe I  
13 received the Saints exam later in the discovery process. I  
14 think there was a hearing at which that was addressed that I  
15 had not received, the Saints exam, and I did not see the need  
16 at that point when I did receive the Saints exam to ask for a  
17 physical exam independently.

18           Q.       Okay. So there were two reasons you didn't ask for a  
19 psychological examination. One was there was no psychological  
20 evidence that you saw that was forthcoming from the State?

21           A.       The State had not endorsed an psychiatric expert. I  
22 believe Mr. Greco informed me that he was not calling a  
23 psychiatric expert.

24           Q.       The second reason in terms of the psychological a

1 motion for the psychological evaluation that the children had  
2 had no counseling?

3 A. That primarily. The -- what I was looking for was if  
4 there was a possibility that the children had been questioned  
5 by an expert, if there was any possibility of coaching or  
6 suggesting that had been made to them. And because of the  
7 amount of time that had elapsed and the information that I have  
8 that there was -- that they had not been counseled, I did not  
9 see the reason for that. I also did not have any or did not  
10 gain any information during the course of the investigation of  
11 this case that led me to believe that the children had any  
12 prior sexual activity going on in their lives, prior to their  
13 allegations that Mr. Maki had sexually molested them.

14 Q. Okay. Is it your understanding that you couldn't ask  
15 the Court for a psychological evaluation merely because you  
16 didn't expect the Court -- merely because you didn't expect the  
17 State to offer psychological testimony?

18 A. No. That's not my testimony. I think I still could  
19 have asked for one. I made a decision not to ask for one.

20 Q. Based on the fact that the State wasn't going to  
21 produce such evidence and because the kids had no counseling?

22 A. The information that I had received, yes.

23 Q. Okay.

24 A. And because I could not -- I could not establish that

1       there had been sort of any prior incidents of sexual  
2       molestation of the children by anyone else. There was no -- I  
3       couldn't establish that there had been any sexual activity by  
4       them.

5           Q.       In your mind, was that required? Did you have to  
6       make such a showing in a motion before the Court?

7           A.       No, I didn't think I had to make such a showing. I  
8       also knew that Mr. Maki was very concerned about that and had  
9       informed me of his very strong beliefs that the children had  
10      engaged in sexual activity. And because he had informed me of  
11      that, I tried to find out about that, I asked people, we did  
12      investigations of that.

13          Q.       Okay. Would it be fair to say that a psychiatric  
14      evaluation that's proposed by the defense can be used to gain  
15      evidence or determine the credibility of the victim who is  
16      going to testify at trial?

17          A.       I suppose it would be fair to say, yes.

18          Q.       And the same thing with the physical examination,  
19      right?

20          A.       Yes.

21          Q.       Okay. So did you make -- based on that, did you make  
22      a determination that there were no credibility issues regarding  
23      the children who are going to testify against Mr. Maki?

24          A.       Yes. I found in my own, because I was there at the

1 preliminary hearing, and the follow-up investigations that we  
2 did, no -- I found the children to be credible and also viewing  
3 the video tapes that were done by the police.

4 Q. Okay. So in terms of the credibility, you didn't  
5 make a motion for psychiatric evaluation, because the children  
6 seemed credible to you?

7 A. Yes.

8 Q. And that assessment that you made was based on doing  
9 a preliminary examination of the children, is that correct?

10 A. That's right.

11 Q. Reviewing discovery in the case?

12 A. Yes.

13 Q. Which would have included reviewing the taped  
14 interviews of the children?

15 A. Yes.

16 Q. Police reports?

17 A. Yes.

18 Q. Speaking with the district attorney about his case?

19 A. Yeah.

20 Q. Reviewing everything that you had in terms of  
21 investigation and discovery?

22 A. Yes.

23 Q. Okay. And would that reasoning also apply to why you  
24 elected not to make a motion for an independent physical

1 examination of the children?

2 A. Yes.

3 Q. Basically -- okay. Because you thought they were  
4 credible witnesses? Okay. Now, you mentioned that the Saints  
5 exam also was a factor in your decision not to ask the Court  
6 for such an evaluation, the physical part?

7 A. Yes.

8 Q. Okay. And what was it about the Saints exam that led  
9 you -- that you didn't need to make or petition the Court for  
10 an independent physical examination of the children?

11 A. Because my belief at that point was that there had  
12 been an exam done, the exam results were not especially -- I  
13 believe it was the older child, Desiree, that there was no --  
14 the Saints exam wasn't real clear that there had been trauma to  
15 her, that there had actually been sexual assault.

16 Q. In fact, the Saints exam regarding Desiree said that  
17 the hymen was normal and they could find no signs of sexual  
18 abuse, right?

19 A. Yes.

20 Q. Did you find that report consistent with Desiree's  
21 allegations that she had been sexual assaulted four times by  
22 Mr. Maki?

23 A. Of course, it's not consistent. I mean, but in the  
24 sense that they were finding that they -- there was no trauma.

1 But I'd also heard the child testify at preliminary hearing.  
2 She had been pretty consistent throughout all the statements  
3 she made at the preliminary hearing and to the police and I  
4 realize that one of the things that we would be able to do with  
5 the Saints exam was argue that in front of the jury.

6 Q. And would it have been consistent with your reasoning  
7 not to get a psychological evaluation of the children that  
8 although the Saints exam showed no sexual abuse, nevertheless,  
9 Desiree was claiming that Mr. Maki had sexually abused her four  
10 times?

11 A. I'm not quite following that. Could you ask that  
12 again?

13 Q. When you decided not to pursue a psychological  
14 evaluation of Desiree, did you factor in your decision the fact  
15 that although the Saints exam said she had not been abused,  
16 that she'd nevertheless herself claimed she had been abused  
17 sexually four times by Mr. Maki?

18 A. Yes.

19 Q. So is it fair to say from your testimony, then, that  
20 you didn't seek either a psychological or physical examination  
21 from the Court based on your assessment of the credibility of  
22 the children?

23 A. That was part of it, yes.

24 Q. Okay. Not entirely, though?

1 A. No.

2 Q. Okay. Let me ask you, then, regarding your  
3 assessment of credibility, did your assessment take into  
4 account the fact that Summer testified at the preliminary  
5 hearing at one point that no sexual assault had ever occurred  
6 on her in December?

7 A. I can't -- right now, I don't remember that  
8 particular testimony at the preliminary hearing. Just --

9 Q. Would it help if I provided a transcript?

10 A. Sure.

11 MR. PLATER: Okay. For counsel's benefit, I'm referring to  
12 preliminary hearing transcript, page 42.

13 BY MR. PLATER:

14 Q. Miss Schmuck, on page 42 of this transcript, I refer  
15 you to lines 12 through 17. You're done?

16 A. Yes.

17 Q. Do you remember that testimony?

18 A. I remember. I can't say that I remember specifically  
19 the child giving the testimony. I remember now the preliminary  
20 hearing transcript.

21 Q. Okay.

22 A. And, yes, I did take that into account.

23 Q. On line 15 it says: Summer, did his private ever go  
24 inside your private in December? Answer: No. Did you take it

1 to mean from Summer that she is saying Mr. Maki never sexually  
2 assault her in December?

3 A. I -- in taking that in isolation, yes, I think that's  
4 what you would have to, but I also was aware and what I took  
5 into my consideration that my opinion of this were the video  
6 tapes as well.

7 Q. Okay. So in any event, you're saying you took that  
8 into consideration when you made the decision that they were  
9 credible witnesses?

10 A. Yes.

11 Q. Do you have any background in psychiatry?

12 A. I think I took a class when I was college.

13 Q. Or psychology?

14 A. Psychology 101.

15 Q. In your experience as an attorney, do you think this  
16 type of information could have been a reasonable -- could have  
17 been part of a reasonable -- could have been a reasonable basis  
18 for a motion to the Court that the Court should have ordered an  
19 independent examination of Summer based on the fact that under  
20 oath, at one point she said she had never been sexually  
21 assaulted, even though at another time under oath she said she  
22 had?

23 A. I made a decision in this case not to seek the  
24 psychological examination based upon the information that I had

1 and my training and in my evaluation of the situation. I  
2 certainly think that there are cases where it could be very  
3 reasonable to do that.

4 Q. In this particular situation, given these facts,  
5 would it have been reasonable for counsel for Mr. Maki to make  
6 such a motion based on the testimony of Summer?

7 A. I think if that were the only thing that we had, this  
8 be it would become more reasonable.

9 Q. So as I understand your testimony, you took it upon  
10 yourself to make the decision whether the children were  
11 credible?

12 A. I did make a decision, yes.

13 Q. Did you ever seek an independent professional in the  
14 field of psychiatrist, psychology or medicine to help you with  
15 your assessment whether the children were credible?

16 A. No.

17 Q. In your decision regarding the credibility of the  
18 children -- strike that.

19 I'll represent to you that also during this preliminary  
20 hearing, Summer at one point testified that she was never  
21 rubbed or touched so as to constitute lewdness by Mr. Maki. Do  
22 you remember that testimony?

23 A. Not right off the top of my head, no.

24 Q. The reference is page 46 of the preliminary hearing.

1 Miss Schmuck, if you could read lines three through six?  
2 Just a short paragraph.

3 A. Okay.

4 Q. On line three, the question was asked by the  
5 prosecutor at the preliminary hearing: Oh, Summer, besides the  
6 time when Chuck put his penis inside your private, did he ever  
7 touch his private to the outside of your private? Answer: No.  
8 Do you remember that testimony?

9 A. Yes, now, that I read the transcript.

10 Q. Now, there was a charge of lewdness against Mr. Maki.  
11 In fact, two charges that he touched or rubbed Summer's vagina  
12 and that he rubbed his penis on her vagina. Do you remember  
13 those two counts of lewdness?

14 A. In the information?

15 Q. Right.

16 A. Yes.

17 Q. So given Summer's testimony at the preliminary  
18 hearing that Mr. Maki never did touch his private to the  
19 outside of her private, did you use that in your decision  
20 regarding the credibility of Summer regarding the two lewdness  
21 counts?

