IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY ANTHONY WILLIAMS,	)	NO. 70868
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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JURISDICTIONAL STATEMENT

A. **Statute which grants jurisdiction to review the judgment: NRS 177.015.**

B. **Judgment of Conviction filed June 23, 2016; Notice of Appeal filed July 15, 2016.**

C. **This appeal is from a final judgment entered on June 23, 2016.**

ROUTING STATEMENT

Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because Williams was convicted of multiple Category A felonies.

ISSUES PRESENTED FOR REVIEW

I. The Court erred by denying the defense motion to sever the counts involving A.H. from the counts involving T.H.

II. The Court erred in denying a hearing and the admission of evidence under *Summit v. State*.

III. The trial court violated the Equal Protection clauses of the United States and Nevada Constitutions by denying the defense challenge to discriminatory practices prohibited by Batson v. Kentucky.

IV. The Court committed reversible error by denying defense cause challenges.

V. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense instructions.

VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes, and convictions based on insufficient evidence violate federal and state due process guarantees.

VII. The Court abused its discretion in denying Williams' motion to dismiss counsel.

VIII. The sentence imposed amounts to cruel and unusual punishment.

IX. Cumulative error warrants reversal of this conviction.

STATEMENT OF THE CASE

The State filed a complaint on September 10, 2013, alleging three counts of lewdness with a child under 14 and five counts of sexual assault on a minor under 14. (I 1). On September 19, 2013, the State filed an amended complaint alleging twenty-eight counts of lewdness and twenty-five counts of sexual assault on a minor under 14. (I 5-20). After waiving his preliminary hearing, Williams was bound over to District Court pursuant to negotiations. (I 27). On December 10, 2013, the State filed an information alleging one count of attempt sexual assault on a minor and one count of attempt lewdness with a child under 14. (I 45). Williams subsequently changed his mind regarding the negotiations and the case did not resolve. (II 316). On December 27, 2013, the State filed an amended information alleging twenty-eight counts of lewdness with a child and twenty-five counts of sexual assault on a minor under 14. (I 47). On January 2, 2014, Williams was arraigned and pled not guilty on all counts. (II 357). On March 29, 2016, the State filed a second amended information alleging nine counts of lewdness and six counts of sexual assault. (II 266). On April 4, 2016, jurors convicted on counts 1, 2, 3, 5, 7 and 9, lewdness with a child under 14, and on counts 4, 6, and 8, sexual assault on a minor under 14. Jurors acquitted on the remaining counts, and counts 5, 7, and 9 were subsequently dismissed as

alternative counts. (II 305; II 312; VI 1260). On May 23, 2016, the Court imposed the following sentence: Counts 1, 2 and 3: 120 months to life, concurrent; count 4: 420 months to life, consecutive; count 6: 420 months to life, consecutive; count 8: 420 months to life, consecutive, for an aggregate sentence of 115 years to life, with 1010 days credit for time served, plus restitution and lifetime registration as a sex offender. (VI 1261-62). The State filed the Judgment of Conviction on June 23, 2016. Williams filed a timely notice of appeal on July 15, 2016. (II 311).

STATEMENT OF THE FACTS

Gregory Williams began dating Aneesah Hasan in the spring of 2009. Hasan has five children: A.H., T.H., James, Demarius, and Kayla. They lived in an apartment in Las Vegas. (III 747-48). James shared a room with his brother Demarius, and the three girls shared a separate bedroom. (IV 804). Later that year, Williams moved in with Hasan and her children. (III 747). The family later moved to another apartment in April of 2011. (III 748). Williams worked intermittently as a wedding photographer. (III 751). Sometime in the spring of 2013, Hasan testified that her son James spoke to her about Williams and expressed concerns. (IV 752). Hasan testified that she consulted her other children and was told that one night Williams had taken T.H. from her bed and moved her to another room. (IV 753). Hasan

admitted that James did not see anything and had no specific information when he first approached her about Williams in early 2013. (IV 762). Hasan spoke with Williams and decided that there was no basis for any further action. (IV 753). Six months later, in September, the children approached Hasan while she was cooking breakfast and told her they needed to speak with her about Williams. (IV 754-55). After the conversation, in which T.H. and A.H. alleged acts of lewdness and sexual assaults by Williams, Hasan called 911. (IV 755).

