

18-9527

No. _____

ORIGINAL

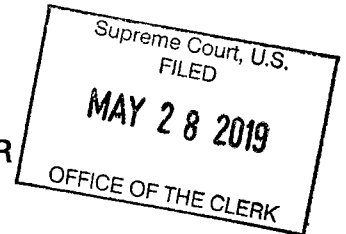
IN THE

SUPREME COURT OF THE UNITED STATES

Thomas Branagan

(Your Name)

— PETITIONER



VS.

ISIDRO BACA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

US Court of Appeals for the Ninth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

THOMAS BRANAGAN

(Your Name)

PO Box 7000 (NNCC)

(Address)

CARSON City NV 89702-7000

(City, State, Zip Code)

NA

(Phone Number)

Questions Presented

- 1) Why after I told Detective Mason at questioning I was on pain medications (opiates) and antipsychotic medication. He would not stop questioning me about what supposing happened with the complaining witness.
- 2) I told Detective Mason that I was being treated by the Veterans Administration for P.T.S.D, Bi Polar, and A.D.H.D. and Sleep disorder.
- 3) I also told him that with the sleeping disorder my memory most of the time I was in a "Fog".
- 4) The judge at trial knew defendant was on pain medication because I told the judge I was in pain while testifying but it was NOT explained to the jury why I was on pain medication or it's effects. Or the outcome involving memory loss or sex drive from the medication and psych medication.
- 5) Why didn't the trial attorney for defense did not obtain medication list from the Veterans Administration or Dr Crudo which defendant's did offer trial attorney before trial he said he didn't "need them"
- 6) Trial attorney did not even read the Discovery or he would have knew what maladies defendant was suffering from and maybe would have investigated the side effects from the pain medication and antipsychotic medications.
- 7) Why after I told defense attorney that I didn't remember most of the 2nd interview with Det Mason and I woke up in Clark County Jail days later

he did not even investigate the questioning or what defendant said because I didn't even remember most of it. I was in a room all by myself and not even knowing why till I earlier bailed myself out and not remembering any of it. I was told that I had the money in my person.

- 8) The outcry witness did not even identify the defendant at Prelim hearing. Still why did it go on?
- 9) Why at Prelim the mother Victoria was supposedly told what happen. But in trial she testified it wasn't till two before trial that Leyah the daughter told her another story.
- 10) Mother Victoria also said her daughter referred to that the front of male part is "Dick" but recanted at trial when asked again
- 11) Mother Victoria also stated that her daughter Leyah told her sister Priscilla the aunt of Leyah that something happened but recanted at trial.
- 12) Aunt Priscilla was the first adult that questioned Leyah when she took to her place and she told her nothing
- 13) Why when the child was questioned by Det Mason she didn't say anything happened with defendant.
- 14) Why didn't the Detectives question Daniel since he was suppose to have been the first person she told he was about 14 years old at the time

- 15) Why the statement that was quoted so many times in Prelim hearing and Trial "It happened" was never defined by prosecution at all.
- 16) Why on redirect examination by the state at Prelim hearing, Leah again testified that defendant Thomas never made her suck his front part that she did not put Thomas's front part in her mouth, and that she did not know why she said that, so why did it go to trial
- 17) Why when Victoria testified at trial that the only thing that Leah told her on the phone "it happened" Leah did not elucidate any details or tell Victoria what "It" meant and to this day no one knows.
- 18) Why did she testify about what happened at all even the statements she made on the 911 call she made very specific allegations to police which she attributed to Leah.
- 19) So literally, Victoria admits that when she spoke to the police, she was lying, why was this also allowed?
- 20) Why when Victoria finally speaks to Leah, Leah changes her story dramatically. This time the facts relating to defendant picking her up from the floor and putting her on her grandmother's bed are the same, only this time, she tells her mother that she told defendant that she was hungry and he dropped his pants and grabbed his penis and said "This is breakfast"

- 20) CONTINUE - It is clear that Leyah statement changed from two years prior, from "it tastes like candy" to "this is breakfast" This is a significant change, in that, it appears that Leyah is just making things up.
- 21) Why at trial Leyah states that she "NEVER" told her sister Linda that defendant made her suck his penis.
- 22) Leyah testifies that she remembers testifying at the Prelim hearing that she [REDACTED] said "it never happened, So again "It happened" is still unknown.
- 23) Victoria testified that Leyah told her two weeks before trial that defendant told her that his penis was breakfast and she said she just ran out of the room. So this connotes there was "NO PHYSICAL CONTACT" This would effectively "eliminate the sexual assault charge."
- 24) Why at the trial Leyah did not make a statement to her mother Victoria of any type relating that any kind of physical contact occurred during her relation of the incident
- 25) Why when Leyah testify that defendant "Did Not" put his "front part" (meaning his penis) in her mouth, When asked if this happened Leyah says "NO", So again NO "physical contact".
- 26) THEN Leyah testifies that defendant asked her to put his "front part" (AKA penis) in her mouth and she testifies that he did ask her, Again connoting that there was NO "physical contact".

