IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR., #1149356, Appellant,	)	**CASE NO.: 81255, 81257**
	)	**E-FILE**
v.	)	D.C. Case: **A-18-784704-W**
	)	**C-13-291374-1**
STATE OF NEVADA, Respondent.	)	Dept.: **XII**

APPELLANT'S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR., #1149356, Appellant, v. STATE OF NEVADA, Respondent.	)	**CASE NO.: 81257, 81255** **E-FILE** D.C. Case: **A-18-784704-W** **C-13-291374-1** Dept.: **XII**

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Frederick Harold Harris, Jr., hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated withy my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 29th day of October, 2020.

Attorney of Record for Frederick H. Harris, Jr.

//s// *Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

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	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief
Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from the Denial of Post Conviction Relief in District Court.

SPECIFICATION OF ERROR

1. The District Court erred by not finding defense counsel was ineffective under *Strickland* because he failed to adequately investigate and prepare pretrial;

2. The District Court erred by finding defense counsel was not ineffective in the jury selection process;

3. The District Court erred by not finding defense counsel was ineffective under *Strickland* for failing to seek a court ordered psychiatric evaluation of the alleged victims pretrial;

4. The District Court erred in not finding counsel was an ineffective advocate at trial;

   A. Counsel was ineffective cross-examining the State's main witness(es);

   B. Counsel was ineffective responding to prosecutorial misconduct;

   C. Counsel was ineffective during closing argument;

5. The District Court erred by not finding defense counsel was ineffective at sentencing. The sentence of 720 months to life imprisonment was cruel and unusual punishment under the Eighth Amendment;

6. The District Court erred in not finding ineffective assistance of counsel in handling the Motion for New Trial;

7. The District Court erred in not finding ineffective assistance of counsel on appeal;

8. The District Court erred in not finding there was cumulative error which required reversal.

SUMMARY OF THE ARGUMENT

Counsel was ineffective pretrial because he did not adequately investigate and prepare. *Strickland v. Washington,* 466 U.S. 668 (1984) requires counsel to do a reasonable investigation and preparation. That was not done in this case. Defense counsel did not adequately familiarize themselves with the law and facts. Defenses counsel should have done a thorough study of the law and facts to prepare for the State's case. *Strickland, Id*. 687.

Adequate investigation in this case required consulting with necessary witnesses who could have provided exculpatory evidence. The defense, not having done such necessary investigation, were totally ineffective in challenging the State's witnesses. The defense could not effectively challenge the State's experts. (A.A. 882-984), (A.A. 1395-1414), (A.A. 1463-1516), (A.A. 1783-1816) This amounted to ineffectiveness under *Strickland*.

Counsel was also ineffective under *Strickland* because he did not file a meritorious Motion to Suppress. *Kimmelman v. Morrison,* 477 U.S. 365 (1986) A Motion to Suppress would have been granted because none of the exceptions to the warrant requirement existed in this case and also the Defendant's arrest was without probable cause. The defense counsel also failed to file a necessary Motion for a Court

Ordered Psychiatric Evaluation of the victims. *Warner v. State,* 102 Nev. 635 (1980). That failure of counsel was prejudicial error under *Strickland v. Washington, supra,* because there was substantial evidence one or more of the victims had some issues that could have affected their credibility. *See, Lickey v. State,* 108 Nev. 191 (1992).

Appellant submits defense counsel was a very ineffective advocate during the trial in multiple ways. Counsel did not effectively cross examine important witnesses for the State. Counsel also did not effectively handle the multiple instances of prosecutorial misconduct during trial. *United States v. Alcantara-Castillo,* 788 F.3d 1188 (9th Cir.2015). Finally, counsel was also an ineffective advocate during closing arguments. *See, Smith v. Spisak,* 558 U.S. 139 (2010).

The aggregate sentence Appellant received of 60 years to life was excessive and disproportionate, and that sentence was in violation of the Eighth Amendment. That disproportionate and excessively harsh sentence resulted from ineffective assistance of counsel and the District Court should therefore have granted Defendant's Petition for Habeas Corpus relief.

Counsel was ineffective when handling the critical Motion for New Trial. Because counsel failed to adequately prepare a critical witness before the evidentiary hearing on the New Trial Motion, he was unable to effectively prove the facts

necessary to win the Motion.

Counsel was also ineffective in handling the Appeal. Counsel failed to effectively raise many meritorious issues and was therefore ineffective under *Strickland. See, Kirksey v. State,* 112 Nev. 980 (1996).

The totality of errors should have resulted in a finding of reversal because of cumulative error. *Mulder v. State,* 116 Nev. 1 (2000), *Nika v. State,* 124 Nev. 1272 (2008).

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to N.R.S. 177.015(3).

ROUTING STATEMENT

This is a denial of post-conviction relief that should be assigned to the Nevada Supreme Court pursuant to NRAP 17(a) because it involves a case of first impression on several important legal issues. Also, the Defendant was convicted of an A level felony. It is therefore not a case presumptively assigned to the Court of Appeals.

LEGAL ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in finding defense counsel was not ineffective for failing to do adequate pretrial preparation and investigation. Adequate investigation included hiring necessary experts to effectively challenge the State's

experts;

II. Whether the District Court erred by finding defense counsel was not ineffective during the jury selection process;

III. Whether the District Court erred when it found that defense counsel was ineffective for not filing a meritorious motion for a defense psychiatric examination of the alleged victims;

IV. Whether the District Court erred when it found defense counsel was an ineffective advocate during trial;

A. Whether defense counsel was ineffective cross-examining the State's witnesses;

B. Whether the district court erred by not finding defense counsel was ineffective handling prosecutorial misconduct which involved the prosecutor personally vouching for the credibility of the State's witnesses;

C. Whether the district court erred by not finding defense counsel was ineffective during closing argument;

V. Whether the District Court erred when it found the defense counsel was not an ineffective advocate at sentencing;

VI. Whether the District Court erred by finding that defense counsel was not ineffective handling the Motion for a new Trial;

VII. Whether the District Court erred by not finding that defense counsel rendered ineffective assistance of counsel on appeal;

VIII. Whether cumulative errors by counsel requires reversal of Defendant's conviction.

STATEMENT OF THE CASE

After the Defendant was charged in a multi-count complaint, the preliminary hearing was heard on April 29, 2013. Defendant was bound over on July 23, 2013. An Information was then filed charging multiple felonies on July 23, 2013. (A.A. 01-14) An Amended Information was later filed March 27, 2014. (A.A. 100-110) Jury trial began on March 25, 2014 (A.A.125) and concluded after 14 days with a verdict of guilty on most counts of the Amended Information on April 15, 2014. (A.A. 70-80) On April 28, 2014, Defendant filed a Motion for New Trial. (A.A. 81-87) On June 13, 2014, the State filed Opposition to Defendant's Motion for a New Trial. (A.A. 88-095)

On July 9, 2014, Defendant filed a Reply to State's Opposition/Response to New Trial Motion and Supplement to Defendant's Motion for New Trial. (A.A. 102-

115) On July 17, 2014, Defendant was sentenced and counts 1, 15, 17, 18, 21, 30, 32, 43 and 45 were dismissed. (A.A. 2462-2473) On October 29, 2014, the State filed Opposition to Defendant's Supplemental Motion for New Trial. (A.A. 088-101) On November 24, 2014, an Evidentiary Hearing on the Motion for New Trial was heard. (A.A. 2381) Again, on June 30, 2015, an Evidentiary Hearing and Argument occurred on the new trial Motion. (A.A. 2441-2461) At that time, the Court denied the Motion for New Trial. (A.A. 2455)

