IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 81255 / 81257

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 8

SUMMARY OF THE ARGUMENT 15

ARGUMENT 16

I. THE DISTRICT COURT DID NOT ERR IN FINDING COUNSEL'S PRE-TRIAL INVESTIGATION/PREPARATION TO BE EFFECTIVE ... 21

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE DURING VOIR DIRE. 24

III. THE DISTRICT COURT DID NOT ERR IN NOT FINDING COUNSEL INEFFECTIVE FOR NOT FILING A MERITLESS MOTION 29

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THAT COUNSEL WAS AN EFFECTIVE ADVOCATE AT TRIAL 33

V. THE DISTRICT COURT DID NOT ERR BY NOT FINDING THAT COUNSEL WAS INEFFECTIVE AT SENTENCING 40

VI. APPELLANT'S SENTENCE WAS NOT CRUEL AND UNUSUAL 42

VII. THE DISTRICT COURT DID NOT ERR BY NOT FINDING THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE DURING THE MOTION FOR NEW TRIAL 43

VIII. THE DISTRICTR COURT DID NOT ERR IN FINDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE 46

IX. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO CUMULATIVE ERROR 49

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 52

CERTIFICATE OF SERVICE 53

TABLE OF AUTHORITIES

Page Number:

Cases

Abbott v. State,
122 Nev. 715, 138 P.3d 462 (2006) 29

Allred v. State,
120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) 27, 42

Blume v. State,
112 Nev. 472, 475, 915 P.2d 282, 284 (1996) 42

Browning v. State,
120 Nev. 347, 359, 91 P.3d 39, 48 (2004) 36

Culverson v. State,
95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979) 42

Dawson v. State,
108 Nev. 112, 117, 825 P.2d 593, 596 (1992) 19, 32, 34

Deveroux v. State,
96 Nev. 388, 610 P.2d 722 (1980) 43

Donovan v. State,
94 Nev. 671, 675, 584 P.2d 708, 711 (1978) 19

Ennis v. State,
122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) 18, 32, 36, 50

Ford v. State,
105 Nev. 850, 853, 784 P.2d 951, 953 (1989) 19

Glegola v. State,
110 Nev. 344, 871 P.2d 950 (1994) 43

Guy v. State,
108 Nev. 770, 780, 839 P.2d 578, 584 (1992) 26

Hall v. State,
91 Nev. 314, 315, 535 P.2d 797, 798 (1975) 45
Hargrove v. State,
100 Nev. 498, 502, 686 P.2d 222, 225 (1984) 20, 25, 26
Harrington v. Richter,
562 U.S. 86, 111, 131 S.Ct. a770, 791 (2011) 22
Jackson v. Warden,
91 Nev. 430, 432, 537 P.2d 473, 474 (1975) 18
Jones v. Barnes,
463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983) 47
Jones v. State,
110 Nev. 730, 877 P.2d 1052 (1994) 39
Kirksey v. State,
112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) 17, 47
Koerschner v. State,
116 Nev. 111, 13 P.3d 451 (2000) 30
Maresca v. State,
103 Nev. 669, 673, 748 P.2d 3, 6 (1987) 48
McNelton v. State,
115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) 20, 27, 46
Means v. State,
120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) 18, 20
Molina v. State,
120 Nev. 185, 192, 87 P.3d 533, 538 (2004) 21
Morris v. Slappy,
461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983).....21

Mulder v. State,
116 Nev. 1, 17, 992 P.2d 845, 855 (2000) 50
Pellegrini v. State,
117 Nev. 860, 879, 34 P.3d 519, 532 (2001) 46
Randell v. State,
109 Nev. 5, 846 P.2d 278 (1993) 43
Rhyne v. State,
118 Nev. 1, 8, 38 P.3d 163, 167 (2002) 18, 34, 36, 39
Riley v. State,
110 Nev. 638, 647, 878 P.2d 272, 278 (1994) 17
Rowland v. State,
118 Nev. 31, 39, 39 P.3d 114, 119 (2002) 36
Sefton v. State,
72 Nev. 106, 110, 295 P.2d 385, 387 (1956) 37
Silks v. State,
92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) 42
State v. District Court (Romano),
120 Nev. 613, 97 P.3d 594 (2004) 30
State v. Love,
109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) 17
Strickland v. Washington,
466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984).....17
U.S. v. Kerr,
981 F.2d 1050, 1053 (9th Cir. 1992).....36
United States v. Aguirre,
912 F.2d 555, 560 (2nd Cir. 1990).....47

United States v. Cronic,
466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).....19
United States v. Ridley,
134 U.S. App. D.C., 412 F. 2d 1126 (1967) 27
United States v. Rivera,
900 F.2d 1462, 1471 (10th Cir. 1990).....50
Walker v. State,
85 Nev. 337, 343, 455 P.2d 34, 38 (1969) 46
Warden, Nevada State Prison v. Lyons,
100 Nev. 430, 432, 683 P.2d 504, 505 (1984) 18

Statutes

NRS 34.735(6) 20
NRS 50.700.....31
NRS 50.700(1) 31

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR., Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 81255 / 81257

RESPONDENT'S ANSWERING BRIEF

Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

While this post-conviction appeal challenges a judgment of conviction based on a plea of guilty, this appeal also challenges the convictions for Category A felonies. The appeal is presumptively assigned to the Nevada Supreme Court. See NRAP 17(b)(3).

STATEMENT OF THE ISSUE

1. Whether the district court correctly denied Appellant's Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

On July 23, 2013, Defendant Frederick Harris ("Appellant") was charged by way of Information with the following: Counts 1, 15-18: Child Abuse, Neglect, or

Endangerment (Category B Felony - NRS 200.508); Counts 2-3, 6, 8-11, 13-14, 21-22: Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 4-5, 7, 12, 20: Lewdness with a Child Under the Age of 14 (Category A Felony - NRS 201.230); Counts 19, 25, 28, 37: First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320); Count 23: Coercion (Sexually Motivated) (Category B Felony - NRS 207.190); Counts 24 and 27: Administration of a Drug to Aid in the Commission of a Crime (Category B Felony - NRS 200.405); Counts 26, 29-35: Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 36, 39-41: Sexual Assault (Category A Felony - NRS 200.364, 200.366); Count 38: Battery with Intent to Commit Sexual Assault (Category A Felony - NRS 200.400); Count 42: Pandering (Category C Felony - NRS 201.300); Count 44: Living from the Earnings of a Prostitute (Category D Felony - NRS 201.320); and Count 45: Battery by Strangulation (Category C Felony - NRS 200.481). 1 Appellant's Appendix (AA) 0001.