At trial, T.H. testified that Williams called her over to the couch when she was sitting at a table in the living room. She testified that he told her to pull down her underwear and her pants. (IV 846). She testified that Williams placed his penis in her vagina and in her rectum. (IV 847). T.H. could not remember many of the details about this event, including the individuals' positions, the time of day, whether anything was said, and how the incident ended. (IV 847-49). T.H. testified that about six months earlier, Williams took her out of the bunk bed she shared with Kayla. (IV 860, 864-65). She could not remember what happened that night, but testified that she was taken into the living room. (IV 864-65). T.H. testified that a previous time, she saw naked pictures on the living room television. (IV 866). She testified that Williams touched her breasts and penetrated her vagina and rectum. (IV

868). T.H. testified that on another day, the children had gotten in trouble for misbehavior and she was standing in the corner in the guest room. (IV 860-61). She testified that Williams came into the room and told her to approach him, and that he penetrated her vagina and rectum with his penis. (IV 863).

A.H. testified that she saw Williams take T.H. out of their bedroom one night. (IV 913). A.H. testified that Williams would discipline the children by sending them to their rooms or telling them to stand in the corner. She testified that one night Williams told her to leave the corner of the living room and lie on the couch, and that he lifted up her shirt and sucked her breast. (IV 911-914). She testified that her siblings were at home when this happened. (IV 916). A.H. testified that the next day, Williams told her to come over and tried to pull up her shirt, but that she said she was scared and started crying and that he stopped. (IV 917-18). A.H. admitted that she didn't tell Hasan about these events when the siblings talked to her about T.H. (IV 919).

James testified that Williams would sit on a chair wearing only his underwear, and that he would kiss T.H. on the cheek. (IV 792). James testified that Williams would tell him to stay in the bedroom until T.H. was no longer in the living room with him. (IV 794). James testified that the first time he spoke to his mother about Williams, he told Hasan that T.H. was

Williams' favorite, and that she would get treats and snacks but that Williams would not give treats and snacks to the other kids. (IV 794). James testified that he didn't feel good about the relationship between Williams and T.H. because she got treats he didn't get. (IV 798). Although James testified that he would sometimes peek under the door to see Williams and T.H., he admitted that he could only see their feet. (IV 801).

Kayla testified that Williams was often alone in the living room with T.H., and that she would sit on his lap, facing him. (IV 814). Kayla admitted that she told the investigating Metro officer, Detective Flink, that she didn't see anything happen to T.H. or A.H. (IV 819).

Dr. Vergara testified regarding the examination she conducted on T.H. She testified that T.H.'s hymen was intact and that there was adequate hymenal tissue. (V 1144). She admitted that she saw no lesions in the genitalia and rectal areas, and no local redness or hymenal or rectal tears. (V 1153-55).

The State's forensic scientist, Cassandra Robertson, testified that she obtained sperm and a protein found in semen when she tested the vaginal swabs obtained from T.H. (IV 975). The quantities retrieved were too low to conduct a full profile, although T.H.'s epithelial cells were identified. (IV 977). Robertson also testified that she obtained DNA from rectal swabs

taken from T.H. and found sperm and a protein found in semen. (IV 982). The DNA contained epithelial cells from T.H. (IV 987). Robertson was able to test the sperm fraction, and testified that the results were consistent with Williams' buccal swab DNA sample to a degree of one in 700 billion. (IV 988). Robertson also found sperm and semen protein in the underwear taken from T.H. Robertson identified DNA from T.H.'s epithelial cells and DNA from a male in the sample; Williams could not be excluded as the source of the male DNA. (IV 993-96). Robertson testified that the DNA profile obtained from one of the underwear samples was consistent with Williams. (V 1034). Although she was able to determine that the second sample's epithelial fraction contained DNA contributed from a male, there was not enough material present to draw conclusions about the contributor. (V 1038). The sperm fraction contained in the second sample had DNA consistent with Williams. (V 1039). A third area tested also contained DNA consistent with T.H., and DNA consistent with Williams in a sperm fraction. A third unknown contributor's DNA was also present in this sample. (V 1042).

After a five-day trial, jurors convicted Williams on counts I through 9 and acquitted on counts 10 through 15. The State dismissed 4, 6, and 8 as

alternate counts, and Williams was sentenced to 35 years to an aggregate sentence of 115 years to life in prison.

SUMMARY OF THE ARGUMENT

This case hinged on the jury's willingness to believe a story about years of unreported physical abuse by complaining witnesses whose allegations cross-corroborated each other when the trial Court denied severance of the counts. Because these witnesses' credibility was the cornerstone of the State's case, this Court cannot deem the trial Court's refusal to sever these cases harmless error. These claims occurred months to years apart and did not comprise a common scheme or plan; thus, the prejudice to Williams from joinder cannot be overstated. Instead of facing two separate accusers whose credibility may have been individually questionable, Williams was forced to defend against two accusers who essentially "cross-corroborated" each other. In addition, the Court excluded evidence of alternate sources of sexual knowledge on the part of the accusers, and made numerous improper evidentiary and legal rulings during the trial.