22 A. Yes.

23 Q. That she was alleging against him?

24 A. Yes.

1           Q.     What did you decide that she was not telling the  
2 truth at the preliminary hearing when she made the statement or  
3 she was inaccurate?

4           A.     What I decided was that I knew there was going to be  
5 an argument about the video tape as far as her testimony that  
6 was made that would be child hearsay and that we were -- that I  
7 knew I was going to have to deal with that as far as a motion  
8 was concerned, because I -- at that point, I'm not sure I had  
9 seen the video tape at the preliminary hearing or when she  
10 testified at the preliminary hearing. But I knew there was  
11 going to be a question as to the video tape being introduced  
12 and the testimony as well. And ultimately took all of those  
13 into consideration in making the decision.

14          Q.     Do you remember during the preliminary hearing where  
15 Summer said she was not sure if Mr. Maki had rubbed or touched  
16 her?

17          A.     No. Not -- I don't remember that -- the preliminary  
18 hearing specifically her saying that.

19          Q.     I'd like to refer you to page 41 and 42 of the  
20 preliminary hear. Could you read lines 23 through 25 on 41 and  
21 then one through 11 on 42?

22          A.     Okay.

23          Q.     Does that sound familiar?

24          A.     Yes. It sounds familiar in the sense that I recall

1 reading transcript.

2 Q. Okay. On the top of 42, Mr. Greco said: Now, when  
3 you say he moved his private on yours, did he start with  
4 rubbing it around your private? Answer: I forget. Question:  
5 All right. When you say he moved your private around, what do  
6 you mean? Answer: He moved around, I think, on the outside.  
7 Okay. He touched his private to the outside of your private?  
8 Answer: I think. And in your mind, was Summer somewhat unsure  
9 of what happened, according to her testimony at the preliminary  
10 hearing?

11 A. To the passage that you just read, yes, she seemed  
12 somewhat uncertain.

13 Q. Did you factor that into your decision regarding the  
14 fact that there was no problem regarding the credibility of the  
15 children?

16 A. Yes.

17 Q. And is that the reason why you didn't bring out these  
18 inconsistencies at trial? In other words, when Summer took the  
19 stand, you didn't take a preliminary hearing transcript and  
20 say: Summer, you know, at the preliminary hearing, you were  
21 kind of unsure, isn't this true? And present the jury with her  
22 testimony?

23 A. Well, at the trial, and I can't answer that  
24 because -- I mean, I don't remember exactly in terms of

1 questioning the child at the trial. But at the trial, the  
2 focus of the defense was that Mr. Maki did not do this. No  
3 matter what the children claimed at all, Mr. Maki did not do  
4 this. And the evidence that we had were the tattoos and I  
5 don't remember exactly when you asked me if that was why I  
6 didn't ask the child at the trial, I don't know. But I know  
7 that we were really concentrating on the fact that there were  
8 the tattoos and Mr. Maki was not saying to anyone on that jury  
9 this didn't happen. That was not the defense in this case.  
10 The defense was Mr. Maki did not do this.

11 Q. And so if I understand your testimony, you're saying  
12 and the defense was based on the fact that they were mistaken  
13 about the tattoos, about the tattoos on his body?

14 A. Well, the children didn't talk about the tattoos at  
15 the preliminary hearing, if I understand your question  
16 correctly.

17 Q. The defense at trial was that Mr. Maki didn't do  
18 this?

19 A. Yes.

20 Q. As part of your defense strategy, then, based on your  
21 idea of what the defense was, was it your decision not to use  
22 inconsistent statements of the victims?

23 A. I -- as well as I can remember, my feeling about this  
24 was that the children were going to testify however they chose

1 to testify. And I was -- I don't remember making a conscious  
2 decision not to come in and say: Okay, this is what you said  
3 at the preliminary hearing. This is what you're saying now.  
4 What I was concerned about and wanted to make clear to the jury  
5 was that no matter what they were saying, this could not have  
6 been Mr. Maki, because they never talked about some very  
7 visible tattoos he had on him.

8 Q. And would it be inconsistent with that defense to  
9 also show or to question the credibility of the children  
10 themselves?

11 A. No, not necessarily.

12 Q. The children could have been credible and Mr. Maki  
13 could still not have done this?

14 A. Well, I think that's possible. I think the children  
15 could have been credible and I think -- and he still couldn't  
16 have done it. I guess, looking at the total picture, we were  
17 not able to establish and what we looked for very intensely was  
18 whether or not these children had had any sort of prior sexual  
19 exposure to anyone, because in that sense, that might make  
20 their testimony quite credible. And I had been assured by Mr.  
21 Maki that he had not done this, so we looked and spoke to  
22 everyone that we possibly could to try to establish what I had  
23 been told from him that the children had been sexually active  
24 with someone else, not him.

1 Q. So was it your belief if you pursued this defense, it  
2 was possible that the children actually thought this had  
3 occurred to them by Mr. Maki, but it hadn't?

4 A. No. I think the defense was that the children were  
5 telling the truth that someone had done it to them, but that it  
6 wasn't him. Mr. Maki believed that they were saying this, that  
7 they had been sexually molested by someone else and they were  
8 saying this about him, specifically because of problems that he  
9 had had with the shoulder.

10 Q. So in that regard, the children would not have been  
11 telling the truth regarding who did it to them?

12 A. Yes.

13 Q. That's an issue of credibility regarding their own  
14 stories and their own testimony, right?

15 A. Sure.

16 Q. As a practicing lawyer, inconsistent statements are  
17 often used to attack the credibility of somebody who is saying  
18 something under oath, isn't that true?

19 A. Yes.

20 Q. So as I understand it -- is it because Mr. Maki  
21 denied this and that the children did not have testimony about  
22 the tattoos and that possibly they had been molested by other  
23 people, that is the reason you didn't bring out these  
24 inconsistencies in testimony?

1           A.     I couldn't establish that they had been molested by  
2 someone else or I couldn't -- I could never get any information  
3 on that, but, yes.

4           Q.     Okay. At the preliminary hearing, I'll represent to  
5 you that on page 12, talking about Desiree, Desiree testified  
6 that in relation to where she was when she was being babysat,  
7 she said I guess in our house, I'm not sure, given the fact  
8 that she testified under oath that she was not sure where she  
9 was when she was being babysat by Mr. Maki, do you also factor  
10 that into your decision regarding their credibility?

11          A.     You'll have to help me out with that one. I remember  
12 the testimony at the preliminary hearing about sexual assaults  
13 taking place in two different places, at Mr. Maki's apartment  
14 and at the children's apartment.

15          Q.     Okay. On page 12 of the preliminary hearing, have  
16 you read lines four through eight?

17          A.     Okay.

18          Q.     Do you remember that testimony?

19          A.     Yes, now that I've looked at it.

20          Q.     Okay. It says: All right. Was Chuck baby sitting  
21 you that day in December? Answer: Yes. Question: And where  
22 was he baby sitting you at? Answer: I guess at our house.  
23 I'm not sure. Given the fact that she was not sure where she  
24 and Mr. Maki were at the time he was baby sitting her, did you

1 factor that in in determining her credibility?

2 A. Yes.

3 Q. Or, in fact, regarding her recollection?

4 A. I think I factored that in as well as the fact that  
5 in other places of the testimony she seemed to be pretty clear  
6 about what happened at his apartment and then what happened at  
7 her family's apartment.

8 Q. Do you remember during the preliminary hearing that  
9 Desiree testified in response to Mr. Greco that during the  
10 first sexual assault Mr. Maki's penis was going down?

11 A. Yes, I do remember that.

12 Q. Later on, she testified she wasn't sure if she ever  
13 saw the penis up a little bit. Did you use that in your  
14 decision?

15 A. Yes.

16 MR. PLATER: Your Honor, I'm wondering how much time did  
17 you want to take on this?

18 THE COURT: I want to finish.

19 MR. PLATER: Keep going.

20 THE COURT: I hope you can go quickly. But you've got to  
21 pursue your issues.

22 MR. PLATER: Okay.

23 BY MR. PLATER:

24 Q. Miss Schmuck, do you remember any other

1 inconsistencies in the testimony by either girl and their trial  
2 testimony?

3 A. No, not right now.

4 Q. Or statements they gave to other people?

5 A. Not at this moment, no.

6 Q. Do you remember in your investigation observing or  
7 concluding that there were inconsistencies by either girl  
8 insofar -- while comparing their statements from a court  
9 hearing or from a statement with police officers or other  
10 people?

11 A. No, I don't.

12 Q. So you have no recollection that there was -- are  
13 saying that you did not feel there were inconsistencies?

14 A. I'm saying I didn't have any recollection of that.

15 MR. PLATER: Maybe, your Honor, for the purposes of time, I  
16 have a number of what I perceive to be inconsistencies where  
17 the child said one thing one time or another during a prelim as  
18 opposed to trial as opposed to somebody else.

19 To save time, I think Miss Schmuck would testify that she  
20 remembers each of them if she were presented with each  
21 instance, that she considered it and she was -- she made her  
22 decision, based on what she said not to go forward to have the  
23 court order independent physical or mental evaluation. So I  
24 could perhaps just then save some of this examination for

1 argument, either in written form or orally.

2 THE COURT: Okay. I see what you're saying.

3 MR. PLATER: I could keep going on. I have a lot of it.

4 THE COURT: You've asked the generic question. That's fine  
5 with me.

6 MR. MCCARTHY: The only thing I'd suggest is ask the  
7 witness if this offer of proof sounds reasonable to her.

8 THE COURT: That's what I meant by the generic question.

9 THE WITNESS: It's fine. Yes.

10 MR. MCCARTHY: I have no objection to it.

11 MR. PLATER: Or I really do have it outlined.

12 THE COURT: No.

13 MR. PLATER: This is tedious.

14 THE COURT: Just shorten it up. Ask the generic question  
15 and we can move on to other issues and we'll do the same with  
16 other issues.