A jury trial commenced on March 25, 2014. 1 AA0125. On April 15, 2014, after hearing 12 days of evidence and after approximately two days of deliberation, the jury found Appellant guilty of the following: eleven counts of Sexual Assault With a Minor Under Fourteen Years of Age; five counts of Lewdness With a Child Under the Age of 14; six counts of Sexual Assault With a Minor Under Sixteen

Years of Age; four counts of Sexual Assault; four counts of First Degree Kidnapping; one count of Administration of a Drug to Aid in the Commission of a Crime; one count of Coercion (Sexually Motivated); one count of Battery With Intent to Commit Sexual Assault; one count of Child Abuse, Neglect or Endangerment; one count of Pandering; and one count of Living From the Earnings of a Prostitute. The jury found Defendant not guilty of the following: two counts of Sexual Assault with a Minor Under Sixteen Years of Age; one count of Sexual Assault; one count of Administration of a Drug to Aid in the Commission of a Crime; four counts of Child Abuse, Neglect or Endangerment; and one count of Battery by Strangulation. 1 AA0070.

Appellant filed a Motion for New Trial on April 28, 2014. 1 AA0081. The State filed an Opposition on June 13, 2014. 1 AA0088. Appellant's Motion was denied on June 30, 2015. 10 AA2441-61.

Appellant was sentenced as follows: COUNT 2 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 3 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 4 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 5 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections

(NDC); COUNT 6 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 7 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 8 – LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 9 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 10 - LIFE with a MINIMUM Parole Eligibility of THIRTY FNE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 11 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 12- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 13 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 14 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 16 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 19 – LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 20- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada

Department of Corrections (NDC); COUNT 21 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 22- LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 23 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 24 - to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); COUNT 25 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 26 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 28 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 29 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 31 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 33 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 34 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 35 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20)

YEARS in the Nevada Department of Corrections (NDC); COUNT 36 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 37 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 38 - LIFE with a MINIMUM Parole Eligibility of TWO (2) YEARS in the Nevada Department of Corrections (NDC); COUNT 39- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 40 - LIFE with a MIN MUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 41 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 42- to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); and COUNT 44 - to a MINIMUM of EIGHTEEN (18) MONTHS and a MAXIMUM of FORTY EIGHT (48) MONTHS in the Nevada Department of Corrections (NDC); COUNTS 2, 3, 6, 8, 9, 10, 11,13, and 14 are to run CONCURRENT with each other; COUNT 21 to run CONSECUTIVE to COUNT 22; COUNTS 4, 5, 7, 12, and 20 are to run CONCURRENT with each other and to the other Counts; COUNT 16 to run CONCURRENT to the other Counts; COUNTS 19, 25, 28, and 37 are to run CONCURRENT with each other and to the other Counts; COUNT 23 to run CONCURRENT to the other Counts; COUNT 24 to run

CONCURRENT to the other Counts; COUNTS 26, 29, 31, 33, 34, and 35 are to run CONCURRENT with each other and CONSECUTIVE to the other Counts; COUNTS 36, 39, 40, and 41 are to run CONCURRENT with each other; COUNT 38 to run CONCURRENT to the other Counts; and, COUNT 42 to run CONSECUTIVE to COUNT 44, with NINE HUNDRED SEVENTY NINE (979) DAYS CREDIT FOR TIME SERVED. Appellant 's AGGREGATE TOTAL SENTENCE is LIFE with a MINIMUM sentence of SEVEN HUNDRED TWENTY (720) MONTHS. 10 AA2462-73.

On October 27, 2015, Appellant filed a Notice of Appeal. 1 AA0117.

On November 2, 2015, the district court filed the Judgment of Conviction. 1 AA0119.

On November 14, 2016, the district court filed an Amended Judgment of Conviction. 10 AA2474.

On May 24, 2017, the Supreme Court of Nevada affirmed Appellant's Judgment of Conviction. Remittitur issued on November 21, 2017. 10 AA2480.

On November 16, 2018, Appellant filed a Petition for Writ of Habeas Corpus. 10 AA002490. On November 1, 2019, Appellant filed his Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). 10 AA2498. On April 6, 2020, the State filed its Response to Appellant's Supplemental Points and Authorities in Support of Petition for Writ of

Habeas Corpus for Post-Conviction Relief. 11 AA2529. On April 23, 2020, the district court denied Appellant's Petition. 11 AA2607.

On May 27, 2020, Appellant filed a Notice of Appeal, appealing the district court's denial of his Petition for Writ of Habeas Corpus. 11 AA2599.

STATEMENT OF THE FACTS

Appellant physically and sexually assaulted T.D. and several of her children between 2004 and 2012. T.D. and Appellant first became acquainted in 2004 in Louisiana and T.D. moved to Las Vegas shortly thereafter. 3 AA00636, 641-42. For several months between 2004 and 2005, T.D. and her five children (V.D., M.D., S.D., Tah. D., and Taq. D.) lived with Appellant's girlfriend, who they came to call "Miss Ann." 3 AA00644.

T.D. was working as a cocktail waitress in Louisiana where she lived with her five children when she met Appellant in 2004. 3 AA00636, 699. T.D.'s children, who ranged in age from toddlers to twelve years old, were enrolled in school for the first time in 2004. 3 AA0659. Appellant, a Las Vegas resident, was visiting Louisiana and met T.D. at the bar where she worked. 3 AA00639-39. Shortly thereafter, T.D. left Louisiana for Las Vegas, while her children stayed behind. 3 AA00640-41. A few days after T.D.'s arrival in Las Vegas, Appellant's brother picked up T.D.'s children and moved them from Louisiana to Las Vegas. 3 AA00641-42.

In 2004, when T.D.'s children moved to Las Vegas, Appellant's girlfriend, Miss Ann, was living at a house on Trish Lane while Appellant lived in a separate apartment. 3 AA00644-45. The children and T.D. moved in with Miss Ann, where they lived for about six months. 4 AA00997. During the same period of time, Appellant regularly hit V.D. and S.D. with both his hands and a belt. 4 AA00750. Appellant also first sexually assaulted V.D. who was approximately twelve during this time, between December 2004 and May 2005, while she was living with Miss Ann and he was living in his own apartment.

One morning when V.D.'s siblings were ill, Appellant took V.D and her siblings to his apartment, where the children fell asleep. 4 AA00998-99. When V.D. woke up, her siblings were no longer in the house and Appellant told V.D. that they were at the park. 4 AA00999. Appellant entered the bedroom where V.D. was, took his penis out of his pants and placed her hand on it. 4 AA01000- 5 AA01001. He told her that he would beat her if she told anyone what happened and proceeded to remove V.D.'s pants. 5 AA01001-02. He pushed his fingers into her vagina, and then his penis. 5 AA01002-03. He told her again that he would beat her if she told anyone what he had done. 5 AA01003.