The Court also erred in denying a challenge under *Batson v. Kentucky* and in making other erroneous rulings during jury selection. Finally, the State failed to prove these acts beyond a reasonable doubt, and Williams' sentence violates the Eighth Amendment and the Nevada Constitution.

ARGUMENT

I. The Court erred by denying the defense motion to sever the counts involving A.H. from the counts involving T.H.

Prior to trial, the defense moved to sever the counts involving T.H. from the counts involving A.H. on the grounds that the charges would not have been cross-admissible in separate trials. (I 153). The Court denied the motion. (II 449). This decision resulted in significant prejudice and warrants reversal of these convictions. NRS 173.115 governs joinder of offenses:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are: (1) Based on the same act or transaction; or (2) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

However, NRS 174.165 authorizes severance of counts if "... it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses... in an indictment or information..." Thus, joinder of offenses if proper only if the offenses: 1) are based on the same act or transaction, or comprise parts of a common scheme or plan; and 2) are not unduly prejudicial to the defendant or the State.

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The offenses joined here were not part of the same transaction, nor were they part of a common scheme/plan.

The charges relating to A.H. (Counts 1-2) were not part of the same act or transaction as those relating to T.H. (Counts 3-15). The allegations involving A.H. occurred on an unknown date and may have been several months to a year or more prior to some of the acts involving T.H. (II 266; IV 914). Significantly, the acts alleged by A.H. do not resemble the acts alleged by T.H. and involve different parts of the body and entirely different levels of interaction. (II 266-67). Accordingly, the joined offenses were not based on the same transaction or occurrence. A common plan or scheme "requires that each crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant." *Richmond v. State*, 118 Nev. 924 (2002) (internal citation omitted). "'The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime.'" *Id. (citing Mitchell v. State*, 105 Nev. 735, 738 (1989)). The joinder statute requires that a defendant, upon undertaking each act alleged, have contemplated the further acts alleged, and that each act taken must have been in furtherance of an over-arching criminal enterprise.

The separate and distinct charges do not amount to a pre-conceived plan to engage in some over-arching criminal enterprise. First, beyond

indulging purported pedophiliac predilections, the evidence failed to disclose any preconceived plan to engage in a criminal enterprise. Second, even if this Court concludes that repeated allegations of molestation constitute a criminal enterprise, the evidence failed to disclose that Williams contemplated the alleged misconduct involving E.H. at the time he engaged in the alleged misconduct involving A.H. In fact, A.H. could testify only that the incident occurred prior to the first attempted disclosure to Hasan, but could not name the year or month when the conduct occurred. (IV 913).

In *Richmond, supra*, the Nevada Supreme Court confronted facts similar to the instant case. Richmond was convicted of molesting a neighbor's child. *Id.* The trial court admitted evidence that, on another occasion, Richmond had molested another neighbor child. *Id.* The Nevada Supreme Court rejected the trial court's admission of the bad act evidence, finding that the two offenses did not amount to parts of a common plan: "Richmond appeared simply to drift from one location to another, taking advantage of whichever potential victims came his way. His crimes were not part of a single overarching plan, but independent crimes, which Richmond did not plan until each victim was within reach." *Id. See also Mitchell v. State*, 105 Nev. 735 (1989) (holding that sexual assaults perpetrated at same location and in same manner insufficient to establish common scheme or

plan). Accordingly, the *Richmond* Court held: "...[A] sexual assault at the same location and perpetrated in the same manner a month before the sexual assault at issue was inadmissible because it did not establish a common plan (citing *Mitchell*, supra)."

Like *Richmond*, the offenses alleged here did not amount to parts of an over-arching criminal scheme or plan. Prosecutors presented no evidence connecting the charges involving A.H. to the charges involving T.H. While both girls alleged sexual improprieties at the hands of the same perpetrator, the evidence failed to disclose that the encounters were anything more than a series of isolated events, separated by an unknown period of time, possibly years apart. Thus, the offenses joined in the case at bar did not comprise parts of a common scheme or plan.

The joined offenses were not cross-admissible.