- 27) Why during trial Leyah testifies when asked if she put defendants front part in her mouth she says "NO"
Then she testifies in trial that she does not remember saying that [REDACTED] defendant had put his penis in her mouth. Nor, does she remember stating that she previously said that defendant made her suck his penis. AGAIN NO "SEXUAL CONTACT".
- 28) Why was Victoria the mother gave police specific facts about the case on the phone when the child Leyah did not tell her supposedly anything until two weeks prior to the trial. Now that almost two years prior.
- 29) Why when I told my trial attorney about the prior relationship Victoria and defendant had in the past he didn't ask or investigate any of it.
- 30) Why did not my attorney even interview anyone I told about the credibility and veracity, of Victoria past.
- 31) Why did not my attorney bring up in trial the past of the mother Victoria. At all, he was told by me that she proposed at day a Lake Mead skinny dipping I told her I don't get involved with a woman that has a 13 yrs old boys child.
- 32) Why did not my attorney question why the mother had her two daughters taken away twice by child protection Agency.

- 33) Why did my trial attorney allow me to testify, I was on numerous medications. My attorney did not question or challenge whether or not the confession the police had was even valid. No motions were filed in an attempt to keep out this confession.
- 34) Why with the medications i.e. Oxycotin, oxycodone, Roxycodone, methadone for pain, Also a variety different amount of antipsychotic medications did my trial attorney put me on the stand. No way he could of read the case [REDACTED] file. I told the judge I was on pain medication because I was in pain while I was testifying and he told me I can take the meds after I finish testifying.
- 35) Why didn't my trial attorney tell me not to take any pain medication while I was on trial most of the time I was in a "Fog" very hard to remember what questions was asked at trial. All I have is the minutes of the trial to rely on.
- 36) Why when I testify about my [REDACTED] maladies no one including myself explained about the effects of the medication, to the jury.
- 37) Why didn't my trial attorney check with the Veterans Administration about the effects of the medications and how long I was on them.

- 38) Why did not Trial counsel research what the effect of [REDACTED] these psychiatric drugs, in combination with pain medication has on short or long term memory
- 39) Why during the hearing for Writ of Habeas Corpus trial attorney was not current with case law that has to do with Sexual Assault,
- 40) Why during the hearing for Writ of Habeas Corpus the trial attorney could not remember anything he did in trial but remembered everything the prosecution did,
- 41) Why was I given a Trial attorney that only did ONE trial and it was mine, He had no experience doing a trial in over 20 yrs,
- 42) Why was my bail only \$15,000⁰⁰ for a 35 to life crime
- 43) Why even at the Prelim trial the judge herself refused to up the bail,
- 44) Why per NRS 51.385 the state did not file a 10 day notice.
- 45) Why when the state did not file NRS 51.385 on time the defendant trial attorney agreed to waive the other three days,
- 46) Why wasn't the Corpus delicti required that the state prove, independently of the Petitioner's alleged statements that he committed the act of sexual assault, the alleged victim recanted. The victim gave the detective nothing at her interview.

46) CONTINUE - THE VICTIM'S SISTER GAVE THE DETECTIVE MASON NOTHING AT HER INTERVIEW, THE ONLY PERSON WHO TESTIFIED THAT ANYTHING HAPPENED WAS THE ALLEGED VICTIM'S MOTHER VICTORIA. HOWEVER VICTORIA WAS NOT PRESENT WHEN THE ALLEGED ACTS OCCURRED AND HAD NO PERSONAL KNOWLEDGE OF SAME, EVEN SO HER TESTIMONY IS EXTREMELY DOUBTFUL,

47) WHY DIDN'T TRIAL ATTORNEY FILE A MOTION TO SUPPRESS THE STATEMENTS I GAVE TO DETECTIVE MASON, WHILE I WAS ON PAIN MEDICATIONS AND PSYCH MEDS. HE SHOULD OF IT HE READ THE DISCOVERY.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
-

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Feb 27, 2019.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Table of Authorities Cited

CASES

STRICKLAND V WASHINGTON 466 US 668 687-88 (1984)

DOLEMAN V STATE 112 NEV 842 921 P2d 278 (1996)

KOERSCHNER V STATE 116 NEV 1111 13 P3d 451 (2000)

FARETTA V CALIFORNIA 422 US 806 835 95 Sct 2525 2541 (1975)

ECHAVARRIA V STATE 108 NEV 734, 742, 839 P2d 589 595 (1992)

GIDEON V WAINWRIGHT 372 US 335 (1963)

PATE V ROBINSON 383 US 375 378 15 LEd 2d 815 86 Sct 836 (1966)