About a week after this assault, V.D. told Miss Ann and her mother what Appellant had done to her. 5 AA01005. Miss Ann informed Appellant's mother. 5 AA01005-06. Miss Ann, Appellant, and Appellant's mother confronted V.D., who

they berated for reporting this assault and told her they did not believe her. 5 AA01006-07. At that time, no one reported the abuse or sexual assault to authorities. Subsequently, T.D. and her five children left Las Vegas and moved to Utah. 5 AA01007. They lived in Utah for approximately one-and-a half years, before T.D. returned to Las Vegas alone. 3 AA00650-51; 5 AA01008. While T.D. was in Las Vegas, her children were taken into state custody in Utah. 3 AA00652. T.D. returned to Utah and over the course of six months participated in parenting classes and was reunited with her children. 3 AA00652-53. Shortly after, she abruptly moved back to Las Vegas, this time taking her children with her. 3 AA00654-55.

When T.D. and her children moved back to Las Vegas in the summer of 2007, Miss Ann and Appellant were living together in a house on Blankenship Street. 3 AA00656-57. T.D.'s four youngest children moved into that house, while T.D. and V.D. moved into the house of Appellant's mother. 3 AA00656-68. Appellant committed another sexual assault on V.D., who was 15 years old, during this time period. Leading up to this assault, Appellant believed V.D. was a virgin and told her he wanted to "take her virginity." 5 AA01014. On August 24, 2007, Appellant drove around town with V.D. and T.D. in the car during the day, picking up alcohol which all three consumed. 5 AA01015. That night, Appellant drove the three of them up to the top of a hill where he parked the car. 5 AA01016. Initially, Appellant and T.D. sat in the front seat, while V.D. sat in the back. Id. Appellant moved to the back seat

where he began to rub V.D.'s breasts while her mother watched. 6 AA00662. T.D. seemed amused as Appellant removed her daughter's pants. 5 AA01018. He raped V.D. in the backseat of the car by forcing his penis into her vagina and told her he would do the same to her again. 5 AA01018-19. Afterwards, Appellant drove back to his mother's house where he dropped off V.D. and T.D. Id.

In the next few months, T.D. and V.D. moved out of Appellant's mother's house and into a long-term motel efficiency apartment. 3 AA00664 T.D.'s four youngest children continued to live with Appellant and Miss Ann on Blankenship Drive. While T.D. and V.D. lived in the efficiency, Appellant pressured T.D. to engage in sex work and give the money she earned to him, in addition to the wages she earned through her job at Bally's housekeeping. 3 AA00664-68. Appellant and T.D. engaged in a consensual sexual relationship during this time. Id. Appellant also continued to sexually assault V.D., who was then 15, while she and T.D. lived in the efficiency. 5 AA01019-21. At times, Appellant would come to the apartment while T.D. was at work, drink beer, and force V.D. to have sex with him. Id. Other times he would rape V.D. while T.D. was home. 5 AA001022-23. On at least two occasions, T.D. engaged in sexual activities with V.D. at Appellant's behest. 5 AA01023-25. Specifically, Appellant insisted that T.D. insert one end of a sex toy into her vagina while the other end was inserted into V.D.'s vagina. 5 AA01024. He also forced T.D. to perform oral sex on V.D. without V.D.'s consent and forced T.D.

to hold a vibrator to V.D.'s genitals. 3 AA00673-74. On another occasion, Appellant became enraged with T.D. who had not surrendered enough money to him, and in response he raped her by forcing his penis into her anus. 5 AA00669-70.

In October of 2007, T.D. and V.D. moved from the efficiency apartment to an apartment on Walnut Street, where they lived for about six months. 3 AA00668-69 Appellant continued to rape V.D., who was 15 years old, at the apartment on Walnut Street. 5 AA01031. In July of 2008, T.D. and V.D. moved into the Blankenship house. 3 AA00676. Appellant, Miss Ann, Miss Ann's daughter, T.D., and all five of T.D.'s children were living in the house on Blankenship at that point. 5 AA01032-33. Appellant raped V.D., aged 16, once while she lived at the Blankenship house, in the bathroom connected to his bedroom. 5 AA001035-36.

Appellant was also physically abusive to T.D. and her children. Among other incidents, Appellant struck the children with a belt, punched S.D. in the face and stomach, and strangled M.D. 4 AA00765; 5 AA01061; 6 AA01299. V.D. lived there for about two years before she and T.D. moved with two of V.D.'s siblings. 5 AA01158. That left T.D.'s youngest two children (Tah. D. and Taq. D. with Appellant and Miss Ann at the Blankenship house, while T.D., V.D., M.D., and S.D. lived in an apartment called "St. Andrews." 3 AA00679.

Appellant also raped V.D. once while she was living at the St. Andrew's apartment, and approximately 17 years old. 5 AA01038. In 2010, when V.D., her

mom, and siblings were moving into the St. Andrew's apartment, V.D. met Rose Smith, who she came to call Miss Rose. 5 AA01042. Over the course of several months, V.D. spent time at Miss Rose's house, where she eventually lived for a period of time. 5 AA01042-44. Before V.D. moved in with Miss Rose, while she was visiting in December of 2011, V.D. told Miss Rose about the sexual abuse she had experienced. 5 AA01075. Miss Rose took V.D. to a police station in Henderson, where the desk officer called the special victims unit and Detective Aguiar was dispatched to the station to interview Miss Rose and V.D. 5 AA0177; 8 AA01894. After interviewing V.D. at the station, Detective Aguiar went to V.D.'s home on Center Street where T.D. and two of V.D.'s siblings lived. 8 AA01920. Over the course of his interviews, Detective Aguiar learned that V.D. had been physically and sexually assaulted by Appellant on multiple occasions and that V.D.'s younger sisters were currently living with Appellant. 5 AA01078-79. Detective Aguiar then proceeded to Appellant's home on Blankenship. 8 AA01906-07. After interviewing everyone in the home, the officers concluded that probable cause did not exist to make an arrest. 8 AA01911. The officers from Henderson Police Department made contact with CPS who began an investigation as well. 8 AA01785-86.