On October 27, 2015, the Defendant was sentenced to an aggregate sentence of 76 years to life. (A.A. 2462-2473) On October 27, 2015, Defendant filed Notice of Appeal. (A.A. 117-118) Judgment of Conviction was filed on November 2, 2015. (A.A. 119-124) On November 14, 2015, an Amended Judgment of Conviction was filed. (A.A. 2474-2479) That Amended Judgment reduced his aggregate sentence to 720 months. On November 28, 2017, the Nevada Supreme Court issued an Order of Affirmance and entered a Certificate of Judgment affirming the conviction and denying review. (A.A. 2480-84, 2485-86) Remittitur was issued December 7, 2017. (A.A. 2487-89)

On November 16, 2018, a Petition for Writ of Habeas Corpus was filed for the Defendant in case no.: A-18-784704-W. (A.A. 2490-2497) After another counsel was

appointed on June 20, 2019, Supplemental Points and Authorities were filed on November 1, 2019. (A.A. 2498-2528) On April 6, 2020, the State filed a Response to Petitioner's Supplemental Points and Authorities. (A.A. 2529-2560) On April 10, 2020, Defendant/Appellant filed a Reply to State's Response. (A.A. 2566) After Argument on April 23, 2020, the District Court entered Findings of Fact, Conclusions of Law and Order on May 21, 2020. (A.A. 2567-98) Notice of Entry of Findings of Fact, Conclusions of Law and Order were entered on May 22, 2020. (A.A. 2601) Defendant/Appellant filed Notice of Appeal on May 27, 2020. (A.A. 2599-2600)

On July 13, 2020, Defendant/Appellant filed a Motion to Consolidate Supreme Court case no.: 81257 with case no.: 81255. (A.A. 2602-2606) The Supreme Court of Nevada granted the Order consolidating both cases July 28, 2020. (A.A. 2618)

FACTUAL STATEMENT

Defendant was convicted of multiple felony charges including sexual assault with a minor, lewdness with a minor, first degree kidnapping, battery with intent to commit sexual assault, pandering and living from the earnings of a prostitute after a fourteen (14) day jury trial.

Although this was a serious and complex case, defense counsel did an inadequate investigation pretrial. He did not consult with necessary experts about

seeking a Motion for Psychiatric Examination of the Victims.

Despite the nature of the case, defense counsel did not adequately protect his client's right to a fair and impartial jury. Defense counsel did not seek the help of a jury expert or jury strategist pretrial or during the trial. Defense counsel did not file a meritorious Motion for Individual Sequestered Voir Dire, despite the likelihood that many potential jurors may have themselves been traumatized by sexual abuse and the voir dire process would have been offensive to other jurors or could have improperly influenced them in deciding the case.

Defense counsel was also an ineffective advocate during trial because he was ill prepared and did not adequately cross examine important State witnesses. Trial transcripts show that counsel was unable to effectively impeach the victims with prior inconsistent statements. Counsel was also ineffective in handling multiple acts of prosecutorial misconduct by not making appropriate objections to improper vouching by the prosecutor. (A.A. 2276, 2303, 2349) Counsel finished the trial by making an ineffective closing argument and Defendant was prejudiced thereby. (A.A. 2305-2345)

Although there was evidence of juror misconduct that warranted a new trial, (A.A. 2390-2409) defense counsel was ineffective in preparing the essential

witnesses for the Motion for New Trial evidentiary hearing. Counsel's failure to adequately investigate and prepare these witnesses for the evidentiary hearing for the Motion for New Trial resulted in the District Court denying Defendant's Motion for New Trial. (A.A. 2455)

Counsel was then ineffective on appeal and Defendant was sentenced to an extremely harsh and disproportionate aggregate sentence of 918 months to life imprisonment which was later reduced to 720 months. (A.A. 2473), (A.A. 2479) Defense counsel did not zealously and effectively represent Appellant at sentencing. He did not prepare a written sentencing memorandum or even present any witnesses in mitigation at sentencing. (A.A. 2462-2473) The District Court did not find counsel was ineffective when denying Defendant's Habeas Corpus Petition. (A.A. 2567-2598) An Amended Judgment of Conviction clarifying Defendant's sentence was filed November 14, 2016, and the Defendant's Aggregate sentence was reduced to 720 months. (A.A. 2473), (A.A. 2479).

ARGUMENT

I. THE COURT ERRED WHEN IT FOUND DEFENSE COUNSEL WAS NOT INEFFECTIVE UNDER *STRICKLAND* BECAUSE OF HIS INSUFFICIENT PRETRIAL PREPARATION AND INVESTIGATION.

The District Court wrongly denied Appellant's claims that defense counsel in this case did not prepare adequately or investigate adequately to render effective assistance of counsel in this case. (A.A. 2580-82) The most important part of preplea investigation is adequately consulting with the Defendant pretrial so that counsel could be aware of any possible defenses. It is respectfully submitted that counsel failed almost completely in this duty. He did not spend more than a minimal amount of time with the Defendant pretrial or preplea. Every request Defendant made for counsel to file various motions was overlooked or rejected.

The American Bar Association (ABA) Standards on the Prosecution and Defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients.

See, ABA Standards 4.1: **Duty to Investigate:**

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

The importance of this standard has been recognized and cited by the Nevada Supreme Court for over 30 years. *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel however did not adequately fulfill this elementary command to investigate and develop information that might assist his client. The failure to fulfill this critical duty requires reversal of the conviction.

In *Strickland v Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a showing that counsel made errors so serious that counsel was not functioning as the"counsel"guaranteed by the Sixth Amendment. Second, counsel must show that *the deficient performance prejudiced* the defense. This requires showing that counsel errors were so serious as to have deprived defendant a fair trial, that is a trial where the result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that rendered the result unreliable. *Strickland* at 687.

> ... [j]udicial scrutiny of counsel performance must be highly deferential however, counsel must at a minimum conduct a reasonable investigation enabling him to make

informed decisions about how best to represent his client. *Strickland*, *Id*. 691, 104 S.Ct. at 2066. (Emphasis added).

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

> To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness.
>
> Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. (Emphasis added)

. . .

Appellant submits in this case, as well as *Sanborn,* his counsel was ineffective under *Strickland* for failing to adequately investigate and the District Court erred in denying his Petition. (A.A. 2598)

II. THE DISTRICT COURT ERRED WHEN IT FOUND THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE DURING THE JURY SELECTION.

The right to trial by an impartial jury is a fundamental concept of due process. That importance of that right and the duty of strict inquiry into its application were discussed in *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where the Supreme Court found that in holding pretrial publicity that had tainted the jury panel, stated:

> "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. ... In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent jurors...." A fair trial in a fair tribunal is a basic requirement of due process.... In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror

> must be as "indifferent as he stands unsworn".... His verdict must be based upon the evidence developed at the trial." (366 U.S. at 1642, 81 S.Ct. at 721, 6 L.Ed.2d at 755). (citations omitted) (Emphasis added)

Despite the fundamental importance of obtaining a fair and impartial jury in this very serious case, counsel was grievously ineffective in preparing for the jury selection process and in selecting the jury. It is respectfully submitted there were at least two significant ways counsel was ineffective during the jury selection process:

(1.) Defense counsel failed to hire a jury selection expert and that limited his ability to get a fair and impartial jury;

(2.) Defense counsel failed to file a Motion for Individual, Sequestered Voir Dire and the Defendant was prejudiced thereby;

a. The Court Erred when it found Defense Counsel was not Ineffective because he did not seek an Expert Jury Consultant.

