IN THE SUPREME COURT OF THE STATE OF NEVADA

JERICHO JAMES BRIOADY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 70311
Dist Ct. Case. CR14-0357

APPEAL FROM JUDGMENT OF THE HONORABLE SCOTT FREEMAN

SECOND JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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16-26542

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JURISDICTION OF THE COURT

This Court has jurisdiction over the direct appeal from the judgment of conviction which entered after a jury verdict of guilt. NRAP 4 (b). The judgment of conviction entered April 11, 2016. 5AA 180-1181. The notice of appeal was filed December April 28, 2016. 5AA 1182.

ROUTING STATEMENT

The case is properly heard by the Nevada Supreme Court. This case netted Jericho James Brioady, hereinafter: Mr. Brioady, two life sentences with the possibility of parole after service of 10 years in prison on a mandatory sentencing scheme under NRS 201.230. This case proceeded to jury trial. There are constitutional questions involved in this appellate litigation. Key issues such as whether the Defendant's statement to police was gained in violation of the Fifth Amendment and *Miranda* as well as a very serious juror misconduct issues are presented in this appeal.

STATEMENT OF THE ISSUES

1. Juror misconduct during voir dire deprived Appellant of his Sixth Amendment guarantee of the right to a fair trial by a panel of impartial, indifferent jurors who are unbiased.

2. Appellant's statement to the police was obtained in violation of the Fifth Amendment and *Miranda,* it was not knowing or voluntary..

3. There was insufficient evidence to sustain the conviction.

4. The convictions violate the *corpus delicti* rule and due process under the Fifth & Fourteenth Amendments. The District Court's refusal to instruct the jury on the corpus delicti rule deprived the Defendant from pursuing his defense.

5. The District Court erred when it refused to allow cross-examination of the complaining witness for prior false allegations of criminal conduct against her in violation of the Sixth Amendment rights of confrontation and due process right to a fair trial. The District Court's ruling violated Nevada law found in *Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006) and *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989).

6. The Court deprived the Defendant of the right to have the jury instructed on the lesser included offense of NRS 207.260(1), unlawful contact with a child when the offender is more than 5 years older than the child and the child is less than 16 years of age.

7. Cumulative errors deprived Appellant of a fair trial and due process.

8. Mandatory sentencing under NRS 201.230 violates the Defendant's right to have a judge impose sentence upon him. Imposition of a life prison term on this case violated the Eighth Amendment provision against cruel & unusual punishment.

STATEMENT OF THE CASE

Jericho James Brioady was arrested on two counts of sexual assault with a minor and three counts of lewdness with a minor under the age of fourteen for alleged acts with one victim on two separate dates. The case proceeded to preliminary hearing at the Sparks Justice Court on June 4, 2014. A motion to suppress the statements of the Defendant to Sparks Police detectives was filed and litigated and denied by the District Court. 1AA 103-109, 141-43, 154-57 and the hearing transcript at 6AA 1282-1420. The defendant maintained a continuing objection to the admission of the video tape interview of Mr. Brioady at Sparks Police Department. 2AA 382.

The defense sought to introduce a prior false allegation made by the victim against her stepfather, in which the victim falsely accused her stepfather of giving her two black eyes. 1AA 154-57 . The District Court held that this evidence was too prejudicial to the State's case and refused to allow the testimony. 1AA 186. The defense sought to admit evidence that the victim made a prior allegation against a male for doing something similar while they lived in Alaska. The victim

bragged to some friends that she had slept with another friends' uncle. This allegation was proven untrue. 1AA 175. The evidence of the false allegations came from the testimony of the victim's mother. 1AA 155, 170. The Court refused to admit this evidence. 1AA 188.

The case proceeded to trial between January 19, 2016 and January 22, 2016. Jury voir dire was lengthy. The defense waived its 8th peremptory challenge. 1AA 194-195. The jury acquitted Mr. Brioady on the two counts of sexual assault on a minor as well as one count of lewdness with a minor but convicted him on Counts III & IV, lewdness with a minor counts. 5AA 1094-95.

After the trial, it became known to defense counsel that a juror failed to disclose that she had been the victim of a sexual assault as a child. A motion for new trial and to vacate the guilty verdicts was filed. 5AA 1099-1106. The State opposed this motion and a hearing was held. At the hearing, the juror admitted that she failed to disclose that she was a child victim of sexual assault and described her experience as a juror on this case as pretty intense and emotional, as well as not the most comfortable trial for her. 5AA 1145. The incident was

serious enough to this juror that she underwent therapy. 5AA 1142. This juror voted guilty on both Counts III & IV. 5AA 1157. The District Court denied the defense motion to vacate the guilty verdicts and refused to grant a new trial. The District Court found that there was no disclosure by the juror but found no prejudice to the defense. 5AA 1159-1162.

The case proceeded to sentencing and the defense objected to the mandatory sentencing schedule set out by the legislature in NRS 201.230. 5AA 1167. The District Court imposed the mandatory minimum sentence of life in prison with parole eligibility at ten years on each count but ran the sentences concurrently. 5AA 1174-76. The judgment of conviction entered on April 11, 2016. 5AA 1180-81. A timely notice of appeal was filed on April 28, 2016. 5AA 1182.

STATEMENT OF FACTS

On July 20, 2013, Mr. Brioady, his mother, Helen Brioady and his son (with a two week on and two week off custody schedule) resided at a private home on Gault Way in Sparks, Nevada. They decided to have a barbecue and invited Mr. Brioady's childhood friend, Michael Voigt and Mr. Voigt's family to the

barbecue. The members of the Voigt family who were present were Leslie Peterson– girlfriend of Michael Voigt, Ashley– age 16 daughter of Michael Voigt, Cherish– age 12, daughter of Leslie Peterson, and Charles– age 18, brother. Helen Brioady, Jericho Brioady and other neighbors attended as well. 2AA 431-436. At some point, Michael & Leslie decided they would go to a movie and left. Charles left as well by way of moped. It was agreed after the movie got out that Ashley and Cherish would spend the night at the Brioady residence. Mats were put on the floor in the living room by the TV with blankets for the girls to sleep. 2AA 441-443, 455. The plan was for the girls to watch a movie outside with a projector but the projector did not work so they moved inside to watch movies. After the movie, Leslie dropped by the Brioady residence to drop off some menstrual pads for Ashley as she was on her period. 2AA 457. Leslie did not reveal that she dropped by with the pads during her interview at the police or in the preliminary hearing testimony. 2AA 472-474. Leslie did not notice anything unusual when she stopped at the Brioady residence that night. 4AA 489, 499. Upon getting home the next day, Leslie did not notice anything wrong or unusual

with Ashley or Cherish. 2AA 486.

A few days later, Mr. Brioady had physical custody of his son, age 6, and asked if Ashley and Cherish would be interested in spending the night so his son would have company. Ashley's comment was that she did not want to go because it was boring. 2AA 460. Cherish never revealed first hand to her mother that anything out of the ordinary occurred at Mr. Brioady's residence on either date.

The next morning, Mr. Brioady returned Ashley and Cherish to their home. The girls did not express any problems had occurred nor did they act differently. 2AA 486. Leslie learned of Cherish's allegations against Mr. Brioady from Natay, the girlfriend of Cherish's father. 2AA 463.