In the summer of 2012, two years after T.D., V.D., S.D., and M.D. moved out of the Blankenship house, and a few months after the police first questioned him, Appellant began sexually assaulting Tah. D., who was twelve years old. On more

than one occasion, Appellant sexually assaulted Tah. D. in the bathroom attached to his bedroom by rubbing her breasts and the outside of her vagina with his hand, and putting his penis inside her vagina. 7 AA01749-8 AA01753. At other times, he forced Tah. D. to put her hand on his penis, and put his penis in her mouth and vagina in her bedroom. 8 AA01756-57. He also sexually assaulted Tah. D. in the same manner in the garage. 8 AA01759-80. On one particular occasion, he woke Tah. D. and took her from her bedroom to the laundry room where he unbuckled his pants and forced his fingers in her vagina. 7 AA01744-46. When Taq. D. began to approach the laundry room, he stopped and told Tah. D. not to tell anyone what he had done. 7 AA01747-48. Taq. D. saw Appellant through a crack in the laundry room door touching Tah. D.'s leg and asked Tah. D. what happened. 7 AA01573-77. Tah. D. subsequently told Taq. D. that Appellant had molested her. 7 AA01748-49. Together, the two girls told Miss Ann. At that time, Miss Ann took both Tah. D. and Taq. D. to a gynecologist for pelvic exams. 7 AA01577-80. Miss Ann did not report the disclosure to the police and, although Tah. D. and Taq. D. briefly lived with their mother and siblings in Henderson during the summer of 2012, they returned to the Blankenship house in September. 7 AA01581.

In September of 2012, approximately nine months after the police first reported to the Blankenship house and two or three months after Tah. D. was sexually assaulted, Taq. D. called the CPS hotline to report Appellant sexually

assaulting Tah. D. 7 AA01581-82. CPS and the Las Vegas Metropolitan Police Department were assigned to the case and arranged for Tah. D. and Taq. D. to be interviewed and undergo medical exams at the Children's Assessment Center. 8 AA01786-90. Miss Ann was also interviewed at that time. T.D. and her other children were subsequently interviewed. 8 AA01790-93. Appellant was arrested early in 2013. 9 AA02025.

SUMMARY OF THE ARGUMENT

Appellant is appealing the denial of his Petition for Writ of Habeas Corpus in district court. However, none of Appellant's grounds for post-conviction relief contained any merit.

First, Appellant argues that the district court erred in not finding that counsel's pretrial investigation was ineffective. However, Appellant never explains what a better investigation would have uncovered. Further, counsel clearly investigated the case thoroughly enough to know all the facts of the case. Second, Appellant argues that the district court erred in not finding that counsel was ineffective during voir dire. However, counsel's conduct during voir dire did not prejudice Appellant, and Appellant's arguments that counsel needed to request individual sequestered voir dire and hire a jury selection expert are without legal support. Third, Appellant argues that the district court erred in not finding that counsel was ineffective for not filing a motion for psychiatric examination of certain witnesses. However, such a

motion would have been futile. Fourth, Appellant argues that the district court erred in not finding that counsel was an ineffective advocate at trial. However, the record reveals that counsel was effective at trial. Fifth, Appellant argues that the district court erred in not finding that counsel was ineffective at sentencing. However, counsel was effective at sentencing, bringing up all relevant factors in an attempt to lessen Appellant's sentence. Sixth, Appellant argues that the district court erred in not finding that counsel was ineffective during the motion for new trial. However, the record shows that counsel did everything that could be reasonably expected both in preparation for, and presentation of the motion for new trial. Seventh, Appellant argues that the district court erred in not finding that appellate counsel was ineffective on appeal. However, all of the claims Appellant argues counsel should have brought on appeal are without merit. Finally, Appellant argues that the district court erred in not finding that cumulative error warranted reversal. However, no finding of cumulative error was warranted.

ARGUMENT

In his underlying Petition, Appellant brought eight (8) grounds for relief. The first seven (7) grounds alleged ineffective assistance of counsel. Ground eight (8) alleged that cumulative error by defense counsel required the reversal of this conviction. Appellant now all alleges that the district court erred by denying each

and all of his grounds for relief in the underlying Petition. See AOB at 1-2 (listing the alleged errors committed by the district court).

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable

probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of

the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed."

I. THE DISTRICT COURT DID NOT ERR IN FINDING COUNSEL'S PRE-TRIAL INVESTIGATION/PREPARATION TO BE EFFECTIVE

Appellant first argues that the district court erred in finding that counsel's pretrial preparation and investigation was sufficient. AOB at 11. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id.

The State would initially note that Appellant's pleadings in this brief are entirely devoid of any specifics regarding (1) what additional investigation counsel should have conducted, and (2) what such an investigation would have revealed. Appellant similarly did not meet his burden under Molina in his district court pleadings. See 11 AA2501-04. Pursuant to Molina, such a claim cannot sustain post-conviction relief, and must be denied. 120 Nev. at 192, 87 P.3d at 538.

The State would also note that in the underlying Petition that was before the district court, Appellant specified that counsel should have secured expert witnesses to assist Appellant at trial. 11 AA2504. Appellant further made this argument during

the hearing on the merits of his Petition in district court. 11 AA2609-10. Although not directly raised in Appellant's Opening Brief, the district court correctly denied relief under this ground because it is without merit.

First, as mentioned above, Appellant did not even allege what a different investigation would have revealed. Appellant merely asserted that the main witness's credibility could potentially have been attacked and that a psychiatric examination could have been run. 11 AA2504. Appellant did not allege what impeachment evidence a better investigation would have turned up. In fact, he did not even mention the name (or in the instant case identifying initials) of the "main witness" who trial counsel was allegedly obligated to investigate. Further, Appellant did not allege what a psychiatric examination would have contributed to Appellant's defense at trial. As such, Appellant's claim failed as a matter of law pursuant to Molina. Further, they were bare and naked assertions pursuant to Hargrove, and thereby suitable only for summary dismissal.

Second, Appellant was incorrect in alleging that counsel was ineffective for failing to secure an expert witness to challenge the State's expert witnesses. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." Harrington v. Richter, 562 U.S. 86, 111, 131 S.Ct. a770, 791 (2011). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object,

which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellant made no claims regarding why such an expert witness needed to be called. Appellant merely alleged that an expert witness could have challenged the State's child medical experts. 11 AA2504. However, Appellant did not identify what grounds an expert would or even could have challenged the State's expert witnesses on.

Third, assuming that Appellant meant V.D. when he refers to the "main witness" (as V.D. was the victim of the majority of Appellant's sexual assaults), the record showed that counsel's cross-examination evidenced a thorough understanding both of the case and the witness's history. Counsel began by reviewing previous statements and testimony V.D. had given in the case. 5 AA01085. Counsel went on to demonstrate a thorough understanding of the factual allegations surrounds the case. See inter alia, 5 AA01085-1101. Counsel further attempted to impeach V.D. with her preliminary hearing transcripts. 5 AA01106-1120. None of these things would have been possible without a thorough investigation into the case. As such, it was clear that Appellant's counsel conducted a reasonable pre-trial investigation.

As such, Appellant only brought bare and naked allegations that it was unreasonable for counsel not to undertake these actions in her investigation. Pursuant to Hargrove, such claims were suitable only for summary dismissal. Therefore, the

district court did not err in denying Appellant's request for relief based on this ground.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE DURING VOIR DIRE.