Defendant was entitled to a searching voir dire with the help of a Jury Selection Expert.

Defendant's counsel however never retained a jury selection expert despite the enormous benefits of such an experts. In this type of case it is respectfully submitted the need for a juror selection expert was especially critical. An expert could have

assisted with preparing voir dire questions designed to discover any possible biases. An expert could have assisted in providing a profile of favorable jurors for the defense.

The District Court had the power to appoint a jury expert. *See, Ake v. Oklahoma,* 470 U.S. 68 (1985). Defense counsel however never even sought such an expert even though the refusal to supply an indigent with necessary defense tools has been held to be reversible error where such tools were essential to protects a defendant's rights at trial. *See generally, United States v. Durant,* 545 F.2d 823 (2d Cir.1976), *United States v. Bass,* 477 F.2d 723 (9th Cir.1973).

It is therefore respectfully submitted that in this case the Court erred in denying Appellant's Habeas Corpus Petition because if counsel had made an appropriate motion for the appointment of an expert jury consultant it would have been granted. Defendant then would have gained a very valuable resource for picking the jury in this difficult and complex case.

(1) a jury consultant, after reviewing all the facts, could have provided a profile of an ideal juror;

(2) a jury consultant could also, more importantly, have provided a profile of the most important jurors to avoid;

(3) a jury consultant could have assisted counsel in preparing voir dire questions that revealed any juror's hidden biases. This would have been extremely valuable in challenging pro-prosecution jurors for cause;

(4) a jury consultant, trained in psychology and body language, could have recognized subtle signs in jurors which showed any hostility or unfairness to the defense or defense counsel.

Defendant respectfully submits that having an expert jury consultant, who was able to assist in discovering even one jury member who was not fair and impartial because of their hidden biases, may likely have changed the result.

In its Findings of Fact, Conclusions of Law and Order, the District Court found that trial counsel was not ineffective for failing to hire a jury selection expert, stating Petitioner has not demonstrated he was "prejudiced" by counsel's decision not to hire a jury expert. The Court using the prosecutor's language verbatim stated that Petitioner's claim that a jury consultant would greatly benefit him was just a 'bare naked' assertion which could not support a claim of ineffective assistance of counsel. *Hargrove v. State,* 100 Nev. 498 (1984) (Findings of Fact, Conclusions of Law, p. 18) (A.A. 2584)

Appellant respectfully submits this finding by the Court was reversible error.

b. Counsel Failed to File a Pretrial Motion for Sequestered Individual Voir Dire and that Failure led to the likelihood of an Unfair and Biased Jury and was Therefore Ineffectiveness under *Strickland*.

Defendant was charged with numerous counts of sexual assault and statutory sexual seduction and related crimes of violence. The particular facts of this case, which alleged multiple sexual assaults with children, made securing a fair and impartial jury extremely difficult. These circumstances necessitated extensive pretrial work by counsel to protect the right to a fair jury.

It is respectfully submitted that a meaningful voir dire, in which jurors were questioned individually and in private, was the only way to have obtained a fair jury that was not prejudiced or offended by very candid questioning which occurred during voir dire, and that would likely be embarrassing to potential jurors during the voir dire process. Because of the nature of the charges in this case, competent counsel should have filed a pretrial Motion for Sequestered Individual Voir Dire in order to adequately protect the Defendant's Sixth Amendment rights. Because defense counsel did not do that in this case, the Defendant was most likely severly prejudiced during the voir dire process. The failure by counsel to seek this procedure was ineffectiveness under *Strickland* because the Defendant was likely prejudiced when

the whole jury panel was unnecessarily subjected to 'voir dire' that prejudiced the defense.

Such a motion, if granted, would have given counsel much more flexibility to question potential jurors in private about delicate sexual matters including the effect of prior sexual assaults on individual jurors or their families. Such questions must certainly have impacted any juror's ability to serve fairly. The record reflects that numerous jurors admitted they had been the victim of sexual assault or the victim of similar crimes, or they stated that they had close friends or family members who had been the victims of sexual crimes. (A.A. 242, 245, 247, 248, 249, 339, 385)

It is respectfully submitted the District Court should have recognized, that especially with the facts of this case, there would likely be numerous jurors who had emotional responses to voir dire questions. The fact that many jurors may have experienced upsetting, or traumatic incidents in their lives, including having been the victim of sexual offense(s), is a fact that must be recognized when picking a jury in a sexual assault case.

It is not just the particular juror being questioned who may be influenced by very explicit but necessary questions, but the whole panel in a criminal case that may be affected, that makes it almost impossible to get a fair jury. Just a few examples

from the actual voir dire in this case reveal how serious this problem of questioning a jury panel in a sexual assault case can be. Consider the following voir dire segments:

. . . .

MS. LUZAICH: You had mentioned yesterday that your mom had been molested.

PROSPECTIVE JUROR #050: Um-huh.

MS. LUZAICH: You said she told her parents and the parents did nothing. They slipped it under the rug.

PROSPECTIVE JUROR #050: Yeah.

MS. LUZAICH: How - how did that - like when she was describing it to you did that - did it seem like she was angry about that?

PROSPECTIVE JUROR #050:Very. She holds - she still holds a lot of resentment to this day against her parents.

MS. LUZAICH: Were you surprised that happened?

PROSPECTIVE JUROR #050: Yeah.

MS. LUZAICH: That they didn't do anything about it.

PROSPECTIVE JUROR #050: Um - oh, that they didn't do anything? Not really. I know my grandparents and they, you know.

MS. LUZAICH: Did she indicate was it a one-time thing or more than once?

PROSPECTIVE JUROR #050: It was multiple times, yeah. (Emphasis added)

MS. LUZAICH: Did she tell immediately or was it later that she told?

PROSPECTIVE JUROR #050: Later on, after she was talking to her cousin who it also happened to.

MS. LUZAICH: Do you know how she found out that it had happened to her cousin?

PROSPECTIVE JUROR #050: That I do not recall. I take the bits of information that she has given me, I do not pry into the situation, because - can I have permission to approach the bench, please?

THE COURT: You may.

MS. LUZAICH: Oh, of course.

THE COURT: You may. [Bench conference transcribed as follows:]

PROSPECTIVE JUROR #050: I just -

THE COURT: Okay. Just a minute.

PROSPECTIVE JUROR #050: Okay.

THE COURT: Good morning, Ms. Fried is present, badge number -

PROSPECTIVE JUROR #050: 50.

THE COURT: All four lawyers are present. Go ahead.

PROSPECTIVE JUROR #050: My mother tried to kill herself when I was 16 years old. (Emphasis added)

THE COURT: When you?

PROSPECTIVE JUROR #050: When I was 16 -

THE COURT: I'm sorry.

PROSPECTIVE JUROR #050: - - because of the psychological.

THE COURT: Oh, I'm sorry.

PROSPECTIVE JUROR #050: And I didn't know this until, I mean I - about I was 23 when I finally found out everything. And she was used to tell us that she was going bowling, when I was younger, but she was really going to therapy. And it's not something I want to discuss in front of, you know - -

MS. LUZAICH: Of course.

THE COURT: Sure, sure.

PROSPECTIVE JUROR #050: - - people, so. Just - it's hard.

MS. LUZAICH: Okay. Thank you very much.

THE COURT: Okay. So that was kind of why your don't talk about it a lot with your mom?

PROSPECTIVE JUROR #050: Yeah.

THE COURT: Okay.