On October 21, 2013, the Sparks Middle School shooting occurred. One of the children shot was KJ, the boyfriend of Ashley. 2AA 465, 482. On that date, Leslie took Cherish to the Sparks Police Department to file a statement about the allegations against Mr. Brioady. 2AA 466. Cherish was upset and crying over the fact that her boyfriend was shot. 2AA 485. They met with Officer Marquez. 2AA 467. After the meeting, they went to the Sparks Middle School were her friends

were being held. The detectives were not available as a result of the Sparks Middle School shooting and no contact with a Sparks Police Detective took place until Christmas Eve.

Ashley testified at the trial. Her testimony was that, basically, she did not see anything out of the ordinary happen to Cherish. Ashley testified that she had spent the night at Mr. Brioady's before with her father, Michael. 3AA 522. Ashley testified that she was at the barbecue, went outside to watch movies but the projector was not working so they watched movies in the living room. There was a foam pad and blankets that she and Cherish were on watching TV. Mr. Brioady was on the mat with them for some period of time but his mother, Helen was on the couch watching TV too. The two girls and Mr. Brioady also sat on the couch together. The lights were off and they watched several movies. She thought Mr. Brioady might have been a little intoxicated. Cherish was using Mr. Brioady's arm as a pillow. Ashley went to the bathroom. When she came back in the room Cherish and Mr. Brioady were on the couch together. Ashley remember the TV being really loud. Ashley recalled that Cherish was on her period and that Leslie

brought pads over for her. Ashley could not recall the second night at all. 3AA 524, 526-529, 531, 533, 536, 537. Ashley's memory was quite poor and she could not recall much detail and was not 100% sure of many of the details. 3AA 539.

Cherish testified at the trial as well. At the time of the trial, she was 14 years old. At the time of the incident she was 12 years old. Cherish lived at 1720 Gault in Sparks, Nevada with her mother, Leslie Peterson, her stepfather, Michael Voigt. Ashley and Charles also live with them. This house is ten minutes from Mr. Brioady's home. 3AA 591. They went to Mr. Brioady's house for a barbecue. There was a lot of people there. Cherish remembered that she needed menstrual pads and that her mother went and got them for her. Her parents were going to a movie and she and Ashley decided to stay at Mr. Brioady's house to watch a movie. Charles decided to go home and rode Mr. Brioady's bicycle to their home. According to Cherish, Helen Brioady did not watch a movie with them at all, she went to bed. 3AA 544, 551, 554, 556.

Cherish explained that they were watching movies on the foam mat with blankets on the floor in front of the TV. Her pillow disappeared and she was

sharing a pillow with Mr. Brioady. She noted that Mr. Brioady put his hand on her thigh and then moved his hand up toward her vagina. She stated he put her hand on his penis. 3AA 560. Cherish testified that Mr. Brioady put his fingers in her vagina and it hurt. 3AA 561. After this, he tried to put his fingers in her mouth. Mr. Brioady's penis was out of his shorts and her hand was on his penis. 3AA 563. According to Cherish, Mr. Brioady then pulled her hair and told her if she told anyone he would kill her. Mr. Brioady touched her breast inside her shirt, over her bra. She and Mr. Brioady shared a French kiss. 3AA 564. He put his tongue in her mouth but she did not put her tongue in his mouth. He then put her head under the blanket and moved her head up and down. He ejaculated and she spit it on him. She cleaned up and there was blood on her inner thigh. 3AA 565-567, 579. Cherish added that Ashley was there but looked asleep and Cherish could not tell if she was awake or not. She was scared, upset, sad, crying, but did not walk home or report the incident. 3AA 624-25, 631.

As for the second night's events, Cherish stated she did not want to go to Mr. Brioady's house but did so anyway so she could talk to him about what

happened on the first night. Cherish did not recall how she got to Mr. Brioady's house, or what happened during the day. 3AA 573, 620. She remembers "like—like some" of what happened the second night. 3AA 574. Mr. Brioady's son was there but was sleeping in his room. Ashley was there and was awake when the events started. There were mats and a blanket on the floor. 2AA 575. She did not recall at all whether Helen Brioady was there. 2AA 576. She and Ashley were sitting on the mat on the floor in front of the TV. She went and sat on the couch with him but did not remember how or why that happened. 2AA 577-78, 616. They had a blanket. Mr. Brioady put his fingers in her vagina again. 2AA 578. Ashley went to the bathroom and Mr. Brioady told Cherish to put her mouth on his penis. She did not want to do this but did it anyway. 3AA 579. Mr. Brioady put his hand on her breast, under her bra this time. He kissed her but it was not a French kiss. 2AA 580. Her hand touched his penis, but only for a short time that night. 2AA 581. His penis touched parts of her body but did not go inside of her. 2AA 581. He kissed her on the cheek. 3AA 632.

According to Cherish, she reported this behavior to her friend Dasia and to

her boyfriend, KJ. 2AA 582. On the date that Cherish reported Mr. Brioady's alleged actions, she was fighting with her stepmother, Natay. Cherish was not speaking at all. They had an argument. Cherish called her Aunt Sarah in Alaska and told her what Mr. Brioady had done to her. 2AA 585, 610-11. In spite of the fact that she is very close to Natay, and they tell each other everything, Cherish did not tell Natay. They went to the police department on the "worst day" of her life because of the shooting at the Sparks Middle School at which her boyfriend KJ and another friend of hers got shot. 2AA 586, 589.

During cross-examination, Cherish testified that she called Mr. Brioady Hella chubby and that he had a little dick. She smiled when she said that and went on to explain that:

> "My smile is, I don't know, well, it was so long ago that now – I mean, it still affects me, but I'm older and I know what all this is and — I don't know. I guess like I learned how not to let it – not break down every time I have to talk about it. I learned how to not be scared to talk about it, not to – just break down because every time back then, I shut down. I wouldn't want to talk about it. But now, I'm about to be 15 and this happened when I just turned 12. So it's a little– I'm used to it, I guess". 3AA 614.

Cherish testified that her parents, especially her stepdad, doesn't really

believe anything that comes out of her mouth because of the decisions she made when she was a kid during childhood. She stated that she did think her parents would believe "anything that came out of her mouth" so she said nothing. 3AA 632, 648.

At this point, outside the presence of the jury, the defense argued that the State opened the door to the prior false allegation testimony regarding Cherish's allegations that her stepdad, Michael Voigt, gave her a black eye. The defense argued that, unprovoked by the defense, Cherish gave the jury a reason that she did not report the incident at an earlier date. 3AA 636. Cherish admitted, outside the presence of the jury, that she lied a lot when she was young. 3AA 640. Mr. Voigt is an employee with the Washoe County Sheriff's Office and he was very clear that Cherish gave herself a black eye and tried to blame him. 3AA 643. Once again, the District Court refused to allow this evidence to be presented, and ruled that the prejudicial impact was too "impactual" and it outweighs any probative value. 3AA 646-47. In spite of the Court's ruling, the State argued in closing argument that the reason that Cherish did not tell her stepdad is because

she did not think Michael Voigt would have believed her. 4AA 948.