17 MR. PLATER: And then I'll be able to show the Court later  
18 on what the inconsistencies that I would have brought out and  
19 Mr. Maki would have used in application of the Court for a  
20 motion for independent psychological and physical or physical  
21 examination. Is that okay.

22 THE COURT: Okay.

23 MR. MCCARTHY: I'd ask that he exclude everything that was  
24 raised at trial, because by that point it was far too late to

1 seek examination.

2 MR. PLATER: That's fine. Okay. I think that's all I  
3 have, then, at this point.

4 THE COURT: Any questions, Mr. McCarthy?

5 MR. MCCARTHY: Yes, your Honor.

6 CROSS EXAMINATION

7 BY MR. MCCARTHY:

8 Q. Miss Schmuck, have you tried other cases involving  
9 child victims?

10 A. Yes, I have.

11 Q. Is it your experience that child victims or other  
12 witnesses are always 100 percent consistent in their relation  
13 of the events?

14 A. No.

15 Q. As a trial lawyer, do you sometimes become aware of  
16 minor inconsistencies and elect not to bring it out?

17 A. Yes.

18 Q. Why?

19 A. Well, there's several reasons. I think primarily  
20 because if they're minor inconsistencies, especially with  
21 children, I think it's better to let it go than have the jury  
22 look like you're beating up on kids.

23 Q. You perceive a risk that the jury will perceive you  
24 as being overly picky?

1           A.     Yes.

2           Q.     In your experience, do juries expect some  
3 inconsistencies with child witnesses?

4           A.     Yes.

5           Q.     You were asked to read a couple of lines of page 12 a  
6 couple of minutes ago. It was read into the record the  
7 question where was he baby sitting at. The answer: I guess at  
8 our house. I'm not sure. Can you read the rest of that page,  
9 read the rest of that -- the rest of that page. Taking the  
10 testimony as a whole, do you find that those two lines that  
11 were read into the record to be clearing any inconsistencies?

12          A.     No.

13          Q.     Let's do the same at page -- I think we're at 42, 43  
14 before and there were a couple of things of those pages were  
15 read into the record.

16          A.     Okay. I've got page 42.

17          Q.     Okay. Take a look at page 42 and 43, and if you can  
18 recall which lines we read into the record before. I don't.

19          A.     Okay.

20          Q.     So on those pages, do you find that the testimony as  
21 a whole has glaring inconsistencies?

22          A.     No.

23          Q.     Is it your experience in most courts when you choose  
24 to impeach a witness with prior inconsistent testimony, that

1 the prosecutor can insist that that the greater portion also be  
2 read to the jury?

3 A. Yes.

4 Q. Do you perceive any disadvantage had that happened in  
5 this case?

6 A. Yes.

7 Q. Might that go into your decision to not bring out  
8 these inconsistencies at trial?

9 A. Yeah.

10 Q. When we were discussing your evaluation and  
11 credibility of the children, correct me if I'm wrong, I kind of  
12 got the impression that sometimes you were talking about your  
13 opinion of whether they are telling the truth and sometimes  
14 you're talking about the perception of the jury of whether they  
15 were telling the truth. Am I correct?

16 A. Yes.

17 Q. Okay. Is that part of your job as a trial lawyer to  
18 anticipate what the jury might believe?

19 A. Yes.

20 Q. Are you any good at it?

21 A. I like to think so.

22 Q. Could you describe for the Court the nature of your  
23 strategy relating to the tattoos?

24 A. The tattoos came to my knowledge immediately

1 following the preliminary hearing. Mr. Maki told me about the  
2 tattoos, especially the tattoos around his pubic area.

3 At that point, I also was very careful about looking at the  
4 children's tape or the video tapes of the children and what  
5 they had to say there. And I believe one of the children, at  
6 least Desiree, said there was no tattoos around there. While  
7 Chuck had tattoos all over his body, but none down there. I  
8 had an investigator go out and make photographs of Mr. Maki for  
9 the tattoos and our strategy was that had Mr. Maki been the  
10 person who committed these offenses, it would have been  
11 extremely hard for the tattoos to have been missed. They're  
12 very apparent, they're very colorful, and this is something the  
13 children would really zero in on.

14 Q. And so did you have a plan on how to inform the jury  
15 of the existence of the tattoos?

16 A. We were going to have and did have the investigator  
17 from my office, who made the photographs of Mr. Maki, come in  
18 to have the photographs entered as evidence through his  
19 testimony.

20 My intent always had been to argue to the jury these  
21 tattoos are so clear and so obvious that these children would  
22 have automatically mentioned them under any questioning and to  
23 show -- and we did show the jury the pictures of the tattoos.

24 Q. Did you intend to argue if they had seen Mr. Maki

1 without clothes, that in response to the question, you know,  
2 describe what you saw, the children would have on their own  
3 mentioned the tattoos?

4 A. Exactly.

5 Q. Yes. And that's why you didn't ask the children on  
6 the witness stand about the existence of tattoos?

7 A. Yes.

8 Q. And then in the defense case, you did present the  
9 jury with pictures of the tattoos?

10 A. Yes.

11 Q. Did you ever tell Mr. Maki anything along the lines  
12 of that because you had been assaulted yourself, you were not  
13 going to put forth your best efforts on his behalf?

14 A. No.

15 Q. Did you ever tell him that you had been assaulted  
16 yourself?

17 A. No.

18 Q. Did you ever tell him that there was any reason at  
19 all why you wouldn't put forth your best efforts?

20 A. No.

21 Q. Did you tell him you thought he was guilty?

22 A. No.

23 Q. Did you tell him that he would be found guilty?

24 A. Yes.

1           Q.     Do you make it a habit of telling your clients what  
2 you think is the proper result, whether you think they are  
3 guilty.

4           A.     No, I don't. I don't see any place for that.

5           Q.     Do you make it a habit to give them frank advice  
6 about the probable outcome of a trial?

7           A.     Yes.

8           Q.     Did you do that in this case?

9           A.     Yes, I did.

10          Q.     Mr. Maki gave you some names prior to trial of people  
11 who might have helpful evidence, is that right?

12          A.     That's correct.

13          Q.     Did you employ an investigator in this case to assist  
14 you in trying to find any witnesses?

15          A.     Yes, I did.

16          Q.     Can you give us kind of a synopsis of the results of  
17 those efforts?

18          A.     I had actually two investigators from my office  
19 working on this case. Initially, Bob Howell was involved in  
20 working on the case and he spoke with several people or tried  
21 to speak with several people that Mr. Maki had put us in touch  
22 with, one of which was a guy named Frances that Mr. Maki had  
23 explained he was kind of like a Dutch Uncle to the girls and  
24 spent a lot of time with them and was very involved with them.

1 And he believed that there could have been something -- that he  
2 could have been the person who had actually done this.

3 Mr. Howell was in touch with him and he could provide us no  
4 information at all. It was my understanding, and this, again,  
5 came through from Mr. Howell, that he was of no help in terms  
6 of providing any information in this case and did not know  
7 anything.

8 I know he also contacted -- tried to contact the downstairs  
9 neighbors. There was a lady named Doris, who was the  
10 grandmother of the boy John who Mr. Maki believed was having  
11 some sort of sexual relationship with at least one or both  
12 Desiree and Summer. Mr. Howell left -- I know on a lot of  
13 occasions left cards on the door to have Doris contact him.  
14 She never responded to any of those requests for him to contact  
15 her.

16 There was another neighbor named Jay that Tim Ford  
17 contacted and so spoke with him and we had been told that he  
18 knew about a particular incident with the two girls and with  
19 John in which there was something -- some kind of physical  
20 relationship. Whether the kids were playing doctor, it wasn't  
21 exactly clear.

22 Tim Ford did speak with Jay, and Jay told him that he only  
23 knew about this incident from Mr. Maki. And he was somewhat  
24 reluctant to provide any information or to come in and help us

1 out at all.

2 Q. He didn't claim to have any firsthand knowledge?

3 A. Exactly. We -- I had an investigator speak with a  
4 woman named Carla who was a friend of Mr. Maki's. I believe  
5 she spoke with Carla on two separate occasions. I had some  
6 real concerns about her because I think she was extremely  
7 inebriated at least on one occasion when he talked to her very  
8 early in the morning.

9 MR. MCCARTHY: Your Honor, could you instruct the  
10 petitioner to quit making gestures, shaking his head, if he  
11 disagrees.

12 THE COURT: I'm sorry. I had my head down.

13 MR. MCCARTHY: I'm sorry, your Honor. I catch it out of  
14 the corner of my glasses.

15 THE COURT: Mr. Maki and I have had a run in with that  
16 stuff before, so just knock it off. Go ahead.

17 THE WITNESS: I'm trying to remember the other names. Mr.  
18 Maki gave me the name of a woman named Linda, and I believe her  
19 last name was Stallings and I spoke with her. I made contact  
20 with her specifically to ask her. He felt as though she would  
21 be a good character witness at the sentencing and she informed  
22 me that she would not choose under any circumstances to come in  
23 and testify in his defense and he had in fact assaulted her on  
24 one occasion and she was quite sure he was capable of doing

1       these things.

2       BY MR. MCCARTHY:

3           Q.       Was she in your opinion a good character witness for  
4       Mr. Maki?

5           A.       No, she was not.

6           Q.       Were there any witnesses who -- or potential  
7       witnesses whose names were given to you by Mr. Maki who claimed  
8       to have no knowledge of him?

9           A.       I'm trying to remember, because there was quite a few  
10       people that we contacted. There was a man named Ken Daniels  
11       who did call me before the trial and left a message for me to  
12       call him back. It was -- I remember this, because I have a  
13       memo specifically about this, and it was late in the afternoon.  
14       I asked my investigator, Tim Ford to call him, and he called  
15       him the next day and Mr. Daniels said: I don't know anything  
16       about this. And I didn't call him.