Moreover, even if there was an over-arching 'plan' or 'scheme' of which the alleged misconduct was a part, the charges failed to bear sufficient relation to one another to warrant joinder. In *Tabish v. State*, 119 Nev. 293 (2003), the Nevada Supreme Court held that the joinder of related, but not cross-admissible, offenses amounted to error.[1] *Id.* Prosecutors charged Tabish with murdering casino heir Ted Binion for financial gain, theorizing

[1] Admittedly, the *Tabish* Court found the error to be harmless on the facts of that case. *Id.*

that Tabish intended to steal valuable coins from a vault maintained by Binion. *Id.* Prosecutors also charged Tabish with assaulting another individual, Leo Casey, in the months preceding Binion's death. *Id.* Prosecutors argued that Tabish threatened and brutalized Casey in an attempt to obtain access to a valuable sand pit in which both Tabish and Casey invested. *Id.* Prosecutors alleged the Casey charges were properly joined with the Binion murder charge as they demonstrated Tabish's common scheme or plan to harm and steal from his friends and associates. *Id.* The Court disagreed, holding that money and greed could be motivating factors in many criminal cases but that, absent more, the Casey and Binion offenses were not so interrelated as to warrant joinder. *Id.*

As in *Tabish*, the joined offenses here involved alleged misconduct that occurred on different occasions involving different alleged victims. While the allegations of misconduct bore some broad similarities and the same general motivations, those similarities were not sufficiently unique to warrant a finding of cross-admissibility. Cross-admissibility requires more than general similarities between joined offenses. *Mayes v. State*, 95 Nev. 140, 142 (1979). In *Mayes*, prosecutors charged the defendant with stealing a client's money and jewelry after performing an act of prostitution. *Id.* The trial court allowed the testimony of two prior alleged victims, each of whom

testified that the defendant stole money and jewelry after performing a sexual act. *Id.* The *Mayes* Court found that, while each purported offense involved allegations that the defendant stole money and jewelry after performing a sexual act, the allegations lacked the 'special characteristics' distinguishing the offenses from other types of 'trick roll' crimes. *Id.* At 143. Accordingly, the *Mayes* Court rejected the trial court's admission of the prior acts of misconduct.

The Eighth Circuit Court of Appeals similarly rejected the admission of prior allegations of misconduct in a case virtually identical to that at issue here. In *U.S. v. LeCompte*, 99 F.3d 274 (8th Cir. 1996), the defendant was convicted of abusive sexual contact with his eleven-year old niece. The trial court allowed prosecutors to introduce evidence that, on a prior occasion, the defendant molested another of his nieces. Both girls were the same age. Both girls testified that the defendant forced them to touch his penis; that he touched them in the groin area; and that he often committed these acts during games such as hide-and-seek.

The *LeCompte* Court found that the similarities between the crimes were insufficiently unique to establish a particular modus operandi. The Court noted that, to be used for identity purposes, such evidence must show "a greater degree of similarity between the charged crime and the uncharged

crime" than when the evidence is used to show state of mind. *Id.* At 278. "[T]o the extent that the prior abuse of T.T. [the bad act witness] and the charged offense are in fact similar, they reflect misconduct common to all too many child sex offenders. Therefore, T.T.'s testimony was not relevant to prove plan, preparation, or modus operandi." *Id.*

The same can be said of the joined offenses here. There was nothing uniquely idiosyncratic about the misconduct alleged in the case at bar. The sexual acts described by A.H. and T.H. comprise a common type of allegation in sexual molestation cases; further, the acts alleged by A.H. are completely different than the acts alleged by T.H. Thus, under the authority outlined above, the dual sets of charges alleged here were not sufficiently cross-admissible to warrant joinder.

The prejudice occasioned by the instant joinder outweighed considerations of judicial economy.

Finally, even if there was an over-arching 'plan' conceived by Williams, and even if the joined offenses bore similarities sufficiently common to that over-arching enterprise, joinder of the instant offenses was so prejudicial as to require severance. Severance should be granted when there is a serious risk that the jury may not make a reliable judgment about guilt or innocence. *Rodriguez v. State*, 117 Nev. 800 (2001). Accordingly, this Court has recognized that, even if joinder is permissible under NRS

173.115, a trial court should sever offenses if the joinder is "unfairly prejudicial." *Floyd v. State*, 118 Nev. 156 (2002).

Prejudice from joined offenses can take various forms:

> [The] first kind of prejudice results when the jury considers a person facing multiple charges to be a bad man and tends to accumulate evidence against him until it finds him guilty of something. The second type of prejudice manifests itself when proof of guilt on the first count in an information is used to convict the defendant of a second count even though proof would be inadmissible at a separate trial on the second count. The third kind of prejudice occurs when the defendant wishes to testify on his own behalf on one charge but not on another.

Floyd, supra. 42 P.3d 249, 254 (*citing State v. Campbell*, 189 Mont. 107 (Mont. 1980). The critical question is "whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." *Tabish, supra,* at 591. Here, the prejudice resulting from joinder is manifest where the witnesses' inconsistencies were overshadowed by the prospect of cross-corroboration; further, Williams may have taken the stand in a separate trial involving only one complaining witness, but in a joined trial could not elect to limit his testimony to one set of charges and retain his right against self-incrimination as to the other charges, thereby compromising his Fifth Amendment and Sixth Amendment rights.