Prior to the testimony of the defense expert witness, the defense again sought admission of this evidence and the trial court again refused to admit it because it was too prejudicial. 4AA 856.

Cherish admitted that she owned a cell phone, knew how to use a cell phone for both calls and texting. She was not sure whether she had the phone with her on July 20, 2013 or not. 3AA 649-50.

Detective Jace Thelin from Sparks Police Department, detective division, testified at the trial. Thelin testified at length about the Sparks Middle School shooting date and his role in that incident. This was irrelevant to any portion of his interview with Cherish and Leslie, but, nonetheless, the evidence was admitted, as well as meritorious service awards and medals of valor. 3AA 513-514.

According to Detective Thelin, a person can easily suggest things to children and people with diminished mental capacity and it will affect the interview. 3AA His interview with Cherish which occurred on Christmas Eve was

not perfect and he did not get into every detail. 3AA 685, 687. Detective Thelin did not note that Cherish was on her period or ask any questions relating to that subject matter.

Detective Thelin was allowed to testify to the contents of the statement that witness Ashley provided to the police on New Year's Eve. He told the jury that: Ashley felt bad because she missed what happened, that the defendant asked the girls to spend the night, that Helen Brioady went to bed because she had been drinking, that Mr. Brioady told her to turn up the volume on the TV, and that she saw Mr. Brioady and Cherish on the couch together. 3AA 694-696. Interestingly enough, during Ashley's testimony she told the jury that initially Helen Brioady watched a movie with them before going to bed. 3AA 527. She did not tell the jury how it was that the girls decided to spend the night at the Brioady residence.

Detective Thelin went to Mr. Brioady's residence to see him. Upon arrival, Mr. Brioady asked him directly if he was there to investigate his report to the police of slashed tires on his truck. Detective Thelin did not clear the air and took the DNA of Mr. Brioady under the pretext that it was necessary in the truck

investigation to exclude Mr. Brioady's DNA from the razor blade and cigarette butt evidence. 3AA 698, 705. It was about 10:00 a.m. when the Detective was at the Brioady residence. He asked Mr. Brioady to come to the police station to discuss this with him.

Approximately 12:00 p.m., Mr. Brioady arrived at the Sparks Police Department to make his statement about the damage to his truck. Mr. Brioady even brought with him the razor blade and cigarette butt he had collected. 3AA 705. Instead, he was interviewed about a possible molestation case of victim Cherish. At this point, the door to the interview room was open, there was only one detective present and Mr. Brioady was told he could leave. Detective Thelin lied to Mr. Brioady and told him that his DNA was found on the shirt worn by the victim. The Detective asked him how his DNA got on that shirt and on her panties. 4 AA 804, 6AA 1239, 1259 . There was no DNA collected or tested on this case. After 25 denials that he ever received a blow job from Cherish and continuous denials of improper sexual activity between himself and Cherish, Mr. Brioady stood up to leave and was going to pick up his son at school. 4AA 767,

5AA 1246. Mr. Brioady said, "It's time for me to get up. It's time for me to leave." 6AA 1298.

Mr. Brioady was in the hallway attempting to leave when the route to the exit was "not" blocked by Detective Bellamy, who had been watching the interview via live feed. 6AA 1297, 1299. Detective Bellamy told Mr. Brioady that he had a couple of questions. Mr. Brioady said, "I'm going , man. I got to go. OI got to get things done. It's time for me to go. Can I go?". 6AA 1299. For six minutes, there was a conversation in the hallway, outside of the interview room. Detective Bellamy told Mr. Brioady that he knew exactly what happened that this it was a mistake for Mr. Brioady not to explain what happened that night to the police. 1AA 104-105. He was standing 2-3 feet from Mr. Brioady in a small hallway. Detective Bellamy lowered his voice and told Mr. Brioady that he did not think he was being honest, this was his opportunity to be honest and tell the police why it happened and why it won't happen again. 4AA 800-801. The police told him repeatedly, "No matter what you're going home. No matter what. No matter what". 5AA1247, 6AA 1302.

Mr. Brioady's will was overborne and he went back into the interview room where he made qualified admissions against his interest. Detective Thelin told him that, "I told you, hey I, I told you you're not arrest, that you're , you're leaving her when we're don talking; I want the detail so we don't have to stretch this thing out and you're going, as soon as we're don you're going". 4AA 771, 5AA 1248, 6AA 1262-64. Once again, Mr. Brioady told the police that he had to get going and had to pick up his son. 6AA 1262. The Detective then attempted to get Mr. Brioady to write an apology letter to the victim and victim's family. This was a nice trick. 6AA 1262. At this point, two detectives conducted the next 35 minutes of the interview with Mr. Brioady. The interview of the Defendant was admitted in total to the jury as Exhibit 19. 3AA 717-18, 6AA 1282-1420.

The District Court ruled that it was a little unclear as to what happened in the hallway from the DVD because there was no microphone. The District Court ruled the interview voluntary and the Defendant's re-entry into the interview as willing. 6AA 1314-15, 1407.

Mr. Brioady never admitted to having sexual intent, never admitted to

having put a finger into the victim's vagina, never admitted to having the victim perform fellatio on him, but did admit to kissing the victim on the cheek. 4AA 767-768, 774, 775, 784, 787, 6AA 1253, 1406. At the end of the interview, Mr. Brioady left the police station. Detective Thelin told the jury that he was then attempting to reconnect with Mr. Brioady but that Mr. Brioady would no longer speak with him and after five days of trying to again speak with Mr. Brioady, he gave up and went and arrested him. 2AA 741. This testimony was elicited improperly and was a comment on the Defendant's invocation of his right to remain silent. Mr. Brioady had no continuing obligation to speak with the detective at all but Detective Thelin certainly told the jury all about it.

Detective Thelin did not follow up with the investigation and gain any physical items from the home. The bedding was not collected as evidence. The victim was never asked by the officer whether she was on her period, even though Leslie put that information into her written statement to the police. Cherish never mentioned this in her written statement. 4AA 757-765.

Helen Brioady testified that she was at the barbecue at her house on July 20,

2013. She explained that other neighbors were there as well as the Voigt family. She saw the girls watching movies on the floor in the living room on blankets and watched a movie with them. When she got up at about 11, the TV was still on and the girls were watching TV on the floor with her dog sleeping with them. When she got up at 6 a.m., the girls were sleeping on the floor and the dog was still with them. She saw nothing unusual and neither girl made any comment about improper conduct. 4AA 822, 825-830. Helen recalled nothing eventful about the second time the girls spent the night. 4AA 830.

Dr. Deborah Davis, an expert witness the defense wanted to call to use hypothetical questions after reviewing the police interview to explain why Mr. Brioady would make any type of admission in this setting. Dr. Davis prepared a report and was to testify that it is not uncommon for a defendant to acquiesce to a police officer's account of events in order to stay out of jail or think of a reason why the false DNA allegation could have occurred. 6AA 1376. The Court deemed that expert witness Davis could testify, but not on any facts relating to the case itself and not on any hypothetical questions relating to the interview of Mr.

Brioady. 6AA 1409-10. The Court determined that expert testimony in that manner would confuse the jury and be more prejudicial than probative. 6AA 1410. Based upon that ruling, the defense did not call Dr. Davis as a witness.