Appellant next argues that the district court erred in denying his request for post-conviction relief on the grounds that his trial counsel was ineffective during voir dire. AOB at 15. Appellant alleges that trial counsel was ineffective (1) for not securing the services of a jury selection expert, and (2) for not requesting sequestered voir dire.

A. Trial Counsel Was Not Ineffective for Not Hiring a Jury Selection Expert

As an initial point, the State notes that both in his AOB and his Petition for Writ of Habeas Corpus, Appellant does not even allege that an impartial jury was empaneled as a result of this trial decision. See 11 AA2507-11. As such, Appellant failed to reach his burden of even arguing that this decision prejudiced the outcome of his trial under Strickland's second prong.

In addition, Appellant failed to show that the decision not to hire a jury selection expert was an unreasonable one. First, Appellant does not allege what a jury selection expert would have contributed to his case. Instead, Appellant merely stated that "[a] jury consultant, would have seen many things that counsel missed because they would have been trained to look for certain things." 11 AA2511.

Appellant never stated what "things" his trial counsel missed, and instead relied on the circular argument that trial counsel must have missed "things" because he did not hire a jury selection expert. Such bare and naked allegations cannot support a successful ineffective assistance of counsel claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Second, while not included in his Opening Brief, Appellant pointed to the partial voir dire transcripts of two jurors in his underlying Petition as evidence that a jury selection expert was needed.[1] 11 AA2507-10. However, as the State argued in district court, neither of these two jurors was ultimately selected to be on the jury, showing that no jury selection expert was necessary to distinguish which of the jurors displayed bias. 1 AA00159, 219; Vol 3 AA00548-49. Given that neither of these jurors were selected, Appellant never brought any actual evidence forward indicating that a biased jury was empaneled as a result of his counsel's decisions. As such, Appellant did not demonstrate that he was prejudiced by counsel's decision not to hire a jury expert. Therefore, counsel could not be deemed ineffective, and this claim had to be denied. As such, the district court did not err in denying Appellant's request for relief based on this ground.[2]

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[1] Appellant now cites these transcripts under his other claim that trial counsel was ineffective on voir dire. Compare AOB, at 21-27 and 11 AA2507-10.

[2] The State also notes Appellant's brief argument regarding the State and the Court's agreement that this claim must be denied under Hargrove. Such agreement is not surprising given that it is the obvious legal conclusion to reach when the pleading is

B. Counsel Was Not Ineffective for Not Requesting Sequestered Individual Voir Dire

Appellant's argument on this issue in his Opening Brief is not the same argument he presented to the district court. In his Petition for Writ of Habeas Corpus, Appellant argued that the failure to request a sequestered voir dire resulted in an impartial jury because (1) jurors may have been unwilling to reveal that they had previously been victims of sexual assault, and (2) those jurors who had been victims of sexual assault may have been seen as more credible by other jurors, and therefore have been able to sway their minds during jury deliberation. 11 AA2505-07. There is no reference to either of these arguments in Appellant's Opening Brief.

Appellant now seems to argue that the reason this failure was prejudicial is because discussing instances of sexual assault during voir dire would expose the entire panel to "multiple traumas of other jurors." AOB at 27. This argument was never brought before this district court. Given that the question of relevance is whether the district court correctly or incorrectly denied Appellant's Petition based on the arguments in front of it, this Court should decline to consider this argument. See Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992) (stating: "[b]ecause appellant failed to present these hearsay exceptions at trial, the trial court had no opportunity to consider their merit. Consequently, we will not consider them for the

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bare of factual pleadings sufficient to warrant relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

first time on appeal"); see also McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to address arguments not raised before the district court).[3]

Regardless, such an argument is without merit. Appellant has cited to no authority suggesting that not requesting sequestered individual voir dire constitutes ineffective assistance of counsel. Appellant's entire argument seems to be that jurors being exposed to the trauma of others would somehow keep Appellant from securing an impartial jury. However, the leap in how hearing of one person's experiences would somehow implicate Appellant as guilty in an entirely separate sexual assault is never explained. The State would note however, that the jury was thoroughly instructed on the presumption of innocence, as well as the fact that it was only to consider evidence adduced at trial when reaching a verdict. 1 AA0037, 46, 49, 59-62. Jurors are presumed to follow the instructions given to them by the district court. See Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). As such, there can be no serious assertion that counsel's actions were unreasonable, or that Appellant was prejudiced in any way.

[3] The State does submit that Appellant cited to United States v. Ridley, 134 U.S. App. D.C., 412 F. 2d 1126 (1967), in part, for the proposition that "crime victims be questioned at the bench so that other jury panel members not be tainted." 11 AA2506. However, read in the context of Appellant's argument below, it is clear that the taint Appellant argued existed was that some jurors would receive a boost in credibility, not that the entire jury would become traumatized. Id.

Further, neither of the arguments Appellant raised in district court under this ground had any merit. Appellant cited to no authority suggesting that not requesting sequestered individual voir dire constitutes ineffective assistance of counsel. Appellant's entire premise underlying this claim was that jurors who had been victims of sexual assault may not come forward if the voir dire was not sequestered. This claim was belied not only by the record, but Appellant's own pleadings. Appellant readily admitted the numerous jurors admitted they had been the victims of sexual assault during voir dire. 11 AA2505. The record reflects that the court asked the jurors whether they or anyone close to them had been the victim of sexual crimes. 1 AA00237. It was further made clear to the jurors that they were free to approach the bench to discuss any sensitive answers they did not wish to vocalize to the public when the district court had one potential juror do just that when the juror became emotional while discussing her past. 1 AA00249. The jury was therefore aware that they could disclose any sensitive information out of the presence of the rest of the panel. Given that this option was available and made known to the jury, it was disingenuous to suggest that jurors would have responded differently to a sequestered voir dire.

In addition, Appellant never actually alleged in district court that a juror concealed their relevant history and subsequently had a disproportionate effect during deliberations. Appellant merely asserts that this could have occurred. 11

AA2506. Given that Appellant never identified any jurors that concealed bias, his entire argument was based on hypotheticals. As such, Appellant failed to establish that he was prejudiced as a result of his trial counsel's decision to not request sequestered individual voir dire.

Given that the voir dire strategy pursued by counsel was not unreasonable, and that Appellant failed to demonstrate he was prejudiced by failing to even allege that an impartial jury was empaneled as a result, counsel was not ineffective. Therefore, the district court did not err in denying Appellant's request for relief based on this ground.