Although judicial economy would have been minimally compromised by separate trials involving some of the same witnesses, the fact remains that these charges involved two separate and distinct complaining witnesses making fundamentally different types of allegations. DNA evidence was relevant only to the charges against T.H., and because the other siblings never witnessed any of the facts alleged by A.H., they would not have been necessary witnesses at a separate trial involving the counts alleged by A.H. Thus, judicial economy would not have been significantly compromised by separate trials.

The instant joinder was so manifestly prejudicial as to require severance. The dual allegations of misconduct unfairly corroborated each other. Absent this, jurors may not have convicted on the separate offenses, or may not have convicted at least some of the counts. Each girl's testimony suffered from lack of detail. T.H. gave varying accounts of what happened to her, and could not remember several of the alleged instances of abuse. A.H. failed to mention Williams' purported misdeeds until long after they occurred, and added significant, never-before-disclosed details at trial. Tried separately, the credibility problems inherent in each girl's testimony could have resulted in acquittals. Thus, the instant joinder was so patently

prejudicial as to outweigh concerns regarding judicial economy. As such, the trial court erred by refusing to sever the joined offenses.

Finally, the trial court further erred by failing to proffer a limiting instruction guiding the jury's consideration of the evidence pertaining to the joined charges.

The Court should have proffered an instruction limiting the jury's consideration of the evidence pertaining to the joined offenses. In this regard, the trial court failed to limit the jury's consideration of the evidence pertaining to A.H.'s allegations to just the offenses in which A.H. was a named victim; and the evidence pertaining to T.H.'s allegations to the offenses in which T.H. was a named victim. This, too, amounted to error.

The joinder of each set of offenses was tantamount to the admission of bad act evidence. As this Court is well aware, NRS 48.045(2) limits the admissibility of such evidence:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absences of mistake or accident.[2]

[2] Although NRS 48.045 was amended to include the following provision, this section did not become effective until October 15, 2015:

> Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person

Accordingly, "A presumption of inadmissibility attaches to all prior bad act evidence."[3] *Ledbetter v. State*, 129 P. 3d 671, 677 (Nev. 2006) (quoting *Rosky v. State*, 111 P.3d 690, 697 (2005)). "The principle concern with admitting this type of evidence is that the jury will be unduly influenced by it and convict a defendant simply because he is a bad person." *Ledbetter*, supra, at 677 (quoting *Walker v. State*, 116 Nev. 442, 445 (2000)).

This Court requires a limiting instruction upon the admission of bad act evidence and in the jury instructions. *See Rhymes v. State*, 121 Nev. 17, 22-24 (2005); *Tavares v. State*, 117 Nev. 725, 730 (2001). The instant trial court gave neither. While the issue here involves improperly joined charges (i.e., *charged* bad acts) as opposed to uncharged allegations of misconduct, the concerns regarding prejudice to the accused are the same. This Court rejects the notion that this type of evidence should be deemed automatically relevant and cross-admissible in sexual assault cases: "[i]t rests either on an unsubstantiated empirical claim that one rather broad category of criminals

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committed another crime, wrong or act that constitutes a separate sexual offense. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097. Nev. Rev. Stat. Ann. § 48.045 (West).

[3] The presumption of inadmissibility may be overcome only after a finding by the trial court, outside the presence of the jury and prior to the admission of the evidence, that the bad act evidence is: (1) relevant; (2) clear and convincing; and (3) more probative than prejudicial. *Ledbetter*, at 677.

are more likely to be repeat offenders than all others or on a policy of giving the prosecution some extra ammunition in its battle against alleged sex criminals." *Richmond v. State*, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002) (internal citations omitted). Either scenario presents the grave danger that jurors will convict on one or more charges simply because they perceive the defendant to be a person of bad character.

At minimum, the trial court had an obligation to ameliorate such prejudice with one or more instructions limiting the jury's consideration of the evidence relating to each set of charges. While this may have been inadequate to eradicate the prejudice occasioned by the improperly joined offenses[4], the absence of such guidance left jurors at the mercy of the

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[4] This Court concluded as much in *Tabish*, supra:

> In this case, the district court instructed the jury that it was not allowed to consider evidence from the Casey counts in determining Murphy's guilt as to the counts alleged against her. Murphy argues that this limiting instruction was inadequate, partly because the evidence in the Casey counts was so "graphic." Moreover, Murphy contends, the State "guaranteed that the jury would consider the Casey matter in determining whether the Binion crimes were committed" by emphasizing in its closing arguments its view of the similarities between the Casey incident and the separate allegations in the other counts against both appellants.
>
> In light of the graphic nature of the Casey evidence, coupled with the State's closing argument, we are unable to conclude beyond a reasonable doubt that the limiting instruction was sufficient to mitigate the prejudicial impact of the joinder on the jury's consideration of appellants' guilt on the remaining counts.

implication that the joined charges corroborated one another, and that acquittal on the charged crimes required belief in a vast conspiracy on the part of the children. (V 1196). Accordingly, the trial court's denial of severance and failure to proffer instructions limiting the jury's consideration of the evidence pertaining to the two sets of charges warrants reversal.