Dr. William O'Donohue, an expert witness called by the defense, testified that he is a clinical psychologist at the University of Nevada Reno. Dr. O'Donohue explained that if a false allegation was made by the victim close in time to the current allegation there is more concern that the current allegation would be false. This testimony was not allowed by the court. 4AA 849-854. During the testimony of Dr. O'Donohue, there was a bench bar conference which was later put on the record. The Court reiterated its prior ruling that additional conclusions made by Dr. O'Donohue would not be presented to the jury as they would invade the province of the jury and be confusing to the jury. 4AA 925-26.

Dr. O'Donohue testified that PTSD is the most common behavior of a victim of child sexual abuse and it would be visible to an adult because it is intense, a horror-fear which will, in most cases (70-80%), cause the victim to have avoidance behavior. The victim will be hypervigilant, cannot be calmed down,

will have emotional disruptions and be jumpy. The victim will suffer from hopelessness and helplessness. The victim will not go to the place where the abuse occurred and will avoid the perpetrator. 4AA 870-874.

When questioned about false allegations, Dr. O'Donohue explained that all children lie and false allegations occur when a child believes they will get better treatment, more attention or be in less trouble by claiming abuse. 4AA 882-883. Child witnesses are more suggestible and false allegations seem to be due to suggestibility producing false memories. One would also expect the crime to occur in seclusion so if other persons are present he would look carefully at the allegations of abuse because it is unusual to not have seclusion. 4AA 911-912.

During jury selection Juror Threewas seated from the onset of the selection process. 1AA 191. The Court advised the jury that while it had no interest in prying into their personal lives,

> "It is important that you know the significance of full, complete, and honest answers to all the questions I'm about to ask each of you. I caution you not to try to hide or withhold anything which might indicate bias or prejudice of any sort by any of you. Should you fail to answer truthfully, or if you hide or withhold anything touching upon your qualifications, that fact may tend

to contaminate your verdict and subject you to further inquiry by the Court even after you're discharged as jurors." 1AA 205.

During the voir dire process, direct and pointed questions were asked of the venire panel as to whether they or a family member had been the victim of a crime.1AA 242. At one point, a potential juror asked the Court, "Am I supposed to tell everything?". The Court replied, "You're supposed to tell everything, man." 1AA 238. One juror revealed child abuse charges which affected his life. 1AA 240-41. Another juror advised they were molested as a child. 1AA 243. Another juror revealed that their child had been molested by a neighbor boy. 1AA 243. The Court thanked both of these jurors for their candor to the Court. 1AA 247.

The Court directly asked questions of Juror Three, a mother of two daughters, and the juror did not reveal any type of past history of sexual abuse. 2AA 254, 315. The State examined both victims of crime as to their potential bias. 2AA 281-285. Juror Threewas present but still said nothing. The State asked the jurors if they had a "serious secret". 2AA 285. At this point, Juror Threeadvised that she had a serious secret and told a *doctor* when she was an

adult. 2AA 288-89. The State took the time to ask each potential juror if they had any problem serving on this case. Juror Threesaid "No." 2AA 322.

Defense counsel specifically asked the potential jurors if they had been violently assaulted and did not want to tell anybody. Mr. Ohlson asked one potential juror if she would be affected by her childhood abuse and potentially identify with the child victim in this case. 2AA 327, 339, 344. The defense exercised 7 of its peremptory challenges and waived the 8th. 2AA 361. Juror Threeremained on the panel of 12 jurors who convicted Mr. Brioady of two lewdness felonies. 2AA 361.

Jury instructions were argued on the record. The State proposed instructions 1-49 and all of those instructions were given to the jury. 4AA 917. The defense proposed four instructions and all four were denied. 4AA 918, 920, 922, 924. The defense objected to instructions number 28 and 39. 4AA 917-918. These instructions were given to the jury over defense objection.

Jury instruction 28 stated, "There is no requirement that the testimony of a victim of sexual offenses be corroborated, her testimony standing alone, if

believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty". 5AA 1053. The defense objected and argued that the instruction was insufficient and focused too much on the subject of corroboration. 4AA 918. The Court determined it was a correct statement of law and provided it to the jury. 4AA 919.

Jury instruction 39 stated:

> "The law does not compel a defendant in a criminal case to take the stand and testify, and no presumption may be raised and no inference of any kind may be drawn, from the failure of a defendant to testify." 5AA 1064.

Defense counsel objected that the instruction was incomplete, failed to comply with Nevada law and proposed defense instruction A, which stated:

> "A defendant in a criminal trial may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by your or enter into your deliberations in any way." 5AA 1080.

The court rejected defense A and gave instruction 39, which the court based upon *Carter v. Kentucky,* 450 U.S. 288 (1981). 5AA 925.

The defense offered Defense Instruction B which stated:

> "It is important to recognize in a sexual assault case that the complaining witness; credibility is critical to proof of the case beyond a reasonable doubt. 5AA 1081.

Defense counsel cited to *Miller v. State*, 106 Nev. 487 in support of the instruction. The State objected. 4AA 919. The Court ruled that it would not give the instruction, that is was not based on available law but is a successful argument and held that credibility of witnesses was covered in another instruction. 4AA 920.

The defense offered a corpus delicti instruction in Defense Instruction C, which stated:

> "*Corpus delicti* literally means "body of the crime". The term has come to mean criminal act or agency. In every criminal prosecution, the State must prove *corpus delicti* (that a crime has been committed) beyond a reasonable doubt. Evidence of a defendant's confession or admission may not be used by you, the jury, to establish *corpus delicti*. *Corpus delicti* must be proved by the State beyond a reasonable doubt by evidence completely independent of any statement of the defendant. 5AA 1082.

The defense supported this instruction request by *Azbill, Meegan, Tabish and Hicks*. 4AA 921. The Court ruled that *corpus delicti* was not applicable in this case and refused to instruct the jury on the theory of defense. 4AA 922.

The defense proposed a lesser included offense instruction, for a violation of NRS 207.260(1), which is the offense of unlawful contact with a child when the

contact is between a child under 16 years of age and more than 5 years younger than the defendant. 5AA 1083. The defense cited to the transition law of Nevada found in *Green v. State*. The State objected. The Court ruled that NRS 207.260 is not a lesser included offense to either sexual assault or lewdness with a minor and refused to give the instruction. 4AA 923-924.

Closing argument by the State relied heavily upon the statements of the Defendant. In fact, the State told the jury that even if this girl was the aggressor, they should use the defendant's statement only and he would be still guilty of lewdness. 4AA 960.

The jury went into deliberations at 11:55 a.m. At 3:35 p.m., the jury sent a question for the Court, advising that they had made a decision on 3 charges but were undecided on 2 charges. The Court told them to continue to deliberate. 5AA 1085. At 4:55 p.m. the jury sent another question. The jury asked if it could differentiate between oral sex and/or digitally penetrate her vagina in Count I and digitally penetrate in Count II. The Court referred the jury to instruction 31. 5AA 1087. At 6:35 p.m., the jury asked its third question, advising the Court that it

could not come to an unanimous decision on Counts I & II, stating, "Nobody is changing their minds." 5AA 1089. The Court gave an oral Wilkins (Allen charge) instruction. 5AA 1008-09. At this point, the jury had been in deliberations over six hours.