III. THE DISTRICT COURT DID NOT ERR IN NOT FINDING COUNSEL INEFFECTIVE FOR NOT FILING A MERITLESS MOTION

Appellant next argues that the district court erred in not finding counsel ineffective for not filing a Motion for pre-trial psychiatric examination. As he argued in district court, Appellant alleges that there were indications that Tah. D. and M.D. may have had psychological problems that would have rendered their testimony inherently suspect or unreliable. AOB at 29. Appellant bases his argument off Tah. D. being diagnosed with "cognitive delay" and M.D. being diagnosed with "anxiety disorder." Id.

In Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), the Nevada Supreme Court departed from a two year old precedent by overruling State v. District Court

(Romano), 120 Nev. 613, 97 P.3d 594 (2004). In doing so, the Court returned to the requirements it previously set forth in Koerschner v. State, 116 Nev. 111, 13 P.3d 451 (2000), reasserting that a trial judge should order an independent psychological or psychiatric examination of a child victim in a sexual assault case only if the defendant presents a compelling reason for such an examination. "Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity." Koerschner, 116 Nev. at116-117, 13 P.3d at 455.

First, the State notes that Appellant does not even address that these factors exist, much less show that they would have weighed in favor of granting the Motion. As such, Appellant's claim that this Motion would have been meritorious is a bare and naked allegation suitable only for summary dismissal.

Second, the factors articulated in Koerschner would not have weighed towards a finding that an independent psychological or psychiatric examination was required. First, there was significant corroborating evidence to these two victims' testimony. The State called all large number of witnesses, who testified to Appellant's violent and sexually criminal behavior towards multiple members of the Duke family. See

inter alia, 3 AA00630, Trial Transcript, Day 1, at 73, 00662-674 (trial testimony of TD); 4 AA00991, 4 AA01000 – 5 AA1000-04 (testimony of V.D.); 7 AA01518, 1536-48, 1551-53, 1570-78 (testimony of Taq. D.); 8 AA01783, 1791-94 (testimony of CPS employee Sholeh Nourbakhsh). Second, neither disorder suffered by either victim bears on their credibility. M.D. has a general anxiety disorder (6 AA01316), while Tah.D. has a learning disability (8 AA01779-81). Neither of these diagnoses affect one's ability to discern reality. Neither do these diagnoses make one inherently unreliable or likely to fabricate. In fact, both witnesses were able to respond articulately and clearly at trial. As such, the factors articulated in Koerschner would not have weighed towards finding that an independent psychological examination was required.

The State would finally note that approximately one (1) year after the trial in the underlying case took place, the Nevada legislature codified NRS 50.700. NRS 50.700(1) forbids the district court from ordering a victim or witness to a sexual assault to undergo a psychological or psychiatric examination. NRS 50.700. While the date the statute become operable means that NRS 50.700 would not have been applicable at the time of the underlying trial, it's subsequent inclusion in this jurisdiction's statutory framework indicates that the Motion would have been disfavored (as the underlying offenses of the Petition included many charges of

Sexual Assault). As such, any Motion filed to this effect would likely have been denied.

Since the Motion was not likely to succeed, filing it likely would have been a frivolous exercise. Counsel has no obligation to file frivolous motions. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). However even if the motion would not have been frivolous, its dubious chances for success would make whether to file such a motion a strategic decision. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Appellant also seems to argue that without there being a psychiatric examination, it was impossible to determine the relative merits of any Motion to request such a psychiatric examination. AOB at 30. Appellant further asserts that if counsel would have filed such a motion, the Court could have ordered a "limited and nonintrusive" examination, examined the results *in camera*, and then made special ruling on what could and could not have been admitted. However, such an argument puts the cart the horse. Appellant is essentially asking this Court to create a rule that a psychiatric examination must be conducted to determine whether the Court should order a psychiatric examination.[4] Besides making no practical sense, such a rule

[4] While Appellant has baselessly alleged that any such exam would be less intrusive, he has not articulated what this "less intrusive test" would look like, or indeed that it is even possible. See AOB, at 30.

would read the standard announced in Abbot completely out of the jurisprudence. In effect, there would then be no standard governing when a defendant can force a witness or victim to undergo a psychiatric examination, only a standard governing the admissibility of the results. Why Appellant thinks the Court should adopt a standard so clearly contrary to the established law, or why counsel was ineffective for not proposing it, is unclear. As such, this argument is without merit.

Therefore, counsel was not ineffective for not filing a Motion for a psychiatric examination. Since counsel was not ineffective, the district court correctly denied Appellant's request for post-conviction relief on this ground. This claim should be denied.[5]

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THAT COUNSEL WAS AN EFFECTIVE ADVOCATE AT TRIAL

A. Trial Counsel's Impeachment was Effective

Appellant next argues that the district court erred in not finding that counsel's impeachment of Tah. D. was ineffective. AOB at 35. Specifically, Appellant claims that the State's objections kept counsel from impeaching the witness's credibility. Such a claim is belied by the record.

[5] The State notes that in the underlying Petition, Appellant also alleged counsel was ineffective for not filing a Motion in Limine. After reviewing Appellant's pleadings, it does not appear he is appealing the district court's denial of this issue. To the extent Appellant later attempts to raise this issue, the State would respectfully request an opportunity to respond.

Appellant's complaint regarding counsel's performance after the State objected to a line of questioning for "lack of foundation" is unwarranted. The objection was posed merely because the question was asked in a confusing manner. 8 AA1848. Counsel clarified her question, and was able to proceed with the line of questioning. Id. The State further objected to a hearsay statement which was sustained. 8 AA1854. However, the failure to get a hearsay statement admitted into evidence is not a byproduct of counsel's effectiveness, it is a byproduct of the fact that the statement was hearsay and not permitted under the rules of evidence.

Further, the record shows that Appellant's counsel was effective on cross-examination. Counsel elicited that Appellant was the one who drove the children to do well in school. 8 AA1827-28. Counsel elicited that the witness had reported feeling "protected" while staying with Appellant. 8 AA1838. Counsel elicited that the witness had told detectives she had no problems with anybody in the house. 8 AA1840. Counsel outlined the potential contradiction between witness saying she was raped for the first time at age 11, but saying during that same year she was not uncomfortable around Appellant. 8 AA1840-41. Counsel elicited as much information that was helpful to Appellant's case as was possible under the circumstances. Further, the scope of cross-examination is a strategic decision that is virtually unchallengeable. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002); Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Here, the record demonstrates that counsel effectively elicited varying pieces of helpful information on cross-examination. Further, the record belies Appellant's claim that his counsel was ineffective at dealing with the State's objections. Finally, Appellant failed to demonstrate in district court, and fails to demonstrate in his Opening Brief, how a different cross-examination would have made a more favorable outcome at trial probable.

Therefore, counsel could not be deemed ineffective. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground, and this claim should be denied.