PROSPECTIVE JUROR #050: I mean it's not something she brings up. She, you know, a very private person and I - my brother didn't even know about it, so.

MS. LUZAICH: Until?

PROSPECTIVE JUROR #050: Maybe six months ago, I think. And my brother is older than me, so.

THE COURT: Okay. Are there any other questions?

MS. LUZAICH: I won't ask any more questions about that.

THE COURT: Do you have any questions of this particular -

MS. ALLEN: I don't. (A.A. 0338-0340)

. . . .

PROSPECTIVE JUROR #044:

THE COURT: Okay. And you found this out - - I'm sorry - - and you found this out because your aunt told you?

PROSPECTIVE JUROR #044: Um-hm.

THE COURT: Okay. When was this disclosure made?

PROSPECTIVE JUROR #044: About ten years ago.

THE COURT: All right. And it has a pretty profound affect on you?

PROSPECTIVE JUROR #044: I was afraid [indiscernible] and then you asked a question and now here I am. Sorry. (Emphasis added)

THE COURT: That's why I hate asking these questions. And then the next question I have is there anything about that that would affect your ability to be fair and impartial to these parties?

PROSPECTIVE JUROR #044: I want to say no but I also would not think that I would be responding like this. I want to think we were beyond it and above it and educated. I don't know. I don't know that I wouldn't think about that through the whole thing. I don't know. I can't say. (Emphasis added)

THE COURT: Okay. Well I can't tell you what to think about.

PROSPECTIVE JUROR #044: I know.

THE COURT: Okay. So, there's nothing - -

PROSPECTIVE JUROR #044: I want to say going into no, but if I'm in the middle of it I don't - - (Emphasis added)

THE COURT: Okay. And let me tell you that's what I am trying to avoid. I don't want any members of the panel to get on the panel and then decide halfway into the case I can't be fair; do you understand that?

PROSPECTIVE JUROR #044: I do.

THE COURT: Okay. So, I need someone - -

PROSPECTIVE JUROR #044: I'm afraid I couldn't be. (Emphasis added)

THE COURT: Okay.

PROSPECTIVE JUROR #044: I'm embarrassed. I'm embarrassed to say that I couldn't be fair. (Emphasis added)

THE COURT: Okay. So, you're afraid you can't be fair? I feel terrible. I really do apologize. Who is it you think you can't be fair to?

PROSPECTIVE JUROR #044: Well the Defendant.

THE COURT: Okay. Because of the allegations?

PROSPECTIVE JUROR #044: Mm-hmm.

THE COURT: You just really think it's too overwhelming that you might not be able to be fair?

PROSPECTIVE JUROR #044: Yes that's correct.

(A.A. 0250-252) (Emphasis added)

. . . .

The right to trial by jury for serious offenses is a fundamental right 'essential for preventing miscarriages of justice and assuring fair trials are provided for all defendants.' *McMahon v. Hodge,* 225 F.Supp.2d 357 (S.D.N.Y. 2002). *See also, Duncan v. Louisiana,* 391 U.S. 145, 157-58, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Defendant submits his counsel should have been extra alert and sensitive to these dynamics in selecting the jury to cure any possible negative effects or prejudice. Defendant's counsel did not adequately explore these issues in voir dire and did nothing to protect the Defendant's rights by seeking a sequestered voir dire so jurors would not be exposed to the multiple traumas of other jurors. The Court wrongly found counsel was not ineffective for not acting on this issue. *See,* Findings of Fact, Conclusions of Law and Order. (A.A. 2582-83)

Many years ago in the case of *United States v. Ridley*, 134 U.S. App. D.C., 412 F.2d 1126 (1969), the court recommended that crime victims be questioned at the

bench so that other jury panel members not be tainted. The court recognized that the fundamental component of the Sixth Amendment right to trial is the right to a fair and unbiased jury of peers. A defendant's constitutional right to counsel includes the right to question prospective jurors so the defendant may intelligently exercise peremptory challenges. *See, Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (defendant requires counsel's guiding hand at every step of proceedings). The Sixth Amendment guarantees the "assistance of counsel." Part of this constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (citing *Dennis v. United States*, 339 U.S. 162, 171-72, 70 S.Ct. 519, 94 L.Ed. 734 (1950)).

Based upon the nature of this case and the fact that juror bias is often difficult to uncover, as it may be very subtle or even subconscious, extensive sequestered voir dire was essential for the reasons stated.

III. THE DISTRICT COURT ERRED WHEN IT FOUND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MERITORIOUS PRETRIAL MOTION TO COMPEL A PSYCHIATRIC EXAMINATION OF THE ALLEGED VICTIMS.

In its Findings of Fact, Conclusions of Law and Order, the District Court found

that counsel was not ineffective for failing to file a Motion for a Pretrial Psychiatric Examination of the victims. (A.A. 2586-87). This was error as the victims credibility was critical in this trial and a Motion for Psychiatric Examination, if granted, would have provided important information relative to credibility.

Although Appellant argued in his post conviction Petition that alleged victims T. D. had been diagnosed with "cognitive delay" and M.D. had been diagnosed with "anxiety disorder," the Court nonetheless found these facts were not enough to provide a legal basis for an independent Court ordered psychiatric examination of these witnesses. Citing *Abbott v. State,* 122 Nev. 715 (2006) and *Koerschner v. State,* 116 Nev. 1111, 13 P.3d 451 (2000), the Court found existing facts provided insufficient justification to order a psychiatric exam of the victims in this case.

The District Court in its Findings of Fact, Conclusions of Law and Order made an unsupported statement that neither the diagnoses of "general anxiety disorder" or "learning disability" qualified as diagnoses that made a witness testimony inherently "unreliable" or "likely to fabricate." (A.A. 2586) The Court then actually vouched for the credibility of the witnesses, stating that "both witnesses testified "articulately and clearly" at the trial." (A.A. 2586)

The Court concluded the Findings of Fact by finding that any Motion for a

Psychiatric Evaluation would have been a "frivolous" exercise and therefore counsel was not ineffective for failing to file such a motion. *See, Ennis v. State,* 122 Nev. 694 (2006) (A.A. 2586-87), *see also, Dawson v. State,* 108 Nev. 112 (1992).

It is respectfully submitted the District Court erred when it found that counsel was not ineffective for failing to request a psychiatric evaluation of these victims on these facts. Without having done a psychiatric examination by a trained professional, it was impossible to determine if the rather general diagnoses of "anxiety disorder" and "learning disability" were merely such insignificant factors that they should have no relevance in determining the victims credibility or their ability to provide true, accurate and meaningful testimony. A competent psychiatric evaluation of each victim was necessary in this case to supplement the two existing but somewhat vague medical diagnoses. It is respectfully submitted under existing legal authority counsel had an adequate factual predicate for a Motion for Psychiatric Examination of each of the alleged victims.

If the Court felt it necessary, the Court could have ordered a limited and a nonintrusive examination, the results of which could have been viewed *in camera.* If preliminary exam results showed neither victim was significantly impaired, the Court could have then ordered that results of the examinations not be admitted.

However, balancing the rights of the Defendant against the victims, the Court could easily have protected any rights the 'victims' had to privacy by ordering a limited, non-intrusive examination of each victim. The Court however should definitely have protected the Defendant's fundamental right to cross-examination and confrontation as guaranteed by the Sixth Amendment and ordered a necessary evaluation of each victim. In summary, there were substantial grounds for a defense psychiatric evaluation of both prosecution witnesses. Appellant submits an evidentiary hearing would have likely established additional grounds for a psychiatric evaluation of each of the alleged victims.