At 7:20 p.m., the jury asked to see the witness statement that Leslie Peterson (mother of Cherish) gave the police. The Court told the jury that it would have to rely upon the evidence presented. 5AA 1091. At 7:20 p.m., the jury asked if they could call home and tell their family members that they were still alive. The Court advised they could not do so during deliberations. 5AA 1093. At 10:00 p.m., the jury returned its verdict of not guilty on Counts I, II & V but guilty on Counts III & IV. 5AA 1094-1098. The Jury deliberated approximately 10 hours on this case.

After conviction but before sentencing, defense counsel Ohlson learned through a conversation with other deputy district attorneys (not the trial attorney in this case, Ms. Hicks), that Juror Threefailed to disclose that she was the victim of a sexual assault as a very young child. The conversation took place on day 11 after the verdict. While Ms. Hicks knew of that information prior to that date, she did

not reveal it to defense counsel. 5AA 1114, 1120. After confrontation, Ms. Hicks advised Mr. Ohlson that two jurors had failed to disclose information, one who was a child victim of sexual abuse and one who believed a family member was falsely accused. Defense counsel filed a motion seeking a hearing on the matter and to vacate the guilty verdicts. 5AA 1099, 1105. Mr. Ohlson further stated under oath that if the juror who was a victim was not removed for cause, he would have exercised a peremptory challenge on that juror. 5AA 1105.

In response to the State's motion, the State took the position that it was indeed a victim in this matter and that the State suffered prejudice, not the Defendant. 5AA 1110. The State, who withheld this information, had the nerve to move to strike the motion as it was not filed within 10 days of the verdict. 5AA 1117.

At the hearing, Juror Three's testimony had little credibility. She did not recall the question of whether she had been a victim of crime. 5AA 1133. The juror stated she did not answer because she does not consider herself to e a victim. Yet, she clearly testified that she saw a therapist as an adult. She did not reveal

this but used the word "Doctor" during voir dire. She meant to say therapist. This juror admitted that other jurors who admitted they had been molested as a child could not be fair and impartial but decided she could be. 5AA 1142-45. She testified that the jury experience was pretty intense and emotional and it was not the most comfortable trial. 5AA 1145-46. The fact that she was a victim of child sexual assault came out during deliberations. 5AA 1154.

Judge Freeman admitted that during Juror Three's comment that she had a secret and told a doctor he did not interpret that statement to mean she was discussing molestation. The Court ruled that the juror did not disclose when given ample opportunity to reveal the information but did not believe that to be intentional on the part of the juror. The Court ruled that there was no prejudice to the defense case and denied the motion. 5AA 1159-60.

The case proceeded to sentencing. 5AA 1160. Defense counsel objected to a life sentence based upon the facts of this case and objected to the mandatory sentence provided by the Legislature. 5AA 1167. At the conclusion of the hearing, Mr. Brioady was sentenced to life in prison with parole eligibility after

serving ten years on each count and the counts were ordered to be served concurrently. 5AA 1180-81. A timely notice of appeal was filed. 5AA 1182.

LEGAL ARGUMENT

1. Juror misconduct during voir dire deprived Appellant of his Sixth Amendment guarantee of the right to a fair trial by a panel of impartial, indifferent jurors who are unbiased.

Standard of Review:

The denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. *Meyer v. State*, 119 Nev. 554, 80 P.3d 447 (2003). But when reviewing implied bias of a juror, the review is de novo, because implied bias is a mixed question of law and fact. *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir.2000).

Argument:

One thing is clear by this record, Juror Three failed to disclose a material fact which would have altered the jury selection by the defense. Mr. Ohlson advised that he would have exercised his 8th peremptory challenge, which he waived, and would have removed Juror Three from the jury panel. The District

Court's decision that the defense did not demonstrate prejudice cannot withstand review. If it is not prejudicial to have a juror, who was a child victim of sexual assault, on the jury panel for a case involving a 12 year old girl claiming sexual assault and lewd acts, then there will never be a prejudicial act of juror misconduct during voir dire. The District Court's level of prejudice could simply never be met.

The prime safeguard to gain a fair and impartial jury panel is voir dire. "In most situations, voir dire, 'the method we have relied on since the beginning,' should suffice to identify juror bias." Id. at 528 (quoting *Patton v. Yount*, 467 U.S. 1025, 1038, (1984). When the voir dire process fails, misconduct occurs.

This is because truthful disclosure of information during voir dire sets up a challenge for cause (or in less clear-cut cases, a peremptory challenge) that can be exercised before resources are devoted to trying the case to verdict. Cause challenges lie for implied (or presumed) bias as well as for actual bias. The Defendant was deprived of the ability to remove this juror because of the intentional concealment of such critical information. "Voir dire" means "to speak

the truth. This juror failed to do so. The whole point of the voir dire process is to elicit information from the venire that may shed light on bias, prejudice, interest in the outcome, competence, and the like so that counsel and the parties may exercise their judgment about whom to seat and whom to challenge. Without full disclosure, this jury panel consisted of a juror who had been the victim of the same crime charged against Mr. Brioady. This was reversible error.

If the answers to the questions during jury voir dire are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. *Clark v. United States*, 289 U.S. 1, 11, 53 S.Ct. 465, 77 L.Ed. 993 (1933). Justice must satisfy the appearance of justice. *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954). An irregularity in the selection of those who will sit in judgment "casts a very long shadow." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). A perjured juror is as incompatible with our truth-seeking process as a judge who accepts bribes. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997).

It is abundantly clear that Juror Three understood how important it was to

give full answers and reveal any personal issues that could cause her to be biased. The Court heard from two separate jurors that had been involved in prior sexual abuse cases. The Court told the jury panel to tell everything. In spite of this, Juror Three did not disclose. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity?

Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out of the trial. We can infer that she would her responsibilities as a juror-to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions-with equal scorn.

One touchstone of a fair trial is an impartial trier of fact with a jury capable and willing to decide the case solely on the evidence before it. Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause; hints of

bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). Mr. Ohslon would have removed this biased juror.

To obtain a new trial based on a juror's failure to disclose information during voir dire, a party must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc.*, 464 U.S. at 556. The juror failed to answer perhaps the single most significant question which was repeatedly asked by the Court, the State and defense counsel, honestly. Had it come to the Court's attention that the proposed juror was so troubled that she attended therapy as an adult from her molestation as a child, the Court would have removed the juror for cause. If not, the defense would have exercised a peremptory challenge.

The 9th Circuit Court of Appeals has recognized that bias may be implied

where close relatives of a juror "have been personally involved in a situation involving a similar fact pattern," *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir.1990); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979); and *Dyer v. Calderon,* 151 F.3d 9y0 (1998).

The Ninth Circuit Court of Appeal has defined actual bias as, in essence, 'bias in fact'-the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir.2000) (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir.1997) (internal quotation marks omitted)). Actual bias is typically found when a prospective juror states that he can not be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view. The determination of whether a juror is actually biased is a question of fact, *Dyer*, 151 F.3d at 973, that is reviewed for "manifest error" or abuse of discretion, *Gonzalez*, 214 F.3d at 1112.