WASHINGTON V HARPER 494 US 210 108 LEd 2d 178, 110 Sct 1028 (1990)

COY V IOWA 487 US 1012, 1016-1020 101 LEd 2d 857 108 Sct (1990)

TAYLOR V US 414 US 17, 19 38 LEd 2d 174 94 Sct 194 (1973) PER CURIAM

MASSIAH V US 377 US 201 12 LEd 2d 246 84 Sct 1199 (1964)

DROPE V MISSOURI 420 US 162, 43 LEd 2d 103 95 Sct 896 (1975)

COSSEK V MILLER 229 F3d 649 (2000)

TURK V WHITE 116 F3d 1264-1266-68 (9th 788 F3d 1167 Cir) 1997

GERSTEN V SENKOWSKI 299 F Supp 2d 84 (2004)

RIGGINS V NEVADA 112 Sct 1810 (1992)

DEMAREST V PRICE AND NORTON 905 F Supp 1432 (1995)

DUMAS V STATE 111 NEV 1270 1903 P2d 816 (1995)

MILLER V STATE 112 NEV 168: 911 P2d 1183 (1996)

EVANS V LEWIS 855 F2d 831 9th Cir (1988)

WARNER V STATE 102 NEV 635: 729 P2d 1359 (1986)

ARE V OKLAHOMA 470 US 48, 84 LEd 2d 53 105 Sct 1087 (1985)

JENNING V WOODFORD 290 F3d 1006 9th Cir (2002)

US V CRONIC 446 US 648, 659 (1984)

LORD V WOOD 184 F3d 1083 (1999)

TURNER V DUNCAN 158 F3d 449 (1998)

STATUTES AND RULES

- 1) NRS 178.3986 "MENTAL DISORDER"
- 2) NRS 193.220 "INVOLUNTARY INTOXICATION"
- 3) NRS 178.400 (1989)
- 4) NRS 51.385
- 5) DUE PROCESS CLAUSE -

FEDERAL RULES OF EVIDENCE

- 1) Rule [#]602 - NEED FOR PERSONAL KNOWLEDGE
- 2) Rule [#]607 Whomay Impeach A Witness
- 3) Rule [#]608 Witness's CHARACTER FOR truthfulness OR Untruthfulness
- 4) Rule [#]613 Witness's prior statement
- 5) Rule [#]801 "HEARSAY"

CASE LAW PRESCRIBED MEDICATIONS

DROPE V MISSOURI 420 US 418

PEOPLE V SCOTT 146 CAL, App 3d 823 826-827. 194 CAL Rptr 633 (1954)

AKE V OKLAHOMA 470 US 68 (1986)

JENNINGS V WOODFORD 290 F3d 1006, 1012-20 (9th CIR 2002)

FINGER V STATE 27 P3d 66 80 (NEV 2001)

MILLER V STATE 911 P2d 1183 1186-87 (NEV 1996)

SCHLUP V DELO 513 US 298 325-27 (1995)

ECHEVARRIA V STATE 108 NEV 734 (1992)

State of the Case

ANSWERS TO QUESTIONS

First off, I've been taking many different types of pain medication since I fell off a Army Helicopter back in the year 1985, I've injured my left hand and to date have a herniated disc in my lower back. I've been take antipsychotic for PTSD, Bi-polar, and ADHD since May 2002. The P.T.S.D started in the military when my company lost a AH-1 ATTACK Helicopter and we spent over a day to find it. Both pilots bodies were in pieces along with the aircraft, Unfortunately I had to bring both bodies in my aircraft. Just seeing what happen to the pilots and the smell of burning flesh now any type of item being burned brings me back to that horrible day. We traveled over 5 hrs in the aircraft. Also on July 5, 1985 I watched a senior jumper, jump out of my aircraft and did not pull his rip cord, he hit the ground and a boulder at a speed over 150mph, Since I was the Crewchief and I was the last person to talk and see him alive. So I had to identify the body herendous, I still have dreams of these both experiences It still with me today. The Bipolar I've had since I was a child but it was call hyper-activity I been dealing with it for a long time. In prison I do not recieve the proper medications, I've been on a vary amount of med's for Bi-polar, I don't get any medication for AD.H.D.

CONTINUE - QUESTIONS ANSWERED

- 1) I told Detective MASON at questioning I WAS ON PAIN medication, ie - Roxycodone, Oxycodone, Oxycotine 80mg, Methadone, FlexiL, Also told him I had P.T.S.D. Bi-Polar AND A.D.H.D. I WAS TAKING A VARIETY AMOUNT of medications ie. Depacote, Lithium, Gabapentin, AND others. The questioning that Detective MASON gave me I only remember some of it because I also have sleep disorders too.
- 2) I ASKED DET MASON TO STOP ASKING ME ABOUT THE military. It depress me
- 3) I WAS TAKING the medications only when I WAS WORKING FOR PAIN. But sometimes I would have after effects but I WAS supporting myself AND giving money to my mother AND brother who he couldn't work because of his KNEES.
- 4) I don't remember most of the testifying because I WAS taking pain meds. My attorney would have know it if he read the discovery. I only remember what I read in the minutes of the trial.
- 5) I ASKED my trial attorney if he wanted a printout of the medications. He probably would be able to explain the side effects. If he did a little investigating in my case.
- 6) My trial attorney could not have read any discovery in my case. Maybe he would have knew what I was going through.