Substantial case law existed for a court to order a psychiatric evaluation of the complaining witnesses in sexual assault cases when, as here, circumstances warrant critical scrutiny of the complaining witnesses. Defense counsel was therefore ineffective for not seeking such a motion in this case especially because there were some indications of the witnesses having possible mental health issues, i.e., "anxiety disorder" and "learning disability."

In the case of *Ballard v. Superior Court,* 49 Cal.Rptr. 302, 410 P.2d 838 (1966), the defendant, a doctor, was accused of rape by allegedly having sexual intercourse with a female patient while she was under anesthesia. Defendant's

counsel moved that the trial court order a psychiatric evaluation of the complaining witness. The California Supreme Court held that the trial court was not required to order such an examination in all cases where the crime of rape is alleged, but the Court also held that the trial judge had the authority to do so in the sound exercise of its discretion. The Court stated:

> "In urging psychiatric interviews for complaining witnesses in sex cases, some prominent psychiatrists have explained that a woman or girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety. (Cite Om.), and
>
> Thus the testimony of a sympathy arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term." 410 P.2d 846 (Emphasis added)

In *Washington v. State,* 96 Nev. 305, 608 P.2d 1101 (Nev.1980), the Nevada Supreme Court held that psychiatric examination of the victim in a sexual assault is a matter that is left to 'the sound discretion' of the trial court. In the case of *Warner v. State,* 102 Nev. 635, 729 P.2d 1359 (1986), a conviction for sexual assault was reversed because of ineffective assistance of counsel where the defense counsel did

not request the Court to order a psychiatric examination.

The Defendant believes that in the instant case as well, because there were several indicia of psychological problems with the State's witnesses, that compelled the Court to grant a psychological evaluation. Failure to request such an evaluation by counsel should therefore have resulted in reversal.

In the more recent case of *Lickey v. State,* 108 Nev. 191, 827 P.2d 824 (1992) the Nevada Supreme Court again reversed a conviction because the trial court refused to order a psychological evaluation of the victim. The Defendant submits in the instant case, as in *Lickey*, the Defendant was substantially prejudiced because he did not have the opportunity to have an independent court appointed psychiatrist examine the victims. The victims may have been suffering from such significant psychological problems that their testimony should have been found inherently suspect or unreliable. T.D. was diagnosed as having "cognitive delay" and M.D. had been diagnosed with an "anxiety disorder." (A.A. 1316)

Consider also the case of *Keeney v. State,* 109 Nev. 220, 850 P.2d 311, where the Nevada Supreme Court stated:

> "Generally a psychological examination of a sexual assault victim should be permitted if the defendant has presented a compelling reason therefor." (Cite Om.) A compelling

> reason exists where the corroboration evidence is de minimus or non-existent, and the defense has a reasonable basis for questioning the effect of the victim's mental state on her veracity." 109 Nev. 224, 225 (Emphasis added)

Appellant respectfully submits the case law is clear and the State's arguments that such a motion was unsupported in law or fact were clearly untrue. (A.A. 1546-48) There exists substantial legal and factual reasons to grant such a motion in this case and it was therefore prejudicial error under *Strickland* for counsel not to have requested such a motion.

IV. THE DISTRICT COURT ERRED BY NOT FINDING COUNSEL WAS AN INEFFECTIVE ADVOCATE DURING TRIAL.

Defense advocacy during trial requires constant zealous attention to the factual evidence combined with a competent knowledge of the rules of law and procedure. Defense counsel must be skilled in presenting a defense case but in attacking the State's case. Counsel must have a competent grasp of all relevant rules of evidence which are applicable to any facts that may arise during trial. Counsel must always be alert to any prosecutorial overreaching or misconduct and be prepared to take immediate steps to intervene to stop such misconduct.

Careful examination of defense counsel's advocacy during this trial shows

there were at least three (3) areas where counsel failed to meet *Strickland's* rigorous standards:

(1) Defense counsel was ineffective in attempting to impeach key prosecution witnesses;

(2) Defense counsel was ineffective in restraining prosecutorial misconduct including improper vouching for State's witnesses by not objecting appropriately and seeking action by the Court;

(3) Defense counsel was not an effective advocate during the closing argument. Counsel's ineffectiveness during closing was prejudicial ineffectiveness.

A. Defense Counsel Was an Ineffective Advocate While Cross-Examining Important State Witnesses.

Cross examination is a right guaranteed by the Sixth Amendment as a fundamental right. At trial, defense counsel during cross-examination tried to unsuccessfully impeach the alleged victim, T. D., by establishing there was a major inconsistency in prior versions as to the material facts to which she had previously testified. (A.A.1832-1864) During cross-examination, the prosecutor made numerous objections during defense counsel's attempt to impeach the witness with her prior inconsistent statement by arguing that the defense had not laid the appropriate

foundation to impeach her. (A.A. 1848, 1854)

The defense counsel attempted to remedy to the lack of foundation objection by further questioning. She then tried to ask several questions of the witness about what the witness' sister had told her about Fred. (A.A. 1842,1863) The witness however provided no helpful information to the defense and it is respectfully submitted counsel never satisfactorily impeached this critical witness. (A.A. 1817-1864) The totality of the cross-examination of T. D. was ineffective as counsel did not effectively impeach T. D. sufficiently to raise any doubts about her credibility.

The prosecutor's aggressive and skillful use of objections took advantage of the defense attorney's lack of effectiveness. It became evident to the jury Defendant's trial counsel lacked understanding of evidence code rules. As defense counsel struggled to show the witness may have made a prior inconsistent statement, the jury most likely became even more certain the witness was unimpeachable and believable.

Strickland states that the standard for an attorney's performance is "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668 (1984) at 686. It is respectfully stated the defense counsel did not rise to that level of nominal competence demanded by *Strickland* and that the Defendant was prejudiced thereby during his cross examination of many important State witnesses.

B. Defense Counsel Was Ineffective Handling Prosecutorial Misconduct When the Prosecutor Vouched for the Credibility of Witnesses.

The prosecutor committed prosecutorial misconduct by making statements in closing argument which strongly suggested her personal opinion of the witnesses credibility. (A.A. 2276, 2277, 2303, 2349, 2357, 2364) She finished her closing argument stating:

"You heard from all of the Dukes. Do you really think that they could have concocted all of this, those people that you heard on the stand? There is no way. Ladies and gentlemen, the State of Nevada cannot hold the Defendant accountable for his actions. Even the Court cannot hold the Defendant accountable for his actions. Only you can. The evidence shows that the Defendant is guilty of these charges, so please find him guilty. Thank you." (A.A. 2364)

It is respectfully submitted these statements were improper as they can be considered 'vouching' which has long been condemned as misconduct. This prosecutorial conduct should have led to an objection or motion for mistrial based upon the misconduct or the seeking of a strongly worded instructions by the court. *See, United States v. Alcantara-Castillo,* 788 F.3d 1188 (9th Cir.2015).

In this case, defense counsel's response was less than adequate to correct the

serious prosecutorial abuse which occurred. Defendant submits, as the court held in *Alcantara-Castillo, supra,* the actions of the prosecutor amounted to "plain error." Id. 1192

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935). A "prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Maloney,* 755 F.3d 1044, 1046 (9th Cir.2014) (*en banc*) (quoting *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir.1993)).