17           I talked to Mr. Maki at some point after that, and he said  
18       Mr. Daniels will only talk to you, he won't talk to your  
19       investigator. So I called Mr. Daniels again and spoke with him  
20       about any information he could give about the case. And he  
21       said that what he knew about the case came from Mr. Maki also  
22       and whether I spoke with him specifically about coming in and  
23       testifying to Mr. Maki's good character or bad character, he  
24       basically said, I don't know him. I don't know anything good,

1 I don't know anything bad about him.

2 Q. Prior to reading the petition for habeas corpus in  
3 this case, did you ever hear the name Paul Grubbs?

4 A. No.

5 Q. Did you attempt to get Jackie Maki to appear?

6 A. Yes, we did.

7 Q. Run into some difficulty?

8 A. Yes. I had a lot of contact with Jackie Maki, Mr.  
9 Maki's sister. She called me regularly and would talk to me  
10 about his case and agreed on several occasions to provide us  
11 with particularly with clothes and we were having concerns  
12 about his hearing aids and she was going to help us out with  
13 those kinds of things.

14 I also wanted her to come in and testify, specifically at  
15 the sentencing hearing, and this was even before I knew about  
16 his sister Jocelyn coming to testify. We tried on at least two  
17 different occasions to subpoena Miss Maki, because I could  
18 never see her face-to-face and I became increasingly concerned,  
19 because I could never see her face-to-face, only talk to her on  
20 the phone. And my investigator could never talk to her  
21 face-to-face, that we really needed to have her under subpoena.

22 I know Tim tried to have her subpoenaed. Both times he was  
23 unsuccessful. In the one occasion where we actually got close  
24 enough to her to talk to her, she came to our office, I believe

1 the afternoon before trial, and did bring some clothes for Mr.  
2 Maki to wear at trial. She did not bring the hearing aid and  
3 she ran out the door before anyone could have contact with her.  
4 In fact, I think Tim even tried to follow her down the street  
5 and couldn't catch her.

6 I've never seen the woman face-to-face. I've only talked  
7 to her on the phone.

8 Q. Would you have any hesitations about putting her on  
9 as a witness if she had appeared?

10 A. Yes, I would have had some hesitations about putting  
11 her on as a witness, without having a chance to actually see  
12 her face-to-face and speak with her. That was one of the  
13 primary reasons, again, because we had been trying to subpoena  
14 her.

15 MR. McCARTHY: Can I have Exhibit A? Is that around here?

16 BY MR. McCARTHY:

17 Q. Miss Schmuck, I'll show you what has been marked as  
18 Exhibit A and ask if you can identify that?

19 A. Yes. That's a letter that I wrote to Mr. Maki.

20 Q. Was it sent out in the ordinary course?

21 A. Yes.

22 MR. McCARTHY: I'll offer A, your Honor.

23 THE COURT: Any objection?

24 MR. McCARTHY: I still didn't make a copy for Mr. Plater.

1 He might want to take a minute to read it.

2 MR. PLATER: I have no objection.

3 THE COURT: A will be admitted.

4 BY MR. MCCARTHY:

5 Q. Miss Schmuck, did you and Mr. Maki ever discuss his  
6 right to testify at trial?

7 A. Yes, we did.

8 Q. Can you tell the Court the nature of those  
9 discussions?

10 A. I explained to Mr. Maki that he had the right to  
11 testify at the trial. The choice to testify or not testify was  
12 solely his and that if you chose not to testify, the State  
13 could not use that against him.

14 I believe I spoke with him about that on several occasions  
15 from reviewing my memos, because I know that was of concern to  
16 him. And I remember going into trial and not knowing whether  
17 or not he was going to testify.

18 Q. Did you ever tell him that you had the authority to  
19 prohibit him from testifying in his own behalf?

20 A. No, I never told him that.

21 Q. Did you give him your frank advice?

22 A. Yes, I did.

23 Q. What did you tell him?

24 A. That I didn't think he should testify.

1 Q. Why not?

2 A. The primary concerns that I had were, one, about his  
3 prior record, that that would be brought in against him. And  
4 the other concerns that I had were because Mr. Maki was very  
5 prone to try to plug up all the holes, so to speak, in terms of  
6 explaining everything and I had talked to him about that and I  
7 believe that I referred to that in the letter. I was very  
8 concerned about his attempts to do that.

9 And I was very concerned about his ability to maintain his  
10 composure on the stand, I think that was my primary concern,  
11 under cross examination.

12 Q. Do you recall at the trial the Court informed Mr.  
13 Maki of his right to testify?

14 A. I don't remember that in the trial.

15 Q. In any event, did he eventually accept your advice  
16 and not testify?

17 A. I know he didn't testify. I don't know if it was  
18 based on my advice. I know that he didn't testify.

19 Q. Okay. Do you recall photographs being produced as a  
20 result of the Saints exam?

21 A. Vaguely, I remember some photographs, yes, or  
22 photographic evidence.

23 Q. I'm sorry?

24 A. Yes, some photographic evidence.

1 Q. Okay. Do you have any reason -- withdraw that.

2 MR. MCCARTHY: May I have a moment, your Honor?

3 BY MR. MCCARTHY:

4 Q. Did Mr. Maki ask you to make a motion to withdraw  
5 from the case?

6 A. No.

7 Q. As I recall earlier, quite a bit earlier, we were  
8 talking about Miranda and such things. Let me ask your legal  
9 opinion here. Is it your opinion that the concepts of probable  
10 cause and the concepts of custody are equivalent?

11 A. No.

12 Q. Okay. So if, for instance, a police officer on the  
13 side of the road has probable cause to believe someone has  
14 committed a crime, we'll say, for instance, DUI, and that  
15 police officer asks that suspect, have you been drinking,  
16 there's no Miranda violation?

17 A. Yes. I agree.

18 Q. Because the person is not in custody?

19 A. Yes.

20 Q. Okay. Is that your opinion alone or nine learned  
21 individuals also agree with that?

22 A. Yes.

23 Q. I withdraw that. That was inappropriate, too. I  
24 can't help it, Judge. It's my nature.

1 THE COURT: Go ahead.

2 BY MR. McCARTHY:

3 Q. Do you recall being asked by Mr. Maki to secure the  
4 attendance of someone named Fried or Fried for sentencing?

5 A. The only knowledge I have of that name was from a  
6 letter that Mr. Maki gave me the day of sentencing. I believe  
7 that name was in there.

8 Q. Mr. Maki gave you a letter at the sentencing hearing?

9 A. Yes.

10 Q. That letter, he suggested that this individual would  
11 be a good sentencing witness for him?

12 A. I think so. I think that his name was in the letter.

13 Q. Did you have any notice of that, the existence of  
14 that individual, before the sentencing hearing?

15 A. No.

16 Q. Were you licensed to practice law in this state at  
17 the time you represented Mr. Maki?

18 A. Yes.

19 MR. McCARTHY: That's all I have.

20 THE COURT: Redirect?

21 MR. PLATER: Just a couple.

22 REDIRECT EXAMINATION

23 BY MR. PLATER:

24 Q. Miss Schmuck, regarding your testimony about whether

1 minor inconsistencies should be brought in or not, I take it  
2 that if had you see a major inconsistency in a witness'  
3 testimony at trial as opposed to what he or she testified to at  
4 another date, that's something you want to bring out?

5 A. Yes.

6 Q. And you said that it was -- you said that Mr. Maki  
7 did not testify, but you weren't sure what his thinking process  
8 was?

9 A. What I -- yes, that's exactly what -- I didn't say I  
10 wasn't sure what his thinking process was. I said I wasn't  
11 sure why he chose not to testify. I knew we had discussed  
12 whether or not he was going to testify, and I did not know at  
13 the time -- at the beginning of trial or even at the -- I'm not  
14 even sure at the close of the State's case whether or not he  
15 was going to testify. When he chose not to testify, that I  
16 cannot recall right now what his reasoning was or if he told me  
17 why he was not testifying.

18 Q. Okay. So you remember after the State's case in  
19 chief that had you sat down with Mr. Maki and you had a  
20 discussion?

21 A. No. I don't remember that. I remember having  
22 discussions with him prior to the trial, the beginning of  
23 trial, several times, weeks before the trial. But I don't  
24 remember specifically sitting down with him when the State

1 closed its case and having a discussion like that.

2 Q. So you don't remember him ever telling you: I'm not  
3 going to testify.

4 A. I don't remember him saying specifically: I'm not  
5 going to testify.

6 MR. PLATER: That's all I have.

7 MR. McCARTHY: Nothing. Thank you.

8 THE COURT: Thank you, Miss Schmuck. You can step down.

9 MR. PLATER: I don't have any other further witnesses.

10 THE COURT: Okay. Let's take a break and we can sum up.

11 (A short break was taken at this time.)

12 THE COURT: We're back on the record. Mr. Maki is present  
13 with counsel. Mr. McCarthy is here for the State.

14 Mr. McCarthy, do you have anything to present prior to  
15 argument?

16 MR. McCARTHY: I have two stipulations, your Honor. No  
17 evidence.

18 THE COURT: Okay.

19 MR. McCARTHY: The parties agree that at the time she  
20 represented Mr. Maki, she represented Mr. Maki Robin Wright was  
21 regularly licensed to practice law in the State of Nevada.

22 Also, Mr. Plater has a whole series of document. I agree  
23 those were all generated by the State provided to the public  
24 defender as part of the discovery.

1 THE COURT: Okay. How do you want to mark them?

2 THE CLERK: Defendant's one, two, three, four marked for  
3 identification.

4 MR. McCARTHY: With that, the State has no additional  
5 evidence.

6 THE COURT: Okay. Let's go ahead and sum up. Mr. Plater?

7 MR. PLATER: Your Honor, basically, Mr. Maki's petition  
8 alleges ineffective assistance of counsel. You know the  
9 standard, it's a two-prong test. You have to show that a  
10 counsel's actions or decisions were deficient. Number two,  
11 that if they were, they prejudiced the client so that the acts  
12 or omissions, if they didn't occur, or would have occurred,  
13 there's a probability that a different result would have been  
14 obtained.