The district court's factual findings relating to the issue of juror misconduct are reviewed for clear error. Whether a juror is dishonest is a question of fact.

Fields v. Brown, 503 F.3d 755, 767 (9th Cir.2007) (en banc) (citing *Dyer*, 151 F.3d at 973). The assessment of juror bias is essentially one of credibility, and therefore largely one of demeanor. Judge Freeman determined that the juror failed to disclose material information during voir dire but then determined that act to be 'unintentional'. Failure to disclose a childhood history of sexual assault was intentional. The District Court's findings on this issue are erroneous.

The District Court's finding that there was no prejudice to the defense was erroneous as well. When a person is serving a life sentence in prison, that person should feel confident that they were tried by a fair and impartial jury of their peers. The Sixth Amendment guarantees a criminal defendant the right to a "fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This requires that a "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 723.

Mr. Brioady demonstrated the occurrence of juror misconduct during voir dire. The credibility of Juror Threeat the hearing should be reviewed. Her

answers demonstrate that jury service on this case was emotional, uncomfortable and intense. 5AA 1145-46. The failure to disclose, after hearing other jurors come forth with sensitive but honest answers for the Court, was intentional. The misconduct was prejudicial. A new trial is necessary. Three acquittals occurred. Two convictions were entered after ten hours of deliberation. See *Bowman v. State*, 132 Nev. ___, Adv. Op. 30, decided April 28, 2016 and *Meyer v. State*, 119 Nev. 554, 80 P.3d 447 (2003).

2. Appellant's statement to the police was obtained in violation of the Fifth Amendment and *Miranda*, it was not knowing or voluntary.

A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession, and even if there is ample evidence aside from the confession to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376 (1964). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. *Townsend v. Sain,* 372 U.S. 293, 307

(1963).

The statement made by Mr. Brioady occurred after a six minute removal from the interrogation room and a hallway conversation which involved two detectives blocking the exit and over powering the will of Mr. Brioady. He repeatedly stated he needed to leave and go get his son. In spite of the number of times he asked to leave, he was not allowed to do so.

The Nevada Supreme Court has established certain criteria that must be considered when determining whether a statement has been voluntarily made:

> " '[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.' " 30 The suspect's prior experience with law enforcement may also be a relevant consideration for the district court. *Rosky v. State*, 121 Nev. 184, 194, 111 P.3d 690, 696 (2005) (citing *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)).

Together, these factors help to assess whether the defendant's will was overborne at the time he confessed. A confession must be "made freely and voluntarily, without compulsion or inducement." *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). The totality of the circumstances is the primary

consideration for determining voluntariness. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

In this case, we know that the police lied to Mr. Brioady to get him to come to the police station. They lied when they talked him into "voluntarily" providing his DNA. In reality, Mr. Brioady went to the police station to talk about his tires that had been slit by some group of men. Mr. Brioady brought his evidence and repeatedly tried to get the police detectives to offer some help. Initially, they pretended they would do so. After securing his DNA and a statement, the detectives told him that the patrol division would handle that issue and that they would have no involvement. They lied and told him that they had DNA evidence which would demonstrate more contact between himself and the victim than he acknowledged. They let him believe that if the victim was the aggressor that he would not be in trouble with the law. They told him he would be able to leave the police station just as soon as he was done talking with them. They did not let him leave when he stood up, left the interview room and said he was leaving, nor did they let him leave when he repeatedly stated he had to go and pick up his son.

At no time was Mr. Brioady provided his rights per *Miranda v. Arizona*, 384 U.S. 436 (1966), by the detectives so that he could make a knowing decision on exercising his constitutional rights.

Any statements made by Mr. Brioady after the hallway conversation with the detectives were involuntary. See *Carrol v. State*, 132 Nev. ___, Advanced Opinion, decided April 7. 2016. Mr. Brioady's will was overborne. He is a young man, has only one prior felony conviction from California for a marijuana felony, does not have a high school degree, and police deception was used as a weapon against him. See *Sheriff, Washoe County, v. Bessey*, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996). Strong-arm tactics were evident throughout the interrogation. The only factor that weighs in for the State is that they actually let him go. Yet, in front of the jury the Detective used the fact that Mr. Brioady was set free against him by advising the jury that Mr. Brioady did not cooperate with police and was arrested five days later.

It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been

advised of his rights. The prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights. *Gaxiola v. State,* 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the United States Supreme Court concluded that a prosecutor violated a defendant's right to remain silent by cross-examining the defendant as to why he did not tell the police upon being arrested that he had been set up. The Court wrote, "Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these Miranda rights." Id at 617. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id at 618.

In this case, the Detective violated this constitutional rule by telling the jury that Mr. Brioady did not return to the police station to talk to them again, did not return calls to the police, and was arrested as a result of his failure to cooperate with them.

The District Court erred when it determined that the statements made by Mr. Brioady to the Sparks detectives were voluntary and when those statements were admitted to this jury it was reversible constitutional error. The evidence against Mr. Brioady, absent his qualified admissions, was insufficient as a matter of law. The jury deliberated ten hours and acquitted him of three serious charges. When the facts are reviewed against a cold record that does not have Mr. Brioady's statements in it, the facts are insufficient to sustain a conviction. Reversal is mandated.

We know this evidence was prejudicial as the State played the Defendant's statements to the detectives both in their case in chief and in their initial and final closing arguments. 4AA 942, 951, 952 993, 996.

3. There was insufficient evidence to sustain the conviction.

Standard of Review:

In determining the sufficiency of the evidence below, the Court considers "whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt." *Braunstein v. State,* 118 Nev. 68, 79, 40

P.3d 413, 421 (2002). The critical question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Argument:

The bottom line of this transcript is that there is insufficient evidence to sustain this conviction.

Insufficiency of the evidence occurs where the prosecution has not produced "a minimum threshold of evidence" upon which a conviction may be based. *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). It occurs when, even if the evidence presented at trial were believed by the jury, it would still be insufficient to sustain a conviction, as it could not convince a reasonable and fair-minded jury of guilt beyond a reasonable doubt. *Id.* Indeed, when there is truly insufficient evidence to convict, a defendant must be acquitted. *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

It is apparent that the jury did not deem the credibility of the victim to be sufficient to return a conviction, as the convictions herein seem to mimic the defendant's qualified admissions. The jury, when faced with only the testimony of the victim to support a factual allegation, acquitted the defendant. The convictions for two counts of lewdness should be set aside.

4. The convictions violate the *corpus delicti* rule and due process under the Fifth & Fourteenth Amendments. The District Court's refusal to instruct the jury on the corpus delicti rule deprived the Defendant from pursuing his defense.

Standard of Review:

Confessions and admissions of the defendant may not be used to establish corpus delicti absent sufficient independent evidence. Once the state presents independent evidence that the offense has been committed, admissions and confessions may then be used to corroborate the independent proof. However, all other relevant evidence may be considered. The corpus delicti may be established by purely direct evidence, partly direct and partly circumstantial evidence, or entirely circumstantial evidence. *Sheriff v. Middleton*, 112 Nev. 956, 962, 921

P.2d 282, 286 (1996). A jury must be instructed on the theory of the defense case. This Court reviews a district court's denial of proposed jury instructions for abuse of discretion or judicial error. Id. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Argument:

The corpus delicti of a crime must be proven independently of defendant's extrajudicial admissions. *Edwards v. State*, 122 Nev. 378, 132 P.3d 581 (2006); *Doyle v. State*, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996) (citing *Hooker v. Sheriff*, 89 Nev. 89, 506 P.2d 1262 (1973)), overruled on other grounds by *Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004).