Prosecutors may not "vouch" for a witness by offering their personal opinion of a witnesses' testimony. The conclusory statements by the prosecutor, suggested that information existed outside the record that verified the witnesses' truthfulness. *See, e.g., Weatherspoon,* 410 F.3d at 1146-48; *Combs,* 379 F.3d at 574-75; *Sanchez,* 176 F.3d at 1224. Vouching compromises the integrity of the trial and denies the defendant due process because the "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Reyes,* 577 F.3d

1069, 1077 (9th Cir.2009) (internal quotation marks omitted). *United States v. Alcantara-Castillo, Id*. 1191. (Emphasis added)

Defendant respectfully urges the court to find that the lack of any effective objections or other response to this prosecutorial misconduct was error under *Strickland v. Washington.* Counsel was not adequately prepared to respond with effective argument and make appropriate objections or motions.

Even "curative" instructions after such misconduct would have been of little use in eliminating the prejudicial cause by the deliberate actions of the State. This was a close case. The jury deliberated more than three days. It is respectfully submitted that only a mistrial could have cured the prosecutorial misconduct which denied the Defendant a fair trial. It has been held that failure to properly object is ineffective assistance of counsel under *Strickland*, 466 U.S. 668 (1984).

C. Defense Counsel Was an Ineffective Advocate During Closing Argument.

Defense counsel's closing argument was not effective and did not effectively develop a reasonable doubt. (A.A. 2305-2345) The United States Supreme Court has held that an inadequate closing argument may be grounds for reversal in the case of *Smith v. Spisak,* 558 U.S. 139, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010). Attorney

arguments are a critical stage of a criminal case, much more than an opening statement. The Nevada Supreme Court has actually even found it an indicia of incompetency when an attorney just fails to make an opening statement. *See, Buffalo v. State,* 111 Nev. 1139, 901 P.2d 647 (1995).

The closing argument was extremely important in this case, as in any criminal case, as it was the last opportunity for counsel to present a well structured persuasive plea to the jury that the Defendant was innocent and that a reasonable doubt existed. That was especially important in this extremely serious case. A significant amount of energy and planning were necessary for counsel to prepare a competent, well reasoned closing argument that could have persuaded the jury. As the Supreme Court noted in *Buffalo, supra:*

> ". . . Defense counsel's failure to make an opening statement, failure to consider legal defenses of self defense and defense of others, failure to spend any time in legal research, and general failure to present a cognizable defense rather clearly resulted in rendering the trial "unreliable." " *Id*. (Emphasis added) *Buffalo, Id*. 1149

. . .

In this case counsel's closing argument was ineffective under Strickland and it therefore rendered the trial 'unreliable' as in *Buffalo v. State, supra*.

V. THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE AT SENTENCING.

This led to the District Court sentencing Defendant to a lengthy and disproportionate sentence in violation of the Eighth Amendment. Defendant was sentenced to an extraordinarily lengthy and harsh sentence of life with the possibility of parole after 918 months, or seventy-six and a half years. *See,* Judgment of Conviction, November 2, 2015. (A.A. 119-124) That sentence was later reduced to 720 months in an Amended Judgment. (A.A. 2479) Defendant however respectfully submits that his trial counsel was grossly ineffective in preparing for the sentencing and in arguing for a just and proportionate sentence consistent with the Eighth Amendment.

Counsel did not file a Sentencing Memorandum in this case. Counsel did not call any witnesses to provide mitigation testimony for Frederick Harris at the sentencing hearing. (A.A. 2462-2473) This lack of any mitigation evidence resulted in a sentence extraordinarily long and disproportionate of 60 years even after reduction. The prosecutor, in contrast with defense counsel, called the victims to testify and provided the court victim impact statements at sentencing. (See, Sentencing Transcript, November 2, 2015) (A.A. 2462-2473)

Although Frederick Harris was convicted of multiple serious charges, it should not be presumed that his sentence of life with eligibility for parole in 720 months or 60 years, is consistent with the Eighth Amendment, even though this sentence is within statutory guidelines. Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation. The sentence imposed by the Court was improper because the Court gave no consideration whatever to any mitigating circumstances in the Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012). The Defendant's youth and economic background were not given any weight.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983).

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *See, United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. *See, Weems, supra,* stating . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id*. 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to shock the conscience.

Defendant submits the punishment he received in this case far exceeded any fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and lack of zealous advocacy at sentencing. Because the sentence was shocking to the conscience, it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause. It should therefore be reversed.

VI. THE DISTRICT COURT ERRED BY FINDING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE HANDLING THE MOTION FOR NEW TRIAL.

It has been held that a post trial Motion for New Trial is a critical stage of a defendant's case. *See, Kitchen v. United States,* 227 F.3d 1014, 1019 (7th Cir.2000), *McAfee v. Taylor,* 630 F.3d 383 (5th Cir.2011) Defendant respectfully submits that Defendant's counsel was ineffective in preparing, investigating and then arguing the new trial motion. Competent action by counsel in handling the new trial motion would likely have resulted in a new trial. It is therefore respectfully submitted the Court erred in its Findings of Fact, Conclusions of Law and Order when it found counsel acted effectively in preparing and arguing the Motion for New Trial.

It is respectfully submitted that the District Court wrongly decided Defendant's Motion for a New Trial which was filed after the verdict on April 28, 2014. (A.A. 2593-95) The Motion for New Trial filed pursuant to NRS 176.515 raised three evidentiary issues arising during the trial and post trial deliberation. (A.A. 083-87)

The State filed an Opposition to the Defendant's New Trial Motion on June 13, 2014. (A.A. 088-101) On July 9, 2014, Defendant filed a Reply to State's Response and a Supplement to Defendant's Motion for a New Trial. (A.A. 102-115) The Supplement to the Motion raised the issue of juror misconduct during deliberation. The issue of juror misconduct was granted a evidentiary hearing on November 24, 2014. (A.A. 2381-2480) The District Court, after hearing additional evidence, then

denied the Motion on June 30, 2015. (A.A. 2455) The Nevada Supreme Court, in its Order of Affirmance dated May 24, 2017, cited *Meyer v. State,* 119 Nev. 564 (2003) and denied Defendant's appeal, stating that: . . . "any misconduct by jurors was not prejudicial." (A.A. 2481)

Defendant however respectfully submits there was substantial evidence of prejudicial juror misconduct by a juror who was discovered by defense counsel's investigator. This evidence of misconduct should have been sufficient to have persuaded the District Court that juror misconduct very likely prejudiced the jury and denied Defendant a fair trial. It is respectfully submitted there was at least a reasonable probability the jury was prejudiced. *See, Williams-Davis,* 90 F.3d at 496; *People v. Brown,* 399 N.E.2d 51, 53 (N.Y. 1979); *see also United States v. Keating,* 147 F.3d 895, 900 (9th Cir.1998); *United States v. Berry,* 64 F.3d 305, 307 (7th Cir.1995) (reasonable possibility misconduct affected verdict); *State v. Smith,* 573 N.W.2d 14, 18 (Iowa 1997) (reasonable probability misconduct affected verdict).

Appellant submits defense counsel's error in this case in preparing the new trial motion was a major reason the District Court denied the new trial motion. This occurred because the key witness for the Defendant, Kathleen Smith, refused to affirm her earlier Affidavit unequivocally in court on November 24, 2014, even

though she paradoxically stated the substance of the unsigned Affidavit was true, (A.A. 2403-04), when she testified under oath at the evidentiary hearing on November 24th, her testimony was equivocal. (A.A. 2400-06) The trial judge chose to exercise his discretion and deny the Motion for New Trial. (A.A. 2455)

According to the Affidavit of Harrison Mayo, Jr., investigator for the Defendant, the witness, Kathleen Smith had advised him about juror misconduct, stating she had observed another juror make prejudicial statements during deliberations. Mayo noted these statements in his Affidavit, dated July 9, 2014, which was filed with the Motion for New Trial. The relevant part of Mayo's Affidavit stated: . . .