15 In this case, the probably is the best issue, as I see it,  
16 is the fact that counsel did not petition the Court to have  
17 these victims undergo an independent physical and/or  
18 psychological examination. And that would have been important,  
19 even though, and Mr. Maki went to trial on ten counts, he was  
20 acquitted of the first sexual assault and I believe that was on  
21 Desiree. He was acquitted of that one and the jury couldn't  
22 reach a decision, I believe, on Count Two, which was sexual  
23 assault against Desiree. So two of the five were gone, but he  
24 suffered three convictions for sexual assault and five

1 conviction for lewdness.

2 Now, the case law in Nevada and Miss Schmuck's testimony  
3 was that she doesn't -- she decided not to do one of these  
4 motions to the Court, because, basically, as I understand it,  
5 she thought the credibility of the children was fine and really  
6 the defense was focused on Mr. Maki's tattoos had not been  
7 properly identified by the children.

8 Although she conceded that the children were not correct or  
9 possibly were not telling the truth that it was Mr. Maki, the  
10 defense was that, well, they had been probably assaulted, but  
11 they were identifying Mr. Maki and he was the wrong  
12 perpetrator.

13 So she did afterwards concede the fact, well, their  
14 credibility would have been an issue, because they're saying  
15 when they knew better that it was Mr. Maki who had done this.  
16 So that's why I think still the position about getting an  
17 examination was important, because these examinations are to  
18 test the credibility of the people involved. And that's what a  
19 psychological or a psychological doctor or psychiatrist could  
20 have done, could have examined the children or a medical doctor  
21 in terms of their physical appearance.

22 Now, we didn't bring in the doctor, but I think under the  
23 circumstances, if you found that one of these motions should  
24 have been made, that it should be presumed prejudicial against

1 Mr. Maki, because obviously at this point, a doctor can't go  
2 examine them physically and psychologically. We couldn't have  
3 gotten an order from the Court allowing it at this point in  
4 time.

5 But the reason I think this should have been done are  
6 inconsistencies that the children made and these aren't minor  
7 inconsistencies. These are fairly major. The most major one  
8 is that under oath at the preliminary hearing, it was Summer  
9 who said, and I'll quote on page 42 of the preliminary hearing  
10 transcript: Question, and then later on, did he ever put his  
11 private inside your private? Answer: I'm not sure. Question:  
12 Summer, did his private ever go inside your private in  
13 December? Answer: No. That's pretty clear. Is that a minor  
14 inconsistency regarding Count Five where Summer alleges Mr.  
15 Maki sexually assaulted her with his penis? That's a glaring  
16 inconsistency.

17 Now, later on, in examination, right after that, Mr. Greco  
18 said: Wait a minute, Summer, didn't you tell an officer when  
19 he interviewed you that Mr. Maki assaulted you? Yeah. Did you  
20 tell him the truth? Yes. But the point is, whether you want  
21 to believe it, your Honor, this was really good ammunition.  
22 This was real good information that a defense lawyer could have  
23 used to present the Court such as yourself after a preliminary  
24 hearing to say: Judge, this is the basis of a motion to have

1 the Court order this child to undergo an independent  
2 examination, because she says one thing under oath, completely  
3 denies it happened and then she says in the next sentence it  
4 happened.

5 And Summer was a young girl. Who knows why it happened.  
6 It may have been for independent innocent reasons, but the  
7 point is, it's a pretty good basis upon which to base this type  
8 of motion.

9 It doesn't stop there, Judge. If you review the  
10 preliminary hearing transcript, the material that was provided  
11 to counsel before trial, such as the statements from the  
12 children, Mr. Maki's statement, the video taped statements, the  
13 statements from Detective Bohach, you'll see some pretty  
14 inconsistent statements by these children and these exams  
15 should have been ordered.

16 And another inconsistency is Detective Bohach. He  
17 interviewed -- he interviewed that I guess I put it into  
18 evidence. But he interviewed. It wasn't Bohach. It was  
19 Officer Ballue. He interviewed Desiree. When he got the  
20 report, he ran over to the girls' apartment and he spoke  
21 briefly with Desiree and then the next day both girls were  
22 taken down to RPD for a formal interview.

23 But he -- Desiree told that she was touched three times all  
24 together and that was it. Twice at Mr. Maki's apartment and

1 once at her apartment.

2 Now, at trial, and it all occurred on the same day. But  
3 she said all together there's only three times, but at trial  
4 she testified to seven times. Another inconsistency was that  
5 Summer testified at the preliminary hearing she was not sure if  
6 Mr. Maki rubbed or touched her. And, in fact, later on, on  
7 page 46, she completely denied it. She said, no, it never  
8 happened.

9 Now, those are minor inconsistencies, and I'll concede the  
10 point, but it seems to me those are pretty important statements  
11 that somebody would want to look into and why they were said.  
12 What was the mental process of the child? What was the  
13 physical condition of the child such that perhaps we need an  
14 independent witness. And on the case law this has been  
15 established through State v. Kenney, that's a Nevada case, and  
16 it says whenever you present a compelling reason to the Court,  
17 the Court can order an independent examination. One of the  
18 things you look at is does the State have its own expert and  
19 did the expert testify at trial. And that's what occurred  
20 here. The State had an expert, Miss Peele, testified who  
21 testified that the girls had been abused.

22 One of the other things that made this look like it was  
23 somewhat suspicious is the fact that Miss Peele testified that  
24 Desiree's exam showed a normal hymen. There was no sign of

1 abuse. But, nevertheless, Desiree testified she had been  
2 sexually assaulted four different times by Mr. Maki. And Miss  
3 Peele testified there was no healing, no signs of anything  
4 wrong. So, again, that's some -- there's some point as to  
5 whether this should have been pursued.

6 Summer testified -- Miss Peele testified that Summer had  
7 suffered chronic sexual assault, meaning more than once, and  
8 yet Summer only testified at trial and the State agreed to this  
9 that she was only sexually assaulted once by Mr. Maki. And  
10 yet, according to Miss Peele, she showed signs of having been  
11 sexually assaulted on more than one occasion. You'll probably  
12 remember the picture of her that was taken and described by  
13 Miss Peele.

14 If that was the case, if there was chronic assault going  
15 on, an independent evaluation might have revealed who was  
16 responsible, who else was responsible, even if it had been Mr.  
17 Maki, but it certainly -- it certainly lends credence to the  
18 argument that maybe somebody else was involved in this.

19 Miss Peele testified that there was behavior problems with  
20 Summer. She couldn't pinpoint when they began. They may have  
21 begun prior to these allegations and she tried to tie in the  
22 fact that these behavior problems were the result of a sexual  
23 abuse, but she couldn't say when they were started.

24 Some of the other problems we touched on that showed that

1     there was conflicts and inconsistencies in the statements given  
2     by the victims were that Desiree testified at the prelim she  
3     was not sure where she was being babysat. She said she guesses  
4     she was at home with Mr. Maki. She said also during the first  
5     sexual assault, she said at one point that his penis was going  
6     down, another point, she said I'm not sure if I ever saw it up  
7     a little bit. This was during the first sexual assault. And  
8     another time apparently his penis was sticking straight out.  
9     She even said at one point she wasn't sure if it even went in.  
10    At one time she thought it was outside and then she changed her  
11    testimony on that.

12         She testified also that nothing else happened that day  
13    after the third sexual assault so that one might infer that  
14    there was no lewdness that ever occurred between him and  
15    Summer.

16         These are just things that should have been -- that could  
17    have been brought out in a motion for an independent  
18    examination.

19         They also -- Summer, or I mean Desiree at one point said  
20    all of this occurred before Christmas. And then at another  
21    statement in the discovery, she said she wasn't sure when it  
22    occur. Summer said, on the other hand, this occurred after  
23    Christmas.

24         Regarding Summer, she said -- she said he humped with me

1 and Desiree also used the word humped. Desiree used the word  
2 to mean sexual assault. That was in the preliminary hearing.  
3 When Summer used the word humped, she meant it to be lewdness.  
4 That was explained in her testimony. I think it would have  
5 been helpful for an independent person to inquire what these  
6 girls meant by these words and what occurred in that sense.

7 At one point, Summer said during the first lewdness charge,  
8 she said he moved his hand around my private part and moved his  
9 private part on hers. Then she said she couldn't remember if  
10 he started rubbing, if he started rubbing with his private part  
11 under her private part. She said he moved it around, I think,  
12 on the outside and then she appeared to completely deny it on  
13 page 46 of the preliminary hearing.

14 And, of course, we already went over the fact that she  
15 completely denied any sexual penetration at one point, but  
16 asserted it later on.

17 There are other inconsistencies we can talk about, but the  
18 point is, this is something that should have been done by trial  
19 counsel.

20 As far as Miranda is concerned, the only point is that the  
21 Supreme Court ruled Miranda didn't apply when Mr. Maki was  
22 first in custody, because it was not a custodial situation.  
23 But after some period of time, it becomes pretty clear that it  
24 was a custodial interrogation, because Mr. Maki admits to

1     lewdness with Summer. He said, yeah, I'm guilty with Summer.  
2     She washed my back, maybe she touched my genitalia. He said  
3     it's hard to get it outright. I got to get this off my chest.  
4     It had to come out sooner or later and it was all -- I did  
5     something wrong.

6             And at that point, it's pretty clear there's probable cause  
7     to arrest him for lewdness, and, of course, the sexual assault.  
8     Nevertheless, the officers didn't do anything. They kept  
9     questioning this person, Mr. Maki, and finally when he made an  
10    admission regarding Desiree that he was guilty of what she said  
11    he had done, they said: Okay. We're going to Mirandize you  
12    now. He said: I'm going to be under arrest? And they said:  
13    No, you're not. There was no question in their mind it was  
14    custodial at that point.