The involuntary statements that Mr. Brioady made to Detectives Thelin and Bellamy, in violation of his Fifth Amendment rights to remain silent, constituted the evidence that the jury was presented to convict him. The Defendant's statement to the police was played during the trial and again during both initial and final closing arguments of the State. The closing argument by the State as

much as concedes this point. Ms. Hicks told the jury:

--- "We had admissions. We had partial admissions. He gave you what he wanted to give you, but they are partial admissions." 4AA 986.

--- "The facts in this case are what Cherish told you. But like I said, if for some reason you believe his side of the story, you still find him guilty of three Counts, one of those sexual assaults, one of those lewdness that had to do with the breast and the vagina, and the other lewdness that had to do with her touching his penis." AA 998.

--- " No matter what, if you believe Cherish or you believe the Defendant, let's say you believe this suspect and everything he said in that interview. Let's say it got out of hand, he didn't realize the child part of it, that she actually was the aggressor. Let's say you believe that. You still have to find him guilty of lewdness, right, because he admits to you he touched her breast. You still have to find him guilty of touching her vagina, right? Because he admits to it. You still have to find him guilty of the sexual assault where he slid his fingers into her vagina because he admits to that, too. You still have to find him guilty of when Cherish stoked his penis because he admits to that, too. So no matter what, he's guilty. 4AA 959-60.

The argument of the State equated to, the State does not have to prove this beyond a reasonable doubt because the Defendant admitted to it. This conviction violated the corpus delicti rule. The District Court's refusal to instruct the jury on the *corpus delicti* rule by finding it deprived Mr. Brioady of the theory of his defense.

This court has consistently recognized that specific jury instructions that

remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request. See, e.g., *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987); *Margetts v. State*, 107 Nev. 616, 818 P.2d 392 (1991) and *Crawford v. State*, 121 Nev. 744, 748, 754, 121 P.3d 582, 585, 589 (2005). The same is true of the requirement that the State have sufficient evidence outside the statement of the Defendant to sustain its conviction. The District Court erred when it refused to provide the jury with defense instruction #C.

The defense supported this instruction request by *Azbill, Meegan, Tabish and Hicks*. 4AA 921. The Court ruled that *corpus delicti* was not applicable in this case and refused to instruct the jury on the theory of defense. 4AA 922.

If the defense theory is supported by at least some evidence that, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error. *Ruland v. State*, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986) & *Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

The District Court deprived Mr. Brioady of a fair trial under due process of

the Fifth & Fourteenth Amendments by failing to instruct the jury on the *corpus delicti* rule. The conviction cannot be sustained as it is in violation of the *corpus delicti* rule.

5. The District Court erred when it refused to allow cross-examination of the complaining witness for prior false allegations of criminal conduct against her in violation of the Sixth Amendment rights of confrontation and due process right to a fair trial. The District Court's ruling violated Nevada law found in *Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006) and *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989).

Standard of Review:

A trial court has sound discretion in sexual assault case to admit or exclude evidence of a victim's prior false allegations or prior sexual experiences. NRS 50.090 and *Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006) and *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989).

Argument:

This case turned upon the testimony of one 12 year old victim. In the instant case, there was no corroborating evidence beyond the victim's testimony. This same victim had made a prior allegation of having sexual conduct with an "uncle" of a friend while the family lived in Alaska. Part of the reason the family moved

from Alaska back to Reno was that this child was out of control. This evidence was proof by a preponderance of the evidence.

The victim admitted outside the presence of the jury that she lied so often that she did not think her parents would believe "anything that came out of her mouth" so she said nothing about this incident. 3AA 632, 648.

The evidence of a prior false allegation actually came from the testimony of Leslie Peterson, the child's mother. According to Leslie, Cherish stated she had sex and was taken in for a physical examination which demonstrate she was still a virgin. 1AA 155, 170, 175, 188.

Michael Voigt was available to testify that he was employed by the Washoe County Sheriff's Office, was the stepfather of Cherish and that Cherish falsely accused him of giving her a black eye by telling school officials that he had hit her. 1AA 154-57, 3AA 636-640, 643, 6AA 1417-1418.

The District Court did not allow the defense to bring forth this evidence in any manner. 6AA 1418. Dr. O'Donohue was ready to testify about false allegations and false memories relating to this victim. Dr. O'Donohue's testimony

was limited to the subject matter of interrogating or evaluation juvenile victims of crime, general commentary on the subject, but could not apply his findings to any facts found in this case in particular. 6AA 1412-14.

Dr. Davis was ready to explain why Mr. Brioady would acquiesce to the police and make any type of admission in this setting– after he was told his DNA was present and would be used against him. Michael Voigt could have been called as a witness. Cross-examination could have occurred during the testimony of both Cherish and Leslie Peterson. Yet, the jury was left with the belief that this was an honest little girl who had never lied about a material matter.

The United States Supreme Court has held that confrontation means more than being allowed to confront the witness physically. Cross-examination is a primary interest secured by the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). The inability to cross-examine Cherish about prior false allegations of this nature deprived Mr. Brioady of his Sixth Amendment rights to confront the witnesses against him. The Sixth Amendment guarantees an opportunity for meaningful cross-examination,

based upon the Confrontation Clause. *See Kentucky v. Stinger*, 482 U.S. 730, 739, n. 9 (1987).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; see *Idaho v. Wright*, 497 U.S. 805, 813 (1990). The accused to has a right to require the prosecution's case to survive the crucible of meaningful adversarial testing. *U.S. v. Chronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). Mr. Brioady was denied his rights of confrontation under the Confrontation Clause of the Sixth and Fourteenth Amendments and denied his right to due process under the Fifth & Fourteenth Amendments. *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) and *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

The trial court's error in excluding the evidence of child victim's prior false allegations of sexual abuse was plain error that affected Mr. Brioady's substantial rights, in this trial for lewdness and sexual assault. The evidence of prior false allegations was critical to defendant's presenting a defense and receiving a fair trial. If Cherish failed to admit that she had made this prior false allegation, then

the testimony of Leslie Peterson was available to prove it by a preponderance of the evidence. Exclusion of Dr. O'Donohue's conclusions regarding this witnesses false allegations deprived Mr. Brioady of his right to a fair trial.

The credibility of Cherish was a key factor in determining guilt or acquittal in this sexual assault/ lewdness trial. The trial court's exclusion of extrinsic evidence of the victim's prior false allegations of sexual assault or abuse deprived the fact-finder of evidence that was highly relevant to a crucial issue directly in controversy, that being the credibility of the witness. The evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant's constitutional right to present a full defense. The District Court's ruling that this evidence was too impactual and prejudicial was erroneous. 3AA 646-47. This ruling flies in the face of this Court's instructions in *Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006) and *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989). Mr. Brioady is entitled to a new trial at which he may present his defense. He was deprived of his Sixth Amendment right to confront the witnesses against him and his Fifth Amendment right to a fair trial and to present his defense.