CONTINUE

QUESTION ANSWERED

- 7) I told that I could not remember the 2nd questioning I woke up in a cell all by myself and did not know what really happened.
- 8) I knew that child for almost 3 yrs and she didn't recognize me in the courtroom.
- 9) There was so many different versions of what supposedly happened I still don't know.
- 10) Couldn't anyone see the mother Victoria was out to fry me at the stake!
- 11) Again she the mother lied at trial
- 12) Nothing was said the Aunt Priscilla from Leyah when she was the first adult to question her.
- 13) How was a criminal case made out of this when the child even told the Detective Mason nothing happened.
- 14) Daniel Nicastro was supposed to be the first person Leyah seen after the incident.
- 15) During the trial and Prelim "It happened" still was not defined.
- 16) If nothing happened and was said by the so-called witness, it still went to trial even though she recanted the story, and said she made it up.
- 17) Never did get the definition of "It happened"
- 18) The mother Victoria just straight out made this set of lies on her own
- 19) Mrs Victoria Nicastro Lied through the Prelim and Trial and somehow she can perjure herself and get away with it

CONTINUE - QUESTIONS ANSWERED

- 20) Why didn't my trial attorney pick up the change in the stories between Leyah and Victoria, Maybe the lies would be answered on cross-examination.
- 21) Just another version in the saga of the Veracity and Credibility of the trial.
- 22) "It happened" NEVER defined
- 23) If Leyah told her mother Victoria just two weeks prior to the trial "something happened" how did the mother call 9-1-1 and tell them 2yrs prior how and what happened.
- 24) If there was no "physical contact" between defendant and Leyah.
- 25) Again the child recanted.
- 26) Now Leyah say she was asked to put (AKA penis) in her mouth, but connotes NO SEXUAL CONTACT.
- 27) Now the child can't remember that she had defendant's penis in her mouth, AGAIN NO "SEXUAL CONTACT."
- 28) Victoria somehow CAN see what she wants to see and hear
- 29) TRIAL ATTORNEY did not question NO ONE but Mary Nicastro the grand-mother which she didn't even know what happen.
- 30) The woman AS I was told had a child with a 13yrs old boy, I don't think the judge would have given her Credibility to testify

CONTINUE - Questions - ANSWERS

- 31) ON THANKSGIVING DAY PRIOR TO THE SO-CALLED INCIDENT VICTORIA ASKED ME IF I WANTED TO GO SKINNY-DIPPING I SAID I DON'T GET INVOLVED WITH A WOMAN THAT HAS SEX WITH A 13yr old boy. PERSONALLY I THINK THIS STARTED EVERYTHING.
- 32) IF MY ATTORNEY WOULD HAVE LISTEN, ABOUT WHAT I TOLD HIM ABOUT THE MOTHER VICTORIA ABOUT CHILD PROTECTION SERVICES, IT WOULD HAVE SHOWN WHAT TYPE OF PERSON SHE REALLY IS. C.P.S TOOK THE GIRLS BECAUSE POSSESSION OF DRUGS AND SALES
- 33) I TOLD MY ATTORNEY AND HE EVEN ADMITTED AT THE WRIT OF HABEAS CORPUS (POST-CONVICTION) HEARING THAT HE KNEW I WAS TAKING PAIN MEDS FOR MY BACK.
- 34) I JUST DON'T UNDERSTAND WHY MY TRIAL ATTORNEY I FELT SOLD ME OUT. HE SURE DIDN'T HELP ME,
- 35) I TOLD HIM I WAS IN PAIN DURING THE TRIAL, HE KNEW I WAS ON PAIN MEDS HE DIDN'T TELL ME NOT TO TAKE IT BECAUSE I WOULD BE TESTIFYING.
- 36) THE JURY PERSONAL NEVER FOUND OUT OR HAD IT EXPLAINED TO THEM ABOUT THE SIDE EFFECTS OF THE PAIN MEDICATION AND PSYCHOTIC MEDICATION AND SLEEP PROBLEMS
- 37) ALL MY TRIAL ATTORNEY HAD TO DO IS CALL THE VETERANS DOCTORS OFFICE AND ASK HIM ABOUT THE SIDE EFFECTS OF THE MEDICATIONS