15            But the inquiry should be, and it is, according to case  
16    law, not what the officers think custodial means or when it  
17    occurs, but what a reasonable person would believe given the  
18    circumstances. And certainly a reasonable person would believe  
19    after he confessed to lewdness and there's police arrested for  
20    sexual assault that it was a custodial interrogation after  
21    everything after that.

22            I think reasonable counsel would have argued that Miranda  
23    should have been read to him after he made the first confession  
24    regarding Summer and that because it wasn't done, everything

1 else should not have been used against him at trial.

2 Regarding sentencing, what Mr. Fried would have done, Mr.  
3 Maki maintains he the anticipated testimony of Jocelyn Coombs  
4 and what could have been done to rebut that and Mr. Fried would  
5 have been one of those people, according to him, she was less  
6 than credible person who had a real drug addiction problem.

7 So those are the reasons, your Honor, we'd ask that you  
8 grant his petition.

9 THE COURT: Thank you. Mr. McCarthy?

10 MR. MCCARTHY: Preliminarily, your Honor, there are a  
11 number of other issues raised in the petition which have not  
12 been addressed either by evidence or argument. I'd ask the  
13 Court at the conclusion summarily rule those are unsupported by  
14 evidence and no relief shall be granted on those.

15 As to the things that are the subject of the hearing today,  
16 Mr. Plater and I agree on a lot. But primarily, the standard.  
17 The petitioner bears the burden of showing by clear and  
18 convincing evidence the representations by his attorney fell  
19 below an objective standard of reasonableness, not that they  
20 were bad, not that could have been better. But they fell below  
21 an objective standard of reasonableness, such that no  
22 reasonable lawyer could do this, and that but for those  
23 counsel's failings, the result may well have been different.

24 So the first alleged failing that we have here, your Honor,

1 is in the failure to seek independent examinations of these  
2 child victims. Your Honor may recall that they were eight and  
3 eleven years old at the time.

4 The first question that I have that isn't answered by  
5 anything I've heard here today is: Is there any reason to  
6 believe this Court would have allowed such a thing had the  
7 motion been made? Would the Court have granted it?  
8 Unfortunately, your Honor, there's only one person in this room  
9 that can tell us the answer to that. That, of course, would be  
10 yourself. I just have to ask you, when it comes time to rule,  
11 I guess I'm going to ask I can't argue to you what your ruling  
12 would have been, but I can point out that I haven't heard  
13 anything compelling here today.

14 There are a number of factors that would have been  
15 considered had the motion been made. They are more recently in  
16 the State v. Griego, 111 Nevada 444.

17 There are four primary factors to be considered. One of  
18 them is whether or not it's necessary to level the playing  
19 field.

20 Did the State employ a psychiatric or psychological witness  
21 to testify about the psychological makeup of the children and  
22 their voracity, their credibility? No. In fact, as I read  
23 Griego, if any of those questions are answered no, that's the  
24 end of the hunt, then there's no need to appoint or to allow an

1 independent examination. Other people read it differently.  
2 Other people say you balance all four factors. Frankly, I  
3 don't know the answer to that. But there are others. One of  
4 them is there has to be a showing to the Court that there's  
5 something about the psychological makeup of the children that  
6 affects their credibility.

7 Not that there are questions about their credibility. And  
8 inconsistent statements by any witness gives rise to questions  
9 about that witness' credibility. That's what a jury does. But  
10 sometimes you say there's something about the psychological  
11 makeup of the witness, something in that person's past,  
12 something about what has happened to that person, something  
13 about their id.

14 If Miss Schmuck wanted an examination, she would have had  
15 to come to your Honor and in good faith point out some reason  
16 to believe there was something about the id of these children  
17 that affected their credibility. Well, if there is, I haven't  
18 heard it. There's at least two factors, two of the four which  
19 would weigh in favor saying, no, you may not have this  
20 independent examination.

21 But the bigger question, your Honor, what's the result of  
22 the exam? Would it have changed the outcome? Well, got to  
23 hear from the doctor, or at least hypothetically. Let's get a  
24 psychologist up here, find a psychologist, some psychologist in

1 the world, geez, if I had been asked I would say any child that  
2 makes these kinds of inconsistent statements must be crackers,  
3 unworthy of belief. And I don't have to say part. You're not  
4 allowed to say unworthy of belief.

5 But there's something I can tell from these things, someone  
6 would say, the psychologist, that this person is unable to  
7 perceive and relate the truth. Is there any reason at all to  
8 believe from the evidence presented here today that there's any  
9 psychologist, any therapist or any quack in the world who is  
10 willing to come before your Honor and testify in that fashion?  
11 If there is such evidence, I haven't heard it.

12 The next question on the same subject. Would that have  
13 affected the verdict? If you could find some psychologist come  
14 in here and say, yes, there's something about the psychological  
15 makeup of these children that affects their credibility, would  
16 the 12 people in the box gasp in horror and return not guilty  
17 verdicts? That's another reason why we need to know what the  
18 testimony of this proposed psychologist would have been so your  
19 Honor could tell if it would have affected the verdict.

20 There was a comment that the failure to have an exam should  
21 be presumed prejudicial, because we can't have one now. Your  
22 Honor may recall that in Chapter 34 proceedings, there can be  
23 discovery as under the civil rules upon motion. We didn't have  
24 any. You have an opportunity for full discovery just like in

1 any civil case and present it and if the party who bears the  
2 burden of proof doesn't present it, there are certain  
3 consequences to that.

4 But at least we could have done hypothetical questions. We  
5 could have gotten in the psychologist and asked him  
6 hypothetically, but we don't even have that.

7 There was no expert by the State about -- no psychiatric  
8 expert. Miss Peele is a nurse. She made physical observations  
9 and related her opinions about those physical observations,  
10 nothing more.

11 And just in passing, I just happened to think of this.  
12 There also seems to be an assumption going on here that  
13 penetration in the sexual assault must be -- how do I say it  
14 delicately -- as complete as possible. That is not the law,  
15 your Honor, and that was not the testimony. So these alleged  
16 inconsistencies about the hymen not being damaged since you can  
17 have penetration however slight, including fellatio and  
18 cunnilingus. I don't see that as any big problem. That was  
19 kind of an aside. Something I happened to think of. I didn't  
20 want to forget it.

21 But the primary question on the first issue about this  
22 independent investigate examination, the one we cannot get  
23 past, is was it unreasonable for Miss Schmuck to make the  
24 determination that it's not going to help. It's not going to

1 be sufficiently helpful to ask the Court for an independent  
2 examination. Would all reasonable lawyers have acted to the  
3 contrary? If not, then this individual is not entitled to  
4 relief.

5 And as I was saying, even if you did fall below the  
6 subjective standard of reasonableness, there's no prejudice.  
7 At least no showing, because the Court wouldn't have ordered  
8 and there's no psychologist available and it wouldn't have  
9 affected the verdict anyway.

10 On the proposed additional motion to suppress, the  
11 variation in the theory, your Honor, I'll repeat what I said  
12 before. The Supreme Court ruled that all statements made by  
13 him were not the product of custodial interrogation.

14 That should be the end of it. It was litigated here and  
15 reviewed by the Court of last resort. I don't think this Court  
16 ought to be authorized to revisit that question. If you are,  
17 though, well, let's do it. It seems to be a theory proposed  
18 that when an officer has probable cause to arrest, then the  
19 suspect is in custody, is subject to custodial interrogation.

20 Well, you know, that's not right, your Honor. That's not  
21 the law. Never has been. I doubt if it ever will be. I mean,  
22 if it was, then the Supreme Court was wrong because your Honor  
23 may recall the officers had probable cause when they went to  
24 pick Mr. Maki up at his house. They had child victims

1 identifying him as a perpetrator of a sexual assault. If  
2 having probable cause means that any questioning is custodial  
3 interrogation, then the Supreme Court was wrong, he's been  
4 unlawfully convicted and so has damn near everybody else in  
5 Nevada State Prison and we ought to go kick them all loose.

6 I don't suggest that, because that's not the law, and it's  
7 very simple decision.

8 Finally, there is the jailhouse sentencing witness, who was  
9 not called as a witness at sentencing. Your Honor may recall  
10 the testimony was that for reasons of his own, Mr. Maki elected  
11 not to tell his lawyer about his sentencing witnesses until the  
12 morning of sentencing. Even if you believe that's why he did  
13 it, she still couldn't act. They don't let her have the keys.  
14 I don't know why they won't let her have the keys and run down  
15 and get whoever she wants out of the jail. They're very picky.  
16 They insist on orders to produce and things like that.

17 But supposing the reasonable lawyer would have found a way  
18 to get that witness here. Again, we would have had the  
19 question: Would it have made a lick of difference to the Court  
20 that in 1979 this person was a junkie. This person was not  
21 trustworthy. I can think of one way where that kind of  
22 evidence would backfire.

23 Suppose the Court believed both. Yes, Jocelyn the sister  
24 was abused as a child by Mr. Maki, and yes, in 1979 she was a

1 an untrustworthy junky. The Court could see a cause and effect  
2 and be inclined to be somewhat more harsh. So even if Miss  
3 Schmuck had the opportunity to present this witness, I don't  
4 think it's possible to say that there was any prejudice arising  
5 from her failure to do so, certainly not to the point where the  
6 Court can rule -- should rule that a different sentence would  
7 have been imposed. And so, your Honor, I'd ask that for the  
8 issues argued here today and the issues acknowledged in the  
9 petition, that the petition be denied in its entirety. Thank  
10 you.

11 THE COURT: Thank you. Mr. Plater?

12 MR. PLATER: Your Honor, when the State cites Griego,  
13 Griego is just a reiteration of what the Court in Kenney v.  
14 State, 109 Nevada 200 something. I've got 224, somewhere  
15 around 220. But -- and Mr. McCarthy is right. I don't read  
16 Kenney and Griego like he does. The Court says a general  
17 psychological examination should be permitted if the defendant  
18 has submitted compelling reasons therefor. And it goes on to  
19 state several factors that can be used in a psychological  
20 examination of a sexual assault case, but it certainly doesn't  
21 say this is -- these are necessary elements that have to be  
22 met.