6. The Court deprived the Defendant of the right to have the jury instructed on the lesser included offense of NRS 207.260(1), unlawful contact with a child when the offender is more than 5 years older than the child and the child is less than 16 years of age.

Standard of Review:

The interpretation of a statute presents a question of law and is subject to de novo review. *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004). The district court has broad discretion to settle jury instructions. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The Court reviews a district court's denial of proposed jury instructions for abuse of discretion or judicial error. Id. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Whether an instruction was an accurate statement of law is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

Argument:

The district court abused its discretion by denying Mr. Brioady's proposed

jury instruction for NRS 207.260(1) as a lesser included offense to the lewdness charges. In this case, Mr. Brioady was in his early 30's and the victim was age 12, under 16 as required by NRS 207.260. The contact that Mr. Brioady admitted to, clearly, was kissing the victim on the cheek and touching her breast outside of clothing while pushing her off of him. Mr. Brioady admitted to the victim's grabbing of his penis and him telling her to knock it off.

Blockburger licenses multiple punishment unless, analyzed in terms of their elements, one charged offense is the same or a lesser-included offense of the other. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Crowley* and *Braunstein* were dual convictions under NRS 201.230, which by its terms makes "crimes of sexual assault and lewdness . . . mutually exclusive," meaning as a matter of statutory interpretation that the same act can yield a conviction for sexual assault or lewdness but not both. *Braunstein v. State*, 118 Nev. 68, at 79, 40 P.3d 413, at 421; *Crowley v. State*, 120 Nev. 30, at 33-34, 83 P.3d 282 at 286; see also *Wright v. State*, 94 Nev. 415, 418, 581 P.2d 442, 444 (1978) (Nevada's kidnapping statute, as a matter of substantive law, requires movement that increases the risk to the

victim, over and above that to be expected in any robbery—essentially, a sufficiency-of-the-evidence determination); *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)– to similar effect.

This jury was not instructed that it could not convict on both sexual assault and lewdness if the lewdness was part and parcel of the sexual assault fact setting. Since the jury did not convict on the sexual assault, the question becomes whether this was a compromise verdict. We know this jury deliberated for 10 hours and actually asked whether they could let family members know they were still alive.

NRS 207.260(1) provides:

> "A person who, without lawful authority, willfully and maliciously engages in a course of conduct with a child who is under 16 years of age and who is at least 5 years younger than the person which would cause a reasonable child of like age to feel terrorized, frightened, intimidated or harassed, and which actually causes the child to feel terrorized, frightened, intimidated or harassed, commits the crime of unlawful contact with a child."

NRS 201.230 provides:

> "A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child."

The theory of defense for Mr. Brioady included the fact that he should not have been on the floor with the victim or her sister Ashley and that was an improper course of conduct that could frighten the two girls. Mr. Brioady sought to have the jury instructed on this theory of defense. The District Court found that this statute did not apply and held that since there was no authority from this Court declaring NRS 207.260 to be a lesser included offense of lewdness that the instruction would not be given.

In this case, (1) the lesser offense is closely related to the offense charged; (2) defendant's theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists.

Absent the testimony of the Defendant, which should be stricken as unconstitutionally obtained, the evidence supports the fact that Mr. Brioady should not have been lying on the floor with a 12 year old girl, nor should he have sat on a couch alone with a 12 year old girl without another adult in the room. Yes, America really does believe that to be true. As such, a jury would have reviewed the lesser included offense and reasonably convicted Mr. Brioady of violating

NRS 207.260. The difference being a term of life in prison versus a six year maximum sentence. The latter sentence is more properly imposed on this fact setting.

7. Cumulative errors precluded a fair trial, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

A trial that is as fraught with error as this trial calls into question the validity of the process utilized to gain a conviction. Relevant factors to consider in evaluating a claim of cumulative error include whether "'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996) (quoting *Big Pond*, 101 Nev. at 3, 692 P.2d at 1289), cert. denied, 519 U.S. 1012, 117 S.Ct. 519 (1996); see also *Lay*, 110 Nev. at 1199, 886 P.2d at 454. A review of the errors which occurred herein demonstrates that reversal of the conviction and the granting of a new trial is mandated.

8. Mandatory sentencing under NRS 201.230 violates the Defendant's right to have a judge impose sentence upon him. Imposition of a life prison term on this case violated the 8th Amendment provision against cruel & unusual punishment.

Standard of Review:

This court has consistently afforded the district court wide discretion in its sentencing decision. See *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed "[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." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Argument:

Divesting the district court of its discretion in the sentencing role renders the role of the judiciary meaningless with regard to determining whether a convicted sex offender really needs to be on parole for life. Not every case is as egregious as another. Reading the statute as mandatory encroaches upon the judicial function. While a sentencing court has wide discretion in making sentencing decisions, *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), the Legislature is empowered to define crimes and determine punishments,

as long as it does so within constitutional limits. *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978). Moreover, "it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." *Mendoza-Lobos v. State*, 125 Nev. 634, 640, 218 P.3d 501, 505 (2009).

In spite of this, when the sentencing court has a compete inability to impose a reasonable sentence that fits the crime, justice is denied. Although his Court has ruled that just as it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes, it is also within the Legislature's power to limit judicial discretion by mandating factors to be considered by the courts when imposing a sentence. *Mendoza-Lobos*, supra. This sentencing scheme needs an overhaul. Not every touch of a teenage child over the clothing warrants a life prison term.

The sentence is cruel and unusual. *U.S. Const. amend. 8* The life prison term is so grossly disproportionate to the offenses as to shock the conscience. See *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion); *Blume v.*

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

The Court considers several factors (none of which is dispositive) in determining whether a sentence is sufficiently disproportionate to violate the Eighth Amendment. These factors include: (I) whether the particular sentence would serve a legitimate penological purpose, with due deference for legislative judgments; (ii) a comparison of the gravity of the offense with the harshness of the punishment imposed; and (iii) a comparison of the sentence imposed to evolving standards of decency as reflected in the laws and practices of the States and the international community. *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651-2658 (2008); *Roper,* 543 U.S. at 561, 564-567, 575-578; *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (plurality opinion).

When conducting this sentencing review against these facts, a new sentencing hearing should be mandated and the mandatory life sentence imposed under NRS 201.230 found to be unconstitutional under the 8th Amendment.

CONCLUSION

This conviction must be reversed. JERICHO JAMES BRIOADY is entitled to a new trial. His convictions were obtained in violation of the Fifth, Sixth and Fourteenth Amendments. The right to a new trial is apparent and supported by the record of this trial. The verdicts and sentences must be vacated by this Court.

DATED this 24th day of August, 2016.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the word and line counts found in NRAP 32.

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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.

The document was prepared in Word Perfect. There are 62 typed pages, 12968 words in this brief and 1076 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

DATED this 24th day of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

_____ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada, first class postage paid.

_____ Federal Express or other overnight delivery

X Reno/Carson Messenger Service

addressed as follows:

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DATED this 24th day of August, 2016.

Karla K. Butko

KARLA K. BUTKO, Esq.