CONTINUE - Questions - ANSWERS

- 38) TRIAL ATTORNEY just didn't CARE ABOUT the OUT-COME of my TRIAL. He didn't INVESTIGATE NOTHING,
- 39) TRIAL ATTORNEY Admitted that if he KNEW I WAS taking medications he would have done thing different so he did NOT READ the DISCOVERY. And of course didn't SUBPOENA any medical records from V. A.
- 40) It just seems to be wierd how he can only remember WAS DOESN'T make him look bad.
- 41) OVER 20yrs AS A ATTORNEY AND I WAS THE QUINER pig in his first trial
- 42) Could not have BEEN to much evidence with a bail that LOWER
- 43) Don't the judge think that if I WAS A threat she would have RAISED the bail up!
- 44) AS FOR the rest of my defense, I got NO defense!
- 45) AGAIN NO defense
- 46) I'm NOT AN ATTORNEY SO ALL I KNOW THAT THERE WAS NO SEXUAL CONTACT ON my side AT ALL.
- 47) Nothing WAS SAID so why WAS charges even FILED WAS it BECAUSE I didn't report it? I WASN'T even SURE it happened.

XIII

REASON FOR GRANTING THE PETITION

THE FUNCTION OF THE PROSECUTOR UNDER THE FEDERAL CONSTITUTION IS NOT TO TACK AS MANY SKINS OF VICTIMS AS POSSIBLE TO THE WALL. HIS FUNCTION IS TO VINDICATE THE RIGHT OF PEOPLE AS EXPRESSED IN THE LAWS AND GIVE THOSE ACCUSED OF CRIME A FAIR TRIAL - DONNELLY V DECHRISTOFORO 416 US. 637 648-49 (1974)

THE STATE'S ARGUMENT THAT THE AMERICAN FOR DISABILITIES ACT DOES NOT APPLY TO CRIMINAL CASES IS MOOT. NOT ONLY DOES THE ADA HAVE APPLICATION TO CRIMINAL PROCEDURES BUT IF THE CLAIMANT HAS A DOCUMENTED DISABILITY (THROUGH THE VETERANS ASSOCIATION) THEN IT APPLICATION IS "MANDATORY" THE FEDERAL COURTS HAVE ALSO STATED THAT A PERSON WHO HAS A DOCUMENTED DISABILITY HAS A RIGHT TO SUBMIT EVIDENCE OF ~~their~~ their disability IN "ANY TRIBUNAL" THE RIGHT TO GIVE EVIDENCE OF ONE'S DISABILITY RUSS V WATTS 414 F 3d 783 (7th CIR 2005) A CRIMINAL COURT IS CLEARLY A TRIBUNAL.

THE STATE OF NEVADA DOES NOT ALLOW THE SUBMISSION OR ADMISSION OF EVIDENCE AS IT RELATES TO "DIMINISHED CAPACITY" HOWEVER, THIS IS EXACTLY THE SAME EVIDENCE THAT WOULD BE SUBMITTED BY A PERSON WHO HAD A DISABILITY UNDER THE A.D.A. TO WIT: EVIDENCE OF MEDICATION REGIME,

XIII CONTINUE

EVIDENCE OF THE EFFECT OF THIS MEDICATION REGIME
EVIDENCE OF THE EFFECT OF BEING OFF OF THIS MEDICATION
REGIME, ETC. SOME OF THE SIDE EFFECTS OF THE MEDICATION
THAT ARE PRESCRIBED FOR DIFFERENT TYPES OF MENTAL ILLNESS
HAVE SOME VERY SIDE EFFECTS, SIMPLY PUT THE ADA GIVES
THE APPELLANT, WHO HAS SEVERAL RECOGNIZED DISABILITIES
ADHD, PTSD AND BI-POLAR DISORDER THE RIGHT TO PUT ON
EVIDENCE OF HIS DISABILITIES IN ANY TRIBUNAL.

UNDER THE ADA, IS IN FACT EVIDENCE OF DIMINISHED
CAPACITY, A DEFENSE THAT HAS BEEN ELIMINATED FROM THE
LEGAL LEXICON BY THE NEVADA LEGISLATURE THAT IS INCONGRUOUS
WITH THE CONSTITUTIONAL PROTECTIONS THAT THE APPELLANT IS
ENTITLED TO UNDER THE CIVIL RIGHTS CONFERRED UPON HIM
BY CONGRESS. THE CENTRAL PREMISE OF THE SUPREMACY
CLAUSE IS A FEDERAL LAW IS SUPERIOR TO STATE LAW
U.S CONST ART VI CL 2 THE LAWS OF THE UNITED STATES
SHALL BE THE SUPREME LAW OF THE LAND