B. There Was No Prosecutorial Misconduct for Counsel to Object To

Appellant next argues that the district court erred in not finding counsel ineffective for not objecting to the State allegedly committing prosecutorial misconduct by "vouching" for a witness. However, the record shows that the State never vouched for any witness, and as such, there was nothing for counsel to raise a meritorious objection to.

Specifically, Appellant raised issue with the following excerpt from the States closing:

> You heard from the Dukes. Do you really think that they could have concocted all of this, those people 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.

AOB, at 37; 11 AA2515.

Vouching occurs when the State "places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (*citing* U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). This Court has held that it is not vouching where the State claims that a witness' identification was "as good as you could ask for" during closing argument. Id. Further, "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). However, the State may not go so far as to argue that a witness is a person of "integrity" or "honor." Id. Finally, it is the province of counsel to determine what objections, if any, to make during a closing argument. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating that it is trial counsel that has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

A review of the State's closing argument shows that no vouching occurred during the State's closing argument. Much like in Rowland, the instant case involved multiple material witnesses, and the outcome was dependent upon whether the jury believed these witnesses were telling the truth. As such, the State should be afforded reasonable latitude during closing argument. However, here, said latitude was not even necessary. The State did not make any personal assurances of the witness' veracity. As the record plainly shows, the State was merely highlighting that it had presented extensive corroborating evidence. The State's argument that evidence which is corroborated by other evidence should be considered more persuasive is not vouching, but a common legal principle that has been recognized by this Court in multiple contexts. See, *inter alia*, NRS175.291 (stating that the conviction of a defendant cannot be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence); Sefton v. State, 72 Nev. 106, 110, 295 P.2d 385, 387 (1956) (stating: "extrajudicial confession does not warrant a conviction unless it is corroborated by independent evidence").

Given that the statement did not amount to "vouching," the State did not commit prosecutorial misconduct. It therefore would have been futile for counsel to object. Counsel has no obligation to raise futile arguments pursuant to Ennis. Further, even if the State's arguments were construed as vouching, the statements were not such that the failure to object would have rendered a more favorable

outcome at trial probable. See Rowland, 118 Nev. at 31, 39 P.3d at 167 (stating: "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt"). In the instant case, the evidence of guilt was strong. The State presented multiple witnesses, including the entire Duke Family, individuals close with the family, and investigating officers. Given the overwhelming evidence presented against Appellant, even if the statements were considered vouching, Appellant was not prejudiced by his counsel not objecting.

Therefore, counsel could not be held ineffective on this ground. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

C. Counsel's Closing Argument Was Not Ineffective

Appellant next argues that the district court erred in not finding that his counsel was ineffective during closing arguments. AOB at 39. In district court, Appellant did not articulate why, or what portions of the closing argument were ineffective. Appellant did not allege what counsel should or even could have done differently in order to present a more compelling closing argument. Appellant similarly fails to make any such allegations in his Opening Brief. As such, this claim was nothing more than a bare and naked allegation suitable only for summary dismissal pursuant to Hargrove.

Further, the State would note that what arguments to present during closing argument is a strategic decision left to counsel in most circumstances. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating that it is trial counsel that has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"); but see also (Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994) (holding that it is reversible error for an attorney to concede guilt during closing argument over his client's testimonial disavowal).

Given that Appellant has never alleged any issue pursuant to Jones or other rule of law that confines the scope of counsel's arguments, the only question is whether counsel performed reasonably at closing. The record reveals this to be the case. Counsel began by challenging the veracity of the State's witness V.D. 10 AA2305. Counsel went on to point out the V.D.'s mother T.D. had potential issues with Child Protective Services when living in Louisiana. 10 AA2307. Counsel highlighted that it would have been odd for T.D. to bring her children back to the Appellant after they suffered such abuse at his hands. 10 AA2309. Counsel further went on to point out the timing of the reports versus the timing of the incidents. 10 AA2309-10. Counsel went on to reiterate that the children's grades were the best they had ever been during this time. 10 AA2312. The record clearly shows that counsel's closing argument was designed to discredit the witnesses and attempt to

show that Appellant had been a positive influence on the family. While this strategy was ultimately not successful, it was clearly not unreasonable.

Therefore, counsel was not ineffective during closing argument. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

V. THE DISTRICT COURT DID NOT ERR BY NOT FINDING THAT COUNSEL WAS INEFFECTIVE AT SENTENCING

Appellant next argues that the district court erred in not finding that his counsel was ineffective during sentencing. AOB at 41.[6] Specifically, Appellant alleged in district court that it was ineffective for counsel to not file a sentencing memorandum, as well as to not present any witnesses to provide mitigation testimony. 11 AA2517.

As an initial point, in district court, Appellant never alleged what information should or could have been presented in a sentencing memorandum. 11 AA2517-18. Appellant now claims that his counsel should have presented evidence of his youth and economic background. AOB at 42. However, Appellant was fifty (50) years old at the time of sentencing. Appellant does not explain how being fifty (50) is indicative of youth or relevant to sentencing. Neither was Appellant's economic background relevant. Appellant was not convicted of a property crime or some other

[6] Appellant also seems to contend that his sentence was cruel and unusual. Given that this is a legally distinct argument, the State addresses it in section VI.

offense where the defendant's economic background may offer context to the conduct committed. Appellant raped and otherwise sexually assaulted multiple young girls over a period spanning multiple years. Whether or not Appellant was financially well-off was completely irrelevant.

Appellant further has never alleged what witnesses could have been called to present mitigation testimony, or what these alleged witnesses would have even testified to. 11 AA2517-18. As such, Appellant's claims were bare and naked assertions suitable only for summary dismissal pursuant to Hargrove.

Further, the record demonstrates that Appellant's counsel performed effectively at sentencing. Counsel began by noting the number of people who had been called as witnesses who testified that none of the State's witnesses had spoken up regarding the abuse. 10 AA2468. To the extent Appellant believes these are the witnesses who should have been called, such a decision was unnecessary. The sentencing judge was the same judge who had presided over the trial, and as such, had already heard this testimony. 10 AA2466. Counsel further noted Appellant's relatively old age. 10 AA2468. That counsel could not present a more sympathetic argument was due not to counsel's alleged ineffectiveness, but the reprehensible nature of Appellant's actions.