23 Number one, if the State has employed an expert, that's  
24 something you look at. Had the State employed an expert in

1 this case? No question about it. Miss Peele was an expert in  
2 terms of her physical diagnosis of the children. She related  
3 based upon her findings, she was an expert in terms of that.  
4 She did more than the State offers in this hearing. She didn't  
5 merely just say there are physical findings. She also said in  
6 terms of Desiree, I think she was physically or sexually  
7 abused, even though I found no physical signed of that. And  
8 what was the basis of that?

9 It was based on the interview that she did with her when  
10 Desiree said I was touched by Mr. Maki. I submit that's a  
11 psychological finding, because she made no physical finding  
12 otherwise, yet she testified that Desiree was abused. So the  
13 State had its expert.

14 The second factor is the victim is not shown by compelling  
15 reasons to be in need of protection and that could have been  
16 avoided by an independent examination.

17 Evidence of the crime has little or no corroboration beyond  
18 the testimony of the victim. That is the third factor. In  
19 terms of a sexual assault, that was true as to Summer. In  
20 fact, she even denied it happened.

21 And then the one that the State was concerned about, is  
22 there a reasonable basis for believing that the victim's mental  
23 or emotional state may have effected his or her voracity.  
24 That's hard to say when you come into a case when you don't

1 know anything about the children in the first place and the  
2 State is the one that has the discovery and the evidence and  
3 certainly the defense can't go to those people and say: Well,  
4 you know, will you submit, give us your medical records, submit  
5 to the examination.

6 That's why you have to have apply to the Court for the  
7 examination. I think if you go come in with their inconsistent  
8 statements, and they're substantial, you can infer there's a  
9 basis for believing there's an emotional or mental situation  
10 that may have affected the voracity. So I don't think that the  
11 case law says you got to come in with independent evidence, but  
12 if you have evidence that suggests that it might be there, it  
13 affects voracity, then it's okay.

14 So I think she should have gone ahead and at least tried.  
15 I agree, we did not present an expert at this point and an  
16 expert could not have told us what he would have observed, a  
17 medical doctor, for example, something that occurred back in  
18 December of 1993. That obviously is impossible.

19 In terms of the psychological state of the children back  
20 then, the best he could have given us was hypothetical  
21 situations that would have said: I would have had a concern  
22 given the state of the evidence at this time and I would have  
23 liked to have examined the children. But beyond that, we can't  
24 show any more prejudice. That's why we suggested it ought to

1 be presumed.

2 In terms of the Miranda, I don't argue probable cause  
3 should be the basis for determining custodial interrogation,  
4 because that's not what the Supreme Court said. I gave you the  
5 test. The test is what a reasonable person would perceive in  
6 the circumstances of a criminal defendant who is being  
7 interrogated.

8 I suggest a reasonable person in Mr. Maki's situation,  
9 after he was down in police custody and after he had confessed  
10 to lewdness on one of the children, would have believed at that  
11 point he was in custody and not free to leave. It's not what  
12 the police believed. It's not whether there's probable cause,  
13 like Mr. McCarthy says, but it's what a reasonable person would  
14 believe. That's why a motion should have been filed  
15 challenging the lack of Miranda warnings that were not given up  
16 for him, but were delayed until later on. Thank you.

17 THE COURT: Submit it, gentlemen?

18 MR. PLATER: Yes.

19 MR. MCCARTHY: Yes.

20 THE COURT: The petition is denied. The biggest and the  
21 most talked about issue is the ineffective issue, and I find  
22 that Miss Schmuck's conduct did not fall below the acceptable  
23 standards and therefore did not change anything. This happens  
24 an awful lot when somebody -- never mind. I'm not going to

1 comment on it. Miss Schmuck's conduct was -- she did the best  
2 she could with what she had. We'll be in recess.

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1 STATE OF NEVADA       )  
2 County of Washoe     ) ss.

3 I, STEPHANIE KOETTING, a Certified Shorthand Reporter  
4 of the Second Judicial District Court of the State of Nevada,  
5 in and for the County of Washoe, do hereby certify;

6 That I was present in Department No. 8 of the  
7 above-entitled Court on Friday, July 18th, 1997, at the hour of  
8 10:00 a.m., and took verbatim stenotype notes of the  
9 proceedings had upon the post conviction in the matter of  
10 CHARLES MAKI, Petitioner, vs. THE STATE OF NEVADA, Respondent,  
11 Case No. CR94P0345, and thereafter, by means of computer aided  
12 transcription, transcribed them into typewriting as herein  
13 appears;

14 That the foregoing transcript, consisting of pages 1  
15 through 129, both inclusive, contains a full, true and complete  
16 transcript of my said stenotype notes, and is a full, true and  
17 correct record of the proceedings had at said time and place.

18 DATED: At Reno, Nevada, this 10th day of February, 1998.

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24

  
STEPHANIE KOETTING, CSR #207

## IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

NOV -9 A9:27

Supreme Court No. 30904

District Court Case No. CR940345

AMY HARVEY, CLERK

BY *[Signature]*REMITTITUR

TO: Amy Harvey, Washoe County Clerk

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

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

DATE: November 7, 2000

Janette M. Bloom, Clerk of Court

By: *[Signature]*

Chief Deputy Clerk

cc: Hon. Steven R. Kosach, District Judge  
Attorney General  
Washoe County District Attorney  
Karla K. Butko

## RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on Nov 9, 2000.

*[Signature]*  
County Clerk

00 NOV -9 A9:27

APR 11 1967  
 AM: H. J. EY, CLERK Supreme Court No. 30904

District Court Case No. CR940345

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

I, Janette M. Bloom, 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: "... we affirm the judgment of the district court."

Judgment, as quoted above, entered this 10th day of October, 2000.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 7th day of November, 2000.

**Janette M. Bloom, Supreme Court Clerk**

By: J. Rich  
Chief Deputy Clerk

FILED

'00 NOV -9 A9:29

## IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MAKI,

No. 30904

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 10 2000

J. RICHARDS  
CLERK OF SUPREME COURTORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

On May 17, 1994, appellant Charles Joseph Maki was convicted, pursuant to a jury verdict, of three counts of sexual assault of a child under age fourteen and five counts of lewdness with a child under age fourteen. Maki was sentenced to serve consecutive terms of life imprisonment with the possibility of parole, along with lesser terms of imprisonment. This court dismissed Maki's direct appeal. See Maki v. State, Docket No. 26049 (Order Dismissing Appeal, October 4, 1995).

On May 9, 1996, Maki filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed supplemental points and authorities in support of the petition. After holding an evidentiary hearing, the district court denied Maki's petition. This appeal followed.

Maki claims that he demonstrated that he received ineffective assistance of counsel and that the district court erred in denying him relief. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102

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POST CHARLES JOSEPH MAKI (D 7 Pages)  
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(1996). We conclude that Maki has not shown that the district court erred in denying him relief on his claims. We will address each claim in turn.

Maki first argues that his trial counsel was ineffective for failing to request independent physical and psychological/psychiatric examinations of the two victims. However, the evidence adduced at the post-conviction hearing demonstrates that counsel acted reasonably in deciding not to request independent examinations.<sup>1</sup> Trial counsel testified that she did not request independent physical examinations of the victims, in part because she was satisfied with the examinations that had been performed and reported to the defense. Trial counsel cited several reasons why she did not request independent psychological or psychiatric examinations. Having reviewed the documents before this court, we conclude that the reasons cited by counsel are legitimate.

For example, one reason counsel cited was that she was informed that the State would not call an expert witness in psychiatry or psychology. Counsel also explained that she had not received any information that the victims had received counseling or been seen by a psychiatrist. These facts are relevant both to the reasonableness of counsel's decision and to the question of whether Maki would have been entitled to an examination upon request. See Keeney v. State, 109 Nev. 220, 224-26, 850 P.2d 311, 314-15 (1993). Maki has not shown that the State employed an expert witness in psychology or

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<sup>1</sup>We note that the district court found trial counsel's testimony at the evidentiary hearing to be "more credible" than Maki's testimony, which the court characterized as "in large part incredible and unworthy of belief." We defer to these factual findings. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (indicating that a district court's factual findings regarding claims of ineffective assistance of counsel are generally entitled to deference).

psychiatry.<sup>2</sup>

In ruling that counsel acted reasonably, we are cognizant of Maki's claims that the victims expressed uncertainty and made inconsistent statements about the relevant events prior to trial. However, we emphasize that the victims' allegations were at least partially corroborated by Maki's own incriminating admissions that he had engaged in sexual misconduct with the victims. An important factor in determining the need for independent psychological or psychiatric examinations is whether there is "little or no" corroborative evidence. See Keeney, 109 Nev. at 226, 850 P.2d at 315.

Accordingly, we conclude that Maki failed to overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. Maki has not demonstrated that counsel acted unreasonably, let alone that he would have been entitled to independent examinations of the victims had counsel requested such examinations. See Keeney, 109 Nev. at 224, 850 P.2d at 314 ("Generally, a psychological examination of a sexual assault victim should be permitted if the defendant has presented a compelling reason therefor.").

Additionally, Maki has another hurdle to overcome. To properly demonstrate prejudice he must show a reasonable probability that counsel's deficient performance affected the outcome of the proceedings. Maki argues, without citation to supporting authority, that prejudice should be presumed, given the amount of time that has passed and the difficulty of showing what independent examinations would have yielded. We reject

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<sup>2</sup>Maki notes that a nurse testified about behavioral problems that one of the victims was experiencing and the possible source of those problems. It also appears that the nurse concluded that this victim was sexually abused, although that finding appears to be primarily based on the physical examination. Maki has not shown that the nurse was qualified as an expert in psychology or psychiatry; nor could her testimony be reasonably viewed in this light.

this argument. Maki was required to show that such evaluations had a reasonable probability of affecting the outcome of the proceedings. He failed to do so.