THE SUPREME COURT HAS THEREFORE LONG RECOGNIZED THAT
ANY STATE LAW THAT "STANDS AS AN OBSTACLE TO THE ACCOMPLISH-
MENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES
OF CONGRESS" IS PREEMPTED" MORTENSEN V BRENNAN
COMM'NS LLC 722 F3d 1151 1157 (9th CIR 2013) SIMPLY,
THE STATE'S LAW PROHIBITING THE ADMISSION OF EVIDENCE
REGARDING A CRIMINAL DEFENDANT'S FEDERALLY
RECOGNIZED DISABILITY IS PREEMPTED AND MADE A
NULLITY

XIII CONTINUE

LAW AND ARGUMENT

THE ERRORS IN THE CASE MUST BE CONSIDERED MORE PRONOUNCED AS THE ALLEGATIONS IN THIS CASE ARE COMPRISED OF ONE SINGLE ISOLATED INCIDENT, RESULTING IN A LIFE SENTENCE. THIS IS EXACERBATED BY THE FACT THAT THE EVIDENCE WHICH SATISFIED THE CORPUS DELICTI RULE CAME ONLY FROM THE VICTIM HERSELF AND HER TESTIMONY AT TRIAL WAS EXTRAORDINARILY WEAK AND VACILLATED BETWEEN "IT HAPPENED" AND "IT DIDN'T HAPPEN" FURTHER THE VICTIM TESTIFIED THAT WHEN SHE MADE THESE CONFLICTING STATEMENTS SHE WAS TELLING THE TRUTH IN BOTH INSTANCES. THE ALLEGED VICTIM COULDN'T EVEN IDENTIFY THE APPELLANT AT THE PRELIMINARY HEARING. IN ADDITION, TWO YEARS LATER, AT THE TRIAL, THE VICTIM'S MOTHER VICTORIA CAME FORWARD ADMITTING THAT THE TESTIMONY THAT SHE GAVE AT THE PRELIMINARY HEARING WAS FABRICATED. AT TRIAL VICTORIA REVEALED THAT SHE COMMITTED PERJURY WHEN SHE RELATED THE SAME FACTS AS THOSE IN THE PRELIM HEARING TO THE POLICE. VICTORIA TESTIFIED THAT THESE FACTS WERE NEVER RELATED TO HER BY LEYAH HER DAUGHTER.

FURTHER, EVEN THOUGH THE STATE WILL ASSURELY BE QUICK TO INFORM THIS COURT THAT THERE WAS A CONFESSION BY THE APPELLANT IN THIS CASE, THIS DOES NOT TAKE INTO ACCOUNT THE FACT THE APPELLANT WAS UNDER THE INFLUENCE OF PSYCHIATRIC MEDICATION IN CONJUNCTION WITH SOME VERY, VERY STRONG PAIN

XIII CONTINUE

medication (OXYCOTIN 80mg) that may have interfered in his ability to discern fantasy from reality. As such any errors that occurred in this case should be viewed as being magnified under these circumstances. The questionable veracity of the state's witnesses and the de minimis defense by trial counsel, the fact that guilt was found, even though these pronounced inconsistencies and admitted perjury existed bring to light the propensity for juries to find guilt based solely upon the nature of the charges, without any regard to the substance of evidence presented.

The Appellant was prevented any evidence that any acts committed could have been caused by a documented SIDE EFFECTS of his prescribed medication and are on record with Lam's pharmacy in Las Vegas, Nevada, also with the Veterans Administration. The fact that the Appellant was prevented in this regard seems more than a little incongruous when his condition was the result of a doctor's prescription for not one, but 3 medically ascertained disabilities. It is Appellant's counsel's belief that pharmacological toxicity or other synergistic reactions have been documented and proven to a reasonable degree of medical certitude through extensive pharmacological studies. This could have been crucial to Appellant's defense at trial and was easily ascertainable by appeal counsel.

As used in the ADA, the term "disability" means with respect to an individual a ~~physical~~ physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. Trial counsel did not believe it was relevant because they were entirely unfamiliar with the ubiquitousness nature of the A.D.A. An ~~impairment~~ impairment is substantially limiting for purposes of the statute if it has a permanent or long-term impact. Eshelman V Agee Systems, INC 397 F. Supp 3d 557 (E.D. PA 2005) IF AN INDIVIDUAL TAKES MEASURES TO CORRECT FOR, OR MITIGATE A physical or mental impairment the effects of those measures both positive and negative, must be taken into account when judging whether that person is substantially limited in a major life activity. Sutton V United Air Lines INC 527 US 471 119 S Ct 2139 144 L Ed 2d 450 (1999) THEREFORE, SINCE MEASURE BOTH POSITIVE AND NEGATIVE must be taken into account, the Appellant should have been allowed to present evidence of the effects of his prescribed psychiatric medication and the symptoms of his mental illnesses. IN MY CASE IT WAS THWARTED BY TRIAL COUNSEL IGNORANCE OF THE LAW