Therefore, counsel was not ineffective during sentencing. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

VI. APPELLANT'S SENTENCE WAS NOT CRUEL AND UNUSUAL

Appellant has also made allegations that his sentence constitutes cruel and unusual punishment. 11 AA2517-18; AOB, at 41-43. The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad

discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Appellant concedes that his sentence was within the statutory limits. AOB, at 42. Further, Appellant does not even allege that the Court relied on impalpable or highly suspect evidence. Instead Appellant makes a proportionality argument, alleging that his sentence is simply too long given his crimes. The State disagrees. Appellant was convicted for sexually assaulting multiple minors over many years. Appellant was further convicted of beating minors. Appellant was also convicted of sexually assaulting their mother and forcing her to work as a prostitute. See generally, 1 AA0070-80. It is the reprehensible nature of these crimes, not the sentence, which shocks the conscience. Therefore, Appellant's sentence is neither cruel nor unusual. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

VII. THE DISTRICT COURT DID NOT ERR BY NOT FINDING THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE DURING THE MOTION FOR NEW TRIAL

Appellant next argues that the district court erred in finding that his counsel was not ineffective in their preparation and arguments regarding Appellant's Motion for a New Trial. AOB, at 43-53. While Appellant dedicated multiple pages of his Petition to trying to relitigate the issue of whether he should have been granted a new trial due to juror misconduct, his only real claim was that counsel was ineffective is that counsel failed to secure Kathleen Smith's ("Smith") signature on her affidavit once it had been revised. 11 AA2518-23.

The affidavit Appellant pointed to referenced Smith's allegations that a juror (Yvonne Lewis) spoke about being sexually assaulted during jury deliberations. 1 AA0110-16. Lewis did not indicate during voir dire that she had ever been sexually assaulted. As such, Appellant claimed this was grounds for a new trial due to juror misconduct.

However, Appellant is incorrect that counsel's failure to get Smith to sign the affidavit constituted ineffective assistance of counsel. Counsel prepared the affidavit after her investigator spoke to Smith. However, Smith requested that changes be made to the affidavit and refused to sign it, claiming "she did not want to get involved." 1 AA00107, 111. Appellant's counsel could not force someone to sign a document, and any assertion that her failure to do so constitutes ineffective assistance of counsel was incorrect

Further, counsel's conduct following Smith's refusal to sign the affidavit was reasonable. Counsel requested and received an evidentiary hearing on the issue. 1 AA0107-08. At the hearing, counsel called Smith as a witness, and asked her to explain her experience during deliberation. 10 AA2389-97. Counsel further received a hand written statement from Smith detailing what happened during the deliberation. 1 AA0112-13. This statement was attached as Exhibit B to Appellant's Reply. Id.

The simple fact is that Appellant's Motion being denied had nothing to do with counsel's alleged ineffectiveness. It had everything to do with the fact that multiple jurors (including Yvonne Lewis) testified that Lewis did not claim during deliberations that she had been sexually assaulted. 10 AA2411-12, 2435. These jurors also indicated that Ms. Smith had claimed she could not vote guilty based upon Appellant's race. 10 AA2413, 2421. As such, it is clear that counsel did everything she could have possibly done in investigating this claim. Counsel was not ineffective on this ground.

Further, to the extent Appellant was seeking to relitigate the fact that he should have been granted a new trial due to juror misconduct, such a claim was barred by law of the case doctrine. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d

34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

On November 28, 2017, this Court issued an Order of Affirmance finding that stated "the district court did not abuse its discretion in denying the motion for a new trial for juror misconduct, as any misconduct did not prejudice Appellant." Order of Affirmance, at 2, May 24, 2017; filed in case number 69093. As such, Appellant's attempt to relitigate this issue was barred by law of the case and must be denied.

Given that counsel was not ineffective during the preparation for the Motion for New Trial, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

VIII. THE DISTRICTR COURT DID NOT ERR IN FINDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE

Appellant next argues that the district court erred in finding that his appellate counsel was not ineffective. AOB at 53. In district court, Appellant argued that appellate counsel should have raised the following issues on appeal: (1) that Appellant's sentence was a cruel and unusual punishment in violation of the eighth

amendment; (2) that the court erred by limiting cross-examination; and (3) that the court erred by not restraining excessive prosecutorial misconduct. 11 AA2524.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); *citing* Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

Appellate counsel was not ineffective for not bringing the claims Appellant now urges they should have. The claims Appellant advocates for are either without merit, or so bare of factual underpinnings that their merit was and is impossible to address. First, as the State argued in Section VI, Appellant's punishment was not cruel and unusual. Second, it is unclear what witnesses Appellant was not entitled to fully cross-examine. The State notes that appellate counsel did raise the issue on appeal of whether the district court erred in limiting his cross-examination regarding a book written by T.D. 10 AA2481-82. To the extent this is the issue Appellant is alleging, his claim is belied by the record. Otherwise, the underlying claim Appellant alleges counsel should have brought is nothing more than a bare and naked allegation. Finally, as the State argued in Section IV(B), the State did not engage in vouching, so any prosecutorial misconduct claim on these grounds would have been frivolous. Appellant now also alleges that counsel should have argued on appeal that cumulative prosecutorial misconduct was so pervasive as to warrant a reversal under plain error review. Appellant has provided no factual or legal support for this argument, and as such it need not be considered by this Court. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court)."

Further, appellate counsel brought the following claims on appeal: (1) whether the district court erred in restricting the scope of cross examination regarding a book written by T.D.; (2) whether the court improperly allowed the State to introduce testimonial hearsay statements into evidence; (3) whether the district court improperly prevented Appellant from inquiring into one of children's past sexual history; (4) whether Appellant's kidnapping charges were incidental to other charges; (5) whether Appellant was entitled to a new trial on the basis of juror misconduct; (6) whether there was insufficient evidence to support Appellant's convictions; and (7) whether cumulative error warranted reversal. 10 AA2480-81. Given the multitude of claims brought by appellate counsel, as well as the lack of merit regarding the claims Appellant now alleges his counsel should have brought on appeal, appellate counsel was not ineffective.

Therefore, appellate counsel was not ineffective. As such, the district court did not err in denying Appellant's request for post-conviction relief on the ground. This claim should be denied.

IX. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO CUMULATIVE ERROR

Finally, Appellant argues that the district court erred in not finding that cumulative error warranted a reversal of the conviction. AOB at 59.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.

However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Defendant's claim is without merit. "Relevant factors 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, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

In the instant case, even assuming claims of ineffective assistance of counsel can support a finding of cumulative error, such a finding is not warranted here. First, the issue of guilt was not close. As the State has already articulated, significant and overwhelming evidence was presented against Appellant in the form of extensive testimony by a large number of first-hand witnesses to his crimes. Second, none of Appellant's claims demonstrate a single instance of ineffective assistance of counsel, or even an unreasonable strategic decision. As such, there was no error to cumulate. Finally, the gravity of the crimes charged were severe, as Appellant was convicted for multiple sexual assaults, battery, and kidnapping. Therefore, no finding of

cumulative error was warranted. As such, the district court correctly denied Appellant's request for post-conviction relief on this ground, and this claim should be denied.

CONCLUSION

For the foregoing reasons, the district court's judgment should be AFFIRMED.

Dated this 30th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,115 words.
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 30th day of November, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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