Maki next claims that his counsel was ineffective, at trial, for failing to more effectively cross-examine the victims to reveal allegedly inconsistent and exculpatory prior statements. We question whether this issue was properly presented in the district court.<sup>3</sup> In post-conviction cases, this court will generally decline to review issues not properly raised in the district court. See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Further, Maki has not included a complete copy of the trial transcript in the documents submitted to this court, or even the full portion of the transcript detailing the trial testimony of the victims. Accordingly, it is impossible to properly evaluate Maki's claim. Under these circumstances, the deficiency should be resolved against Maki. It is his responsibility to provide the materials necessary for appellate review. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

Maki also argues that his counsel was ineffective for failing to properly cross-examine the victims on tattoos in Maki's genital area, which apparently extended downward from Maki's lower abdomen. It is similarly impossible to properly evaluate this claim because of Maki's failure to include all relevant portions of the trial transcript. We further note that the documents before this court, particularly the post-conviction evidentiary hearing transcript, reflect that trial

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<sup>3</sup>The issue of the victims' prior statements was discussed, and testimony adduced on this point, at the post-conviction evidentiary hearing. However, the discussion and testimony appear to have been related to Maki's claim that counsel should have requested independent examinations of the victims. At one point the State asked to "exclude everything [regarding the victims' inconsistencies] that was raised at trial, because by that point it was far too late to seek examination." Post-conviction counsel responded, "That's fine."

The trial transcript and analysis of all the evidence in relation to all the charges are necessary to properly resolve this and Maki's even less specific contentions of insufficient evidence and other duplicative charges.<sup>5</sup> Again, it was Maki's responsibility to provide the materials necessary for our review as well as relevant authority and cogent argument.<sup>6</sup> See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); Jacobs, 91 Nev. at 158, 532 P.2d at 1036.

Maki next claims that appellate counsel was ineffective for failing to argue that the district court erred in failing to sanction the State or grant Maki a continuance, after the State disclosed evidence, shortly before trial, concerning physical examinations of the victims. Again, Maki has failed to include pertinent documents in the appendix on appeal. Maki has not included transcripts of the proceedings concerning the State's disclosure of the report and Maki's motion for the continuance. Thus, it is impossible to determine whether the district court acted improperly.

For the reasons cited above, and after further review

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<sup>5</sup>We are not persuaded by Maki's specific contention that counsel was ineffective for failing to challenge the charge of digital penetration prior to trial. A victim did testify that the incident of digital penetration occurred "[w]hen he was doing the same thing in our room," meaning "[w]hen he was putting his penis inside" of her. However, a reasonable reading of this victim's testimony does not necessarily suggest that the digital penetration occurred simultaneously with the other charged offense, but simply that the two incidents were part of the same molestation episode. We emphasize that the trial transcript could clarify the relationship between the act of digital penetration and the other offenses. We also note that the jury did not return guilty verdicts on each of the charges of sexual assault, and thus the question of prejudice is also speculative.

<sup>6</sup>We also note that Maki has failed to include specific citation to the appendix indicating how these claims were raised in the district court in the post-conviction proceedings. Indeed, Maki's argument on these claims in the supplemental opening brief is quite general and arguably insufficient to even state a valid claim.

counsel did present pictures to the jury showing Maki's tattoos and that counsel argued this issue to the jury. Counsel indicated that an important point of the defense was that the victims would have mentioned the tattoos, on their own, had they observed Maki's genital area.

Maki also claims that his prior counsel was ineffective for failing to more effectively argue that certain statements made by Maki to police were erroneously admitted pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Because the Miranda issue was fully litigated in the district court and on direct appeal, Maki's claim is barred by the doctrine of the law of the case. See *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975). Although Maki attempts to reformulate his argument in terms of ineffective assistance of counsel, this court has fully considered issues pursuant to Miranda, and this court reviewed the complete transcript of the police interview in resolving these issues.<sup>4</sup> Maki may not avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See *Hall*, 91 Nev. at 316, 535 P.2d at 799.

Maki next claims that trial and appellate counsel were ineffective for failing to raise issues of duplicative and redundant charges and sufficiency of the evidence. Maki specifically notes that at the preliminary hearing one of the victims testified that an incident involving digital penetration occurred at the same time as one of the incidents in which Maki placed his penis in her vagina. He contends that this constituted only one sexual assault and therefore counsel should have sought dismissal of the digital penetration charge.

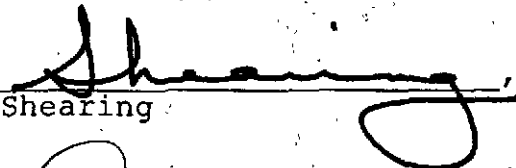
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<sup>4</sup>This court held that Maki "was not 'in custody' before he was read his Miranda warnings" and that, after Maki was read the warnings and invoked his rights, police failed to scrupulously honor Maki's invocation of his right to remain silent. This court noted, however, that only one incriminating statement made after Maki invoked his rights was admitted at trial, and concluded that admission of this statement was harmless error.

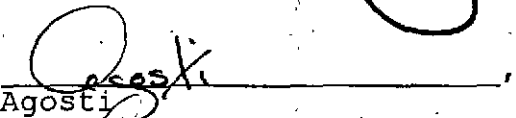
of the briefs and appendix, we conclude that Maki has not shown that he is entitled to relief. In closing, however, we admonish Maki's former appellate counsel, Joseph R. Plater, and his current counsel, Karla K. Butko. On several occasions, counsel failed to cite to relevant portions of the appendix and discuss how issues were raised in the district court, discussed at the post-conviction evidentiary hearing (if applicable), and resolved by the district court. The critical issue to be resolved in a post-conviction appeal is whether the district court erred in denying the post-conviction petition. Counsel should not relegate to this court the task of parsing the record to resolve appellate claims. See NRAP 28.

Having concluded that Maki has not demonstrated error, we affirm the judgment of the district court.

It is so ORDERED.

  
Shearing

J.

  
Agosti

J.

  
Leavitt

J.

cc: Hon. Steven R. Kosach, District Judge  
Attorney General  
Washoe County District Attorney  
Joseph R. Plater  
Karla K. Butko  
Washoe County Clerk

PLAINTIFF  
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CHARLES MAKI

NDOC #42820

Northern Nevada Correctional Center (NNCC)

Post Office Box 7000

Carson City, Nevada 89702-7000

FILED

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HOWARD M. CONYERS

BY *[Signature]*  
DEPUTY

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

CHARLES MAKI,

Plaintiff,

Case No. CR-94-0345

vs.

Dept No. 8

STATE OF NEVADA

MOTION FOR TRIAL COURT RECORDS

Respondent. /

COMES NOW, I, CHARLES MAKI, Plaintiff, In Proper Person request copies of the trial court records for case number CR-94-0345 to include all papers, exhibits, transcripts of proceedings, district court minutes, and docket entries by the district court clerk.

These records are requested for use in my Writ of Habeas Corpus petition.

DATED this 25 day of NOVEMBER, 2008.

Respectfully Submitted

*Charles Maki*  
Charles Maki, Plaintiff,  
In Proper Person

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SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, \_\_\_\_\_

MOTION FOR TRIAL COURT RECORDS

(Title of Document)

filed in case number: CR-94-0345



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-OR-



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A specific state or federal law, to wit:

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-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: 11-25-2008

*Charles Maki*  
(Signature)

CHARLES MAKI

(Print Name)

IN PROPER PERSON

(Attorney for)

V9. 254<sup>TS</sup>  
copy

CHARLES MAKI  
NDOC #42820  
Post Office Box 7000  
Carson City, Nevada 89702-7000

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HOWARD L. MOONYERS  
BY [Signature]  
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Washoe County  
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR COUNTY OF WASHOE

CHARLES MAKI  
Plaintiff  
  
vs  
  
STATE OF NEVADA  
Respondent

Case No: CR-94<sup>p</sup>0345

REQUEST FOR SUBMISSION

Comes now, Plaintiff, CHARLES MAKI (hereinafter "Plaintiff"),  
appearing in proper person, and files this Request for Submission, in the above entitled action.

This Request is made pursuant to District Court Rules , whereas, Plaintiff respectfully  
request that his

MOTION FOR TRIAL COURT RECORDS, be  
submitted to the appropriate Honorable Court for a review and a decision.

Dated this 25<sup>th</sup> day of NOV., 2008.

charles maki  
CHARLES MAKI  
Proper Persona Plaintiff

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, \_\_\_\_\_

REQUEST FOR SUBMISSION

(Title of Document)

filed in case number: CR-94-0345

☒ Document does not contain the social security number of any person

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☐ 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: 11-25-2008

Charles Maki  
(Signature)

CHARLES MAKI

(Print Name)

IN PROPER PERSON

(Attorney for)

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District Court  
Washoe County  
NDC

CODE 2840

**FILED**

JAN 30 2009

HOWARD W. CONYERS, CLERK

By: *K. Rogers*  
DEPUTY CLERK

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

8  
9 **CHARLES MAKI,**10 **Petitioner,**11 **vs.****Case No. CR94P0345**12 **STATE OF NEVADA,****Dept. No. 8**13 **Respondent.**  
14 \_\_\_\_\_15 **ORDER DENYING MOTION FOR TRIAL COURT RECORDS**

16 The Court has learned that Mr. Maki has received two complete copies of his court  
17 records from his previous counsel, Karla Butko, Esq. Therefore, the Court hereby orders  
18 Mr. Maki's Motion DENIED.

19 Dated this 29 day of January, 2009.  
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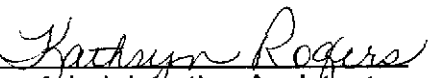
  
DISTRICT JUDGE

## CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30 day of January, 2009,  
she mailed copies of the foregoing ORDER DENYING MOTION FOR TRIAL COURT  
RECORDS in Case No. CR94-0345 to the following:

Charles Maki, #42820  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702-7000

Rex Reid  
Offender Management  
Nevada Dept. of Prisons  
P.O. Box 7011  
Carson City, NV 89702

  
Administrative Assistant