XIII CONTINUE

AFTER READING THROUGH THE TRIAL AND PRELIMINARY HEARING TRANSCRIPT, WHAT APPEALS COUNSEL DISCOVERED WAS AN INCREDIBLE AMOUNT OF IMPEACHMENT MATERIAL THAT WAS NEVER PUT TO USE DURING TRIAL. IN FACT TRIAL COUNSEL DIDN'T EVEN RAISE THE ISSUE REGARDING VICTORIA NICASTRO'S PERJURY AT THE PRELIMINARY HEARING. VICTORIA'S TESTIMONY WAS SO DIFFERENT THAT HAD TRIAL COUNSEL BROUGHT THIS OUT IN HER TRIAL TESTIMONY IT WOULD HAVE COMPLETELY DISCREDITED HER AND MAY HAVE EVEN RESULTED IN A CRIMINAL CHARGE FOR PERJURY AGAINST VICTORIA.

IN GERSTEN V SENKOWSKI 426 F3d 588 (2ND CIR 2005) THE COURT HELD THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT UNDER THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE TRIAL COUNSEL ADOPTED A WEAK POSITION THAT EVIDENCE WAS "CONSISTENCE WITH INNOCENCE" WITHOUT FIRST MAKING AN ATTEMPT TO INVESTIGATE WHETHER THE CASE COULD BE MADE THAT THE EVIDENCE WAS NOT CONSISTENT WITH GUILT.

THE ARGUMENT IS THAT TRIAL COUNSEL FAILED TO USE ANY IMPEACHMENT EVIDENCE THAT WAS AVAILABLE TO HIM. TRIAL COUNSEL'S LEGAL THEORY CAN ONLY BE PRESUMED TO BE THAT ~~THE~~ THE STATE HAD A CONFESSION AND THAT COULD NOT COME IN UNTIL THE CORPUS DELICTI RULE HAD BEEN SATISFIED. THIS COULD HAVE BEEN EASILY THWARTED THROUGH A VIGOROUS AND THOROUGH CROSS-EXAMINATION - WHICH NEVER HAPPENED,

XIII CONTINUE.

THERE WAS NO DNA, NO PHYSICAL EVIDENCE, THERE WAS ONLY THE TESTIMONY OF LEYAH NICASTRO AND HER MOTHER VICTORIA, BOTH OF WHOM COULD HAVE BEEN IMPEACHED EASILY. THEN RELYING ON THE CORPUS DELICTI RULE DEFENSE COUNSEL COULD HAVE KEPT OUT THE CONFESSION, TRIAL COUNSEL [REDACTED] STRATEGY WAS LITERALLY, MY CLIENT IS GUILTY. HE CONFESSED!

THE GERSTEN COURT STATED THAT TRIAL COUNSEL MAY NOT FAIL TO CONDUCT AN INVESTIGATION AND THEN RELY ON THE RESULTING IGNORANCE TO EXCUSE HIS FAILURE TO EXPLORE A STRATEGY THAT WOULD LIKELY HAVE YIELDED EXCULPATORY EVIDENCE. THIS CASE WAS RIFLED WITH EVIDENTIARY FAILURES ON TRIAL COUNSEL'S PART.

THE CRITICAL ISSUE IN THE CASE WAS CREDIBILITY AND A NUMBER OF STATEMENTS SEVERLY UNDERCUT THE CREDIBILITY OF STATE PRINCIPLE WITNESSES.

MOREOVER MANY OF THE STATEMENTS IN THIS CASE WOULD HAVE BEEN ADMISSIBLE AND NONE WERE CUMULATIVE. THUS THERE WERE "MORE THAN A NEGLIGIBLE CHANCE THAT THE COUNSEL FAILED TO INVESTIGATE AND DISCOVER WOULD HAVE AFFECTED THE OUTCOME OF THE TRIAL"

THIS IS EXACTLY WHAT HAPPENED HERE IN THIS CASE, TRIAL COUNSEL FAILED TO INVESTIGATE AND/OR JUST SIMPLY IGNORED THE AVAILABLE MATERIALS BECAUSE OF HIS CLIENTS CONFESSION.