II. The Court erred in denying a hearing and the admission of evidence under *Summit v. State.*

On October 15, 2014, the defense filed a motion to admit evidence of the complaining witnesses' ability to contrive these allegations as well as theory

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> The erroneous joinder was especially prejudicial in Murphy's case, although it was manifestly prejudicial to Tabish's trial on the other counts as well.
>
> Additionally, the limiting instruction was inadequate to prevent the improper "spillover" effect of inappropriate joinder. In Bean v. Calderon, [163 F.3d 1073, 1083 (9th Cir. 1998)] the prosecution joined counts alleging two separate murders. The Ninth Circuit Court of Appeals reversed one of the murder convictions because the consolidation of cases led the jury to infer criminal propensity. In other words, there was an unacceptable risk that the jury found the defendant guilty of the second murder simply because it thought he was a bad person for having committed the first murder. In Bean, this impermissible inference allowed the jury to convict on the prosecution's weak case for one of the murders by relying on the stronger evidence of the other murder. Similarly, here the State's weaker case on the Binion counts was bolstered by combining it with the stronger case against Tabish on the Casey counts. Thus, the prejudice in this case constitutes the same type of due process violation that was found in Bean.

Tabish v. State, 119 Nev. 293, 305 (Nev. 2003).

of the defense evidence. (I 71). The defense noted that this evidence was relevant to the theory that the complaining witnesses could have obtained sexual knowledge from exposure to their mother's business. Hasan worked from her house within the pornography industry as an actress in adult films made primarily in a bedroom of the apartment she shared with Williams and the children; she also sold sex toys from the home. (II 382-86). The defense noted that under *Summit v. State*, 101 Nev. 159 (1985), jurors would likely infer that no ten-year old or twelve-year old could possibly have known about the sexual acts T.H. and A.H. would describe unless they had actually experienced the acts. The Court ruled that a pre-trial hearing would be conducted to explore whether the complaining witnesses had in fact been exposed to sexual knowledge resulting from their mother's employment. (II 399-400).

On March 5, 2015, the Court held a hearing on the defense motion. (VI 1263). The State argued that the evidence amounted to bad character evidence against Hasan and that the Court should exclude the evidence as irrelevant and prejudicial. (VI 1301). The defense sough to examine the child witnesses under oath to determine whether exposure to their mother's career had resulted in an alternate source of sexual knowledge. (VI 1303). The Court denied the motion in part on the grounds that the defense had

interviewed the complaining witnesses the previous day; the Court concluded that the defense had thereby potentially contaminated the witnesses by mentioning the issue, and ordered the defense to file another motion if grounds existed to do so. (VI 1304-6).

The defense subsequently moved a second time to explore alternate sources of knowledge, noting that A.H. had described her mother as a "porn star," and had explained the meaning of the term during the pre-trial interview with the defense attorney. (II 449). The Court denied the motion but indicated that the issue could be revisited during trial if the State implied to jurors that the witnesses were credible because girls their age could not have had alternate sources of sexual knowledge. (II 454-56).

The Court erred in precluding the defense from conducting a hearing and from exploring this issue on cross-examination. As this Court noted:

> We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experiences, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.

Summitt v. State, 101 Nev. 159, 164, 697 P.2d 1374, 1377 (1985).

Because the defense was not permitted to explore under oath whether the witnesses may have been exposed to the very acts they described by the nature of their mother's employment, this Court must find reversible error. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Davis v. Alaska*, 415 U.S. 308, 317 (1974), *Washington v. Texas*, 388 U.S. 14, 19 (1967). Appellant has not only the right "to defend against the State's accusations," but the right to a meaningful opportunity to present a *complete* defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). By denying the defense motion, the Court violated Williams' rights to confrontation and cross-examination under the Sixth and Fourteenth Amendments.