> "5. That Ms. Allen and I interviewed this juror, Ms. Smith, and she disclosed that during deliberations, another juror started talking about being sexually abused as a child. She described this juror as being juror number seven (7), Yvonne Lewis. Ms. Smith further said that Ms. Lewis became emotional during deliberations and began crying while she talked about her own experiences of sexual abuse.
>
> 6. That after she said she had been sexually abused, she began talking about the Defendant, Fred Harris, needing to be punished for what he did.

7. [*That*] after Ms. Allen made changes to the Affidavit as requested by Ms. Smith, she now does not want to get involved." (A.A.110,111) (Emphasis added)

Kathleen Smith then was asked to make minor changes to the Affidavit, which had been prepared for her. Defense counsel however did not get her signature on the revised Affidavit before the evidentiary hearing. Unfortunately for the Defendant, because counsel had not completed the task of preparing Ms. Smith's revised Affidavit **and** obtaining her signature to the revised Affidavit **before** the evidentiary hearing, the witness then would not fully acknowledge the facts contained in the previously prepared Affidavit when in court. (A.A. 2402-2404)

Appellant directs the court to the testimony of Kathleen Smith at the evidentiary hearing on November 24, 2014. She was called to testify about juror Yvonne L., who spoke to her about sexual abuse during jury deliberations. (A.A. 2399-2400) She then attempted to explain why she would not sign the Affidavit previously prepared by the defense investigator when questioned by the prosecutor on cross-examination. She was asked:

Q. Are you saying that Yvonne Lewis, that juror that's sitting outside, actually said that she was sexually abused? (Emphasis added)

A. From what I recall. (Emphasis added)

Q. Are you saying that she actually said that she was basing her verdict on the fact that she had been sexually abused and, therefore, she believed the victims?

A. I didn't say that. I said it appeared. My perception was. (Emphasis added)

Q. And you're saying that everybody was calm up until the third day, that it was the last day that this happened?

A. Was saying everybody was calm?

Q. Well, that's what you said at first.

A. Oh.

Q. How were the jurors? They were calm. Everybody was calm.

A. So what is your question? I didn't understand the question.

Q. Is that your position that everything was calm the first day and calm the second day and that things got heated the third day?

A. From what I recall.

Q. Were you trying to get a job with my office, the District Attorney's

office?

A. I have been, yes. (Emphasis added)

Q. And is that why you refused to sign the affidavit that Ms. Allen gave you?

A. No.

Q. Then why wouldn't you sign it?

A. I didn't feel comfortable at that time, I didn't - (Emphasis added)

Q. 'Cause it wasn't true?

A. No, I'm not saying that. (Emphasis added)

Q. Then why didn't you sign it?

A. I just didn't.

Q. Why?

A. I didn't.

Q. Well, I understand. But why?

MS. ALLEN: Objection, Your Honor, asked and answered.

MS. LUZAICH: She's not answering it.

THE COURT: You need to answer why. 'Cause you had to have a reason why you didn't sign the affidavit. I mean you're the one that initiated the communication with the Defendant's mother.

THE WITNESS: I just - I just changed my mind about it; I just didn't sign it.

MS. LUZAICH: 'Cause it wasn't true?

THE WITNESS: I didn't say that. (Emphasis added)

MS. ALLEN: Objection, Your Honor, asked and answered.

THE COURT: Was the affidavit true that Ms. Allen gave you to sign?

THE WITNESS: Yes, it was **true** but I didn't sign it. (Emphasis added)

THE COURT: Okay. It was true but you didn't want to sign it.

THE WITNESS: Right.

THE COURT: And why didn't you want to sign it?

THE WITNESS: 'Cause I just changed my mind about it that's all.

THE COURT: You changed your mind about what?

THE WITNESS: About signing the affidavit.

THE COURT: Oh, okay. So you told Ms. Allen you would sign an affidavit -

THE WITNESS: Yeah, and then change -

THE COURT: - and then you changed your mind?

THE WITNESS: Yes.

THE COURT: You didn't change your mind about the information that was in there, though? (Emphasis added)

THE WITNESS: No, no. (Emphasis added)

THE COURT: Okay. (A.A. 2402-2404)

It should be noted at the hearing she clearly affirmed the prior Affidavit **was** true multiple times. She did not sign the Affidavit, and although the transcript reflects a reluctance of the witness to sign the Affidavit, she clearly states *under oath* numerous times everything in the Affidavit was true. (A.A. 2400)

It is respectfully submitted that the most logical explanation for her relunctance seems to be some sort of pressure was affecting her, possibly from law enforcement or the District Attorney's Office. No other reason makes sense.

This apparent equivocation in this critical witness' testimony clearly prejudiced the Defendant when arguing the Motion for New Trial. The witness had previously acknowledged prior to defense counsel's investigator, Harrison Mayo, Jr., that

another juror had what could only be described as an emotional breakdown during deliberations. That juror was said to have been tearfully crying and upset when discussing her own experience of sexual assault. (A.A. 2390, 91) It is respectfully submitted hearing such facts most certainly could have influenced a deadlocked jury and therefore these facts should be considered ample grounds for a new trial.

For some reason unknown, while in court, juror Kathleen Smith abruptly changed her mind and would not sign her Affidavit. She did not give the Court a satisfactory answer for not signing the Affidavit. (A.A. 2404) Counsel was unable to persuade her to explain what circumstances had changed her mind or why she wouldn't sign the prepared Affidavit. (A.A. 2404-2406) Was there simply a loss of memory by the juror, Kathleen Smith, or some sort of pressure on her which was never discovered? She never testified under oath the information in the Affidavit was untrue. (A.A. 2403, 2045) She actually testified to the Court the testimony in the Affidavit was true. (A.A. 2403)

It was established she was trying to get a job with the District Attorney's Office. (A.A. 2402) The defense counsel had prepared a Motion for New Trial to set the verdict aside with solid facts of juror misconduct, with a prepared Affidavit by counsel's investigator, Mr. Mayo. Defense counsel however was clearly ineffective

because he neglected to adequately prepare his principle witness before trial. Failure to get the witness to sign the revised Affidavit, before the hearing, was a critical error that doomed the Motion for New Trial to failure. This was gross ineffectiveness that must be considered reversible error under *Strickland v. Washington, supra*. It was impossible to prove to the District Court's satisfaction the facts necessary to establish the Motion for New Trial without a clear and unambiguous signed statement from the witness, Kathleen Smith, because her testimony at the hearing appeared inconclusive. Although it seemed likely she had probably been influenced to recant, or to equivocate during her testimony, defense counsel could not prove that had occurred because of poor investigative techniques. The case should nevertheless be reversed under *Strickland* because of counsel's clear ineffective assistance in preparing the Motion.

VII. THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY ADEQUATELY RESEARCHING THE LAW TO CHOOSE THE MOST MERITORIOUS ISSUES FOR A REVERSAL.