XIII CONTINUE

MARY the grandmother had obtained information from LEYALIS younger sister LINDA - NOT VICTIM HERSELF WHEN she called VICTORIA to discuss the matter with her she related 2nd party hearsay to VICTORIA. VICTORIA testified that she did NOT speak with PRISCILLA, the victim's AUNT. who allegedly spoke directly to the victim, VICTORIA testified extensively at the Preliminary hearing, relating that her information came Directly from the victim, However at trial VICTORIA testified that the victim NEVER related any facts to her until almost 2 yrs later. IN addition when the victim did make some statements to her the victim did NOT indicate in any way that there was any Physical contact between Appellant and her Det MASON admitted that he received absolutely NO information from either the victim or the victim's sister (the original outcry witness) The victim's sister did not testify at trial or at the preliminary hearing. Although PRISCILLA testified at trial she stated that the victim "Did NOT" indicate that there was any physical contact between the victim and the Appellant, Counsel made NO objections to the testimonial statements of VICTORIA, which essentially related that Appellant stuck his penis in the victim's mouth, However the victim testified the Appellant "Asked" her to put her mouth on his "Front part" The victim also denied any physical contact with Appellant, IN addition, the victim also stated that she NEVER

XIII CONTINUE -

told her sister, Linda, that the appellant made her suck his private part, only that he asked her to put her mouth on it, Again not "sexual assault",

Clearly at the Prelim hearing the victim denies that she ever had appellant's front part or penis in her mouth and testified she made it all up. At trial however she says that appellant made her suck it, There clearly [REDACTED] appears to be a great deal of confusion by the victim as to what actually happened and what she perceived or perhaps interpreted as happening.

The mother Victoria testimony at trial was [REDACTED] markedly different from the testimony at the Prelim hearing. In fact, her testimony was at opposite ends of the spectrum, Trial counsel has a duty to object to her testimony as being that of 2nd 3rd or even 4th party hearsay and never did. He didn't because he clearly never read the case file or investigate the case, In fact, trial counsel couldn't object because he never impeached Victoria with her Preliminary hearing testimony, which was readily available to him. Clearly gross negligent conducted on trial counsel's behalf. Had trial counsel not waived the 10 day filing requirement for the introduction of hearsay statements by the outcry witnesses under NRS 51.385.

XIII CONTINUE

the state's flow of evidence that came out at trial would have been reduced to a trickle, The outcome of the trial is therefore highly questionable and suspect. Therefore, trial counsel conduct was highly improper and his errors provided the state with a windfall that severely prejudiced the appellant to his ultimate detriment.

TRIAL COUNSEL should have requested a psychological examination of the victim. A cursory review of the Preliminary hearing transcript in this case would have [REDACTED] REVEALED that there were glaring problems with the testimony of the state's complaining witness. One can assume, it is supposed, that the sole reason for her almost complete inability to testify was her age, along with [REDACTED] the nature of the charges. But a good defense should not rest on assumptions, and it is necessary when, as here, the potential sentence is so very great, to leave no stone UNTURNED

Conclusion

The court is presented with an unusual case. Petitioner was out of custody during these proceedings and therefore readily available to counsel at any time. Yet, there is no evidence of any investigation in this case

XIII CONTINUE -

THE STATE DOES NOT CHALLENGE PETITIONER'S ASSERTION THAT HE ONLY HAD 5 MEETING WITH HIS TRIAL ATTORNEY IN 2 YRS AND INSTEAD SUGGESTS THAT HOWEVER MANY MEETINGS HE MAY HAVE HAD, IT WAS CERTAINLY ENOUGH,

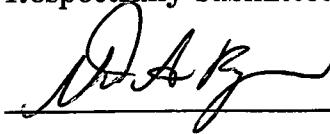
PETITIONER WAS OUT OF CUSTODY THE ENTIRE TIME THIS CASE WAS PENDING AND TO SUGGEST THAT 5 MEETING WITH HIS TRIAL ATTORNEY IS ADEQUATE GIVEN THAT FACT IS CLEARLY WRONG. THIS IS A CASE THAT, BECAUSE OF THE UNUSUAL FACTS AND CIRCUMSTANCES PRESENTED DEMANDED AT LEAST SOME PRE-TRIAL WORK TO BE DONE. AS FAR AS CAN BE TOLD FROM THE RECORD NOTHING WAS DONE. THE RECORDS SHOW NO PRE-TRIAL MOTIONS BEING FILED NO SUBPOENAS BEING ISSUED, NO MEDICAL RECORDS BEING SOUGHT, NOTHING

PETITIONER IS NOW SERVING A LIFE SENTENCE WITH A MINIMUM PAROL ELIGIBILITY OF 35 YEARS, THE ONLY CRIME IN NEVADA THAT CARRIES A HIGHER SENTENCE IS FIRST DEGREE MURDER, AND EVEN THEN IT IS POSSIBLE TO RECEIVE 20 YRS TO LIFE. THE SENTENCE IN THESE CASES IS SO SEVERE THAT MEANFUL EFFORTS MUST BE MADE TO ONLY PROTECT A CLIENT FROM CONVICTION, BUT AT VERY LEAST TO PRESERVE AN ADEQUATE RECORD ON APPEAL, VIRTUALLY NOTHING WAS DONE IN THIS CASE IN PETITIONER'S BEHALF, PLEASE YOUR HONOR I HAVE A BAD SHOULDER SO MY PRINTING GOES BAD FROM TIME TO TIME..

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 5-28-2019.