There are exceptions to Nevada's rape shield law codified at NRS 50.090. A defendant's constitutional rights to "present witnesses in his own behalf, to confront and to cross-examine the witnesses against him" under the Sixth and Fourteenth Amendments of the U.S. Constitution require that the "competing interests" of NRS 50.090 and the defendant's rights be "closely examined." *Summit* at 162 (internal citations omitted). Therefore, where evidence of exposure to sexual conduct is introduced not "to impeach

the credibility of the complaining witness by a general allegation of chastity" but *for some other relevant purpose*, it can be admitted so long as a balancing test is done. In this case, evidence of Hasan's career as an adult film actress comprised a crucial component of Williams' theory of defense: the creation of pornography in the home comprised an alternate source of sexual knowledge on the part of T.H. and A.H. Although only A.H. admitted to familiarity with her mother's employment in her interview with defense counsel, T.H. was never examined under oath as to whether she may have also had some familiarity with the situation. The Nevada Supreme Court has held that "...a defendant must be afforded to show, by specific incident of sexual conduct, that the prosecutrix has the experience and ability to contrive," the charge against him. *Summit v. State*, 101 Nev. 159, 164 (1985), *quoting State v. Howard*, 426 A.2d 457, 462 (N.H. 1981). Without the ability to present evidence that A.H., and possibly T.H., witnessed highly sexual conduct in their home, the jury would be left to reach the incorrect conclusion that the only possible explanation for the young girls' ability to spin such a tale would be Williams' apparent guilt. Further, where Hasan was not a complaining witness and not the prosecutrix in the case, and where the girls' chastity and reputations were not remotely impugned by this evidence or at issue in the case, the right of the defendant to pursue his

theory of the case far outweighed any tangential prejudice to Hasan as a witness. The defense did not seek to introduce this evidence to portray Hasan as a bad mother or a bad person, or to impugn her reputation or character. This evidence was relevant as an alternate basis of sexual knowledge on the part of A.H. and T.H., and the defense should have been permitted to examine the witnesses under oath regarding their exposure to their mother's career.

Further, the Court's error in excluding this type of evidence was compounded when, during Opening Statement, the State alleged that during one of the instances of alleged abuse of T.H., Williams was watching pornography on the television. (III 714). The defense brought an oral motion in limine to exclude any further reference to pornography in light of the Court's refusal to allow the defense to explore Hasan's history of making pornography as a source of sexual knowledge on the part of the complaining witnesses. (III 737). The defense noted that the allegation that Williams watched pornography with T.H. was a thinly-veiled attempt to convince jurors that Williams was grooming T.H. for sexual activity, when in fact he was merely watching his girlfriend's performances in adult films. (III 737). The State opposed, noting that T.H.'s credibility was enhanced by her ability to remember details distinguishing the events, and that there was no

evidence that T.H., unlike A.H., had any knowledge of her mother's employment history, and that the evidence was admissible under the res gestae doctrine. (III 737-738, 743). The defense disagreed and noted that severance would have alleviated this issue, and that if the defense was unable to explore Hasan's employment history, then the State should not be permitted to impugn Williams' character by implying that he groomed T.H. by exposing her to adult films. (III 739, 740-43). The Court ruled that the State could not use the word "pornography" but could introduce evidence that T.H. saw "naked pictures" on the television. (III 744). Thus, jurors were allowed to hear that Williams had exposed T.H. to "naked pictures" without having any context provided as to the actual reason why Williams may have been watching pornography in the home: because their mother was an adult film actress.

Because the defense was not permitted to explore whether the witnesses may have been exposed to these acts by Hasan's activities, this Court must find reversible error. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973); *Davis v. Alaska*, 415 U.S. 308, 317 (1974), *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). By denying the defense motion, the Court violated Williams' rights to confrontation and cross-examination under the Sixth and Fourteenth Amendments.

III. The trial court violated the Equal Protection clauses of the United States and Nevada Constitutions by denying the defense challenge to discriminatory practices prohibited by Batson v. Kentucky.

The United States and Nevada Constitutions provide for the right to a trial by a fair and impartial jury in a criminal case. U.S. Const. Amend. VI, Amend. XIV; Nev. Const. Art. 1 Sec. 3; Art. 1 Sec. 8. The right to a trial by an impartial jury protects the public as much as the defendant. *State v. McClear*, 11 Nev. 39 (1876). "Jury service . . . 'affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law.' (citations omitted). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). The Constitution protects the rights of prospective jurors to sit on a jury. *Walker v. State*, 113 Nev. 853, 944 P.2d 762 (1997) (citations omitted).