The Nevada Supreme Court has previously considered the issue of ineffective assistance of counsel on appeal. In *Kirksey v. State,* 112 Nev. 980 (1996), the

Supreme Court noted:

> "The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State,* 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. *See Jones v. Barnes,* 463 U.S. 745, 751-54 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. *Daniel v. Overton,* 845 F.Supp. 1170, 1176 (E.D. Mich. 1994); *Leaks v. United States,* 841 F.Supp. 536, 541 (S.D.N.Y. 1994), *aff'd,* 47 F.3d 1157 (2d Cir.), *cert. den.,* __ U.S. __ , 116 S.Ct. 327 (1995). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. *Duhamel v. Collins,* 955 F.2d 962, 967 (5th Cir.1992); *Heath,* 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. *Heath,* 941 F.2d at 1132. *Kirksey*, *Id*. 998 (Emphasis added)

Reviewing the Defendant's Appellate Brief for effectiveness, it is clear that defense counsel did not meet *Strickland's* standard of reasonably effective assistance on appeal. The waiver of any appellate issues or failure to raise any issues by

appellate counsel must be reasonable. *Kirksey*, *Id*. If an appellate issue had a very good chance of success or even just a reasonable chance of success, it is respectfully submitted . . . that defense counsel erred by failing to raise such an issue on appeal.

The failure of counsel to raise the best or most meritorious issues on appeal may be grounds for reversal of his conviction. *Banks v. Reynolds,* 54 F.3d 1508 (10th Cir.1995). It is respectfully submitted that counsel in this case failed in getting a reversal of the case because he overlooked the most meritorious issues on appeal that may have reversed the conviction. Potential issues overlooked by defense counsel that may have been more meritorious than the issues actually raised include:

1.The court erred in sentencing the Defendant to a sentence of life, with a minimum of 918 months, later reduced to 720 months. That was cruel and unusual punishment in violation of the Eighth Amendment;

2.The court erred by wrongly limiting cross-examination of essential witnesses;

3.The court committed reversible error by not restraining prosecutorial misconduct that was plain error;

4. The cumulation of prosecutorial misconduct amounted to plain error.

Effective appellate advocacy in this case, as in any case, required several distinct but interrelated skills including:

Careful review and analysis of the entire record to recognize the important appellate issues. The requires a basic understanding of criminal law, constitutional law and the laws of evidence and trial procedures;

Organizing the record to include all the material facts;

Understanding and researching the law as it applies to the case;

Writing a persuasive appellate brief that incorporates all the material facts with the relevant case law and other authorities;

Counsel had to be aware of recent changes in the law and be willing to challenge settled law and precedent when necessary.

It is respectfully submitted counsel did not apply all of these necessary skills effectively in preparing Defendant's appeal. His lack of effectiveness in preparing the Defendant's direct appeal was evident and requires reversal under *Strickland*.

In *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court found appellate counsel was ineffective for not effectively rebutting the prosecutor's theory with expert testimony. It is respectfully submitted that in this case counsel was also ineffective under *Strickland* because there were several potential winning issues on appeal. Defendant was clearly prejudiced by his attorney's failure to raise significant appellate issues that could have resulted in

reversing the conviction.

Consider *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir.1995), where the court in reversing stated:

> ". . . When a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue. *Cook,* 45 F.3d at 392-93; *Dixon*, 1 F.3d at 1083. Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel," *id*. at 1083 n.5, because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. *See, Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983). Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *see Tapia v. Tansy,* 926 F.2d 1554, 1564 (10th Cir.), *cert. den.,* 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d 84 (1991). However, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." *Cook,* 45 F.3d at 394-95 (citing *Page v. United States,* 884 F.2d 300, 302 (7th Cir.1989)).
>
> In this case, Mr. Banks' appellate counsel failed to

> raise either the *Brady* claim or the ineffective assistance of trial counsel claim on direct appeal. These were not frivolous or weak claims amenable to being winnowed out of an otherwise strong brief. They were clearly meritorious. *Id*. 1515 (Emphasis added)

As in *Banks,* counsel here failed to effectively raise several non-frivolous claims that would have been a likely winner on appeal. This was ineffectiveness under *Strickland*.

(1) Defendant submits the extraordinary lengthy sentence the Defendant received should have been an appellate issue. Even though courts have held the usual rule is that a sentence within statutory guidelines is presumptively valid, *see Glegola v. State,* 110 Nev. 344, 348 (1994); *United States v. Moriarty,* 429 F.3d 1012 (11th Cir.2005). Appellant respectfully submits his sentence was excessively harsh and disproportionate. The sentence he received of 60 years to life is cruel and unusual and violates the Eighth Amendment. The sentence exceeds the sentence in many homicide cases. This extraordinarily harsh sentence should have been raised as an issue on direct appeal as a violation of the Defendant's Eighth Amendment rights.

(2) Counsel erred by not raising the issue of prosecutorial misconduct on appeal.This issue should have been raised as plain error because the gross misconduct violated the Defendant's Fourteenth Amendment due process rights. It was ineffective

assistance to have not even briefed this issue on appeal.

Because one or more of these issues were meritorious in that they may have succeeded on appeal, and any competent counsel analyzing all the facts and law should have determined these issues had merit, counsel did not fulfill his duty under *Strickland* to provide effective assistance on appeal.

VIII. CUMULATIVE ERROR BY COUNSEL REQUIRES REVERSAL OF THE CONVICTION.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It is respectfully submitted that even when considered separately, each of the seven errors or omissions of counsel were of such a magnitude that they required reversal. It is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State,* 119 Nev. 498. *See also, Sipsas v. State,*102 Nev. at 123, 216 P.2d at 235 (1986), which stated: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial." (Emphasis added)

Great prejudice to the Defendant resulted from the cumulative impact of the multiple deficiencies. *Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. den., 440 U.S. 970, *Harris by and through Ramseyer v. Wood,* 61 F.3d 1432 (9th Cir.1995). The multiple errors of counsel in this case when cumulated

together therefore must require reversal. A quantitative analysis makes that clear. *See, VanCleave, Rachel A.,* When is Error Not an Error? Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993). *See also, McLaughlin,* It All Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine, 30 Ga. St. U. L. Rev. 859 (2014).

It has been held that the relevant factors for a court to consider in evaluating a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also, Big Pond v. State,* 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003), *United States v. Dado,* 759 F.2d 550 (6th Cir.2014), *Mak v. Blodgett,* 970 F.2d 614 (9th Cir.1992), *Rodriguez v. Hake,* 928 F.2d 534 (2d Cir.1991).

Applying the *Mulder* factors to this case, the quality and character of the error and the gravity of the crimes charged demanded especially vigorous advocacy from counsel both pretrial and during trial. The failure of counsel to adequately prepare and investigate and the failure of counsel to file all necessary motions was clear error under *Strickland, supra*, and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Defense

counsel clearly failed to zealously and competently represent Defendant during trial and also on appeal. This was a close case as the jury was out three days. The result of counsel's error was a conviction with an extraordinarily lengthy sentence for the Defendant. The cumulation of errors in this case compels reversal of the conviction and sentence.

CONCLUSION

The Defendant, Frederick H. Harris, respectfully submits for the reasons stated, that he has met his burden under *Strickland v. Washington,* to show he received ineffective assistance of counsel in this case. Wherefore, this Honorable Court should reverse his conviction and order his case remanded to District Court for such relief as proper.

DATED this 29th day of October, 2020.

Respectfully submitted,

/s/ Terrence M. Jackson

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and it contains 11,789 words, which is within the word limit.

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

DATED this 29th day of October, 2020.

Respectfully submitted,

/s/ Terrence M. Jackson

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Counsel for Petitioner/Defendant *Frederick H. Harris*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 29th day of October, 2020, I served a copy of the foregoing: Appellant Frederick H. Harris's Opening Brief as well as Volumes I - XI of the Appendix, as follows:

[X] Via Electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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