Prosecutors may not discriminate based upon race in selecting a jury. *McNair v. State*, 108 Nev. 53, 61, 825 P.2d 571 (1992). In *Washington v. State*, 112 Nev. 1067, 922 P.2d 547 (1996), this Court set forth the requirements for evaluating *Batson v. Kentucky* challenges. Under *Batson*, the defense must first make a prima facie showing that the prosecutor has

actually used peremptory challenges in a discriminatory fashion. *King v. State*, 116 Nev. 349, 353, 998 P.2d 1172 (2000); *Batson v. Kentucky*, 476 U.S. 79, 94 (1986). The trial court must examine whether the defense raised an inference that the State excluded venirepersons based upon their race. If so, the burden shifts to the proponent of the challenge to express a race-neutral explanation for the challenge. *King*, 116 Nev. at 353; *Batson*, 476 U.S. at 97. "The holding in Batson serves to protect three interests that are threatened by discriminatory jury selection: (1) the defendant's right to equal protection, (2) the excluded juror's equal protection rights, and (3) the public's confidence in the fairness of our system of justice. 476 U.S at 86-87." *Foster v. State*, 111 P.3d 1083, 1088 (Nev. 2005). Batson challenges involve the following steps:

> There are three stages to a Batson challenge—(1) the opponent of the peremptory challenge must show 'a prima facie case of racial discrimination'; (2) the proponent of the peremptory challenge must then present a race-neutral explanation; and (3) the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination.

Hawkins v. State, 256 P.3d 965, 967 (Nev. 2011). In noting the defense's failure to present pretext argument and evidence, this Court expressed concern that "[i]t is almost impossible for this court to determine if the reason for the peremptory challenge is pretextual without adequate development in the district court." *Hawkins v. State*, 256 P.3d at 968. In the

instant case, the defense challenged the State's use of a peremptory challenge to remove panel member Williams, an African-American woman, under *Batson v. Kentucky*. (III 646).

The State responded that the defense had failed to make a prima facie case of discrimination . (III 646). The Court disagreed and asked the State for a race-neutral reason. The State responded that Williams had indicated that science can sometimes make mistakes, that she often gave one-word answers to questions during voir dire, that she gave only short responses to the attorneys' queries, and that her demeanor evinced an overall unwillingness to participate in the process and answer questions. (III 647).

The defense responded that numerous other jurors shared Ms. Williams' views, including Mr. Risner and Mr. O'Reilly, both white men. (III 648).The defense noted that several jurors gave short answers to attorneys' questions, and that the subject matter understandably made many people uncomfortable with speaking at length in a public setting. (III 648). The defense argued that these jurors were not removed despite similar demeanors and abbreviated answers. (III 648). The Court denied the challenge. (III 647-48).

The Court erred in denying the defense challenge. As noted contemporaneously by the defense, several jurors gave abbreviated and one-word answers during voir dire. (III 557-558; 559-560; 571; 582). Although

the State cited Ms. Williams' answer regarding science as a basis for her removal, Mr. Nelson had also agreed with the defense attorney's statement that science can sometimes make mistakes, and he volunteered that this is true whenever a human being is involved in any process. (III 569). Ms. Davis had also agreed with the premise that sometimes scientific-sounding tests can result in errors. (III 571).

Further, contrary to the State's claims, Ms. Williams answered each question completely and cooperatively, volunteered additional information when warranted, queried counsel when she did not fully understand a question, and voluntarily explained her answers to defense counsel. (III 589-590). Thus, the record reveals that the State's purported concern with jurors who questioned the reliability of scientific evidence was not a concern that applied equally to all jurors. Ms. Williams' answers were comprehensive, detailed, and at least as complete as numerous other jurors' answers.

Discriminatory jury selection in violation of Batson generally constitutes "structural" error that mandates reversal. *Diomampo v. State*, 185 P.3d 1031 (Nev. 2008). This Court held in *Diomampo* that where the State fails to ask follow-up questions regarding the alleged area of concern, as with Ms. Williams' purported reluctance to believe in the infallibility of scientific evidence, and fails to dismiss nonminority jurors under similar or worse

circumstances, the State's reasons for the dismissal of the minority juror are pretextual. *Diomampo*, 185 P.3d at 1038. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El v. Dretke*, 125 S. Ct. 2317, 2329 (2005) (citations omitted). As in *Miller-El*, "[t]here is no good reason to doubt that the State's afterthought about [scientific evidence] was anything but makeweight." *Id.* "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligations of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" *Miller-El*, 125 S. Ct. at 2323, *quoting Powers v. Ohio*, 499 U.S. at 412.

Further, the trial Court failed to make any specific findings regarding Ms. Williams' demeanor during voir dire and the State's allegation that she manifested reluctance to participate. (III 647-48). The trial Court failed to meet its constitutional burden: ". . . [T]he record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation." *Snyder v.*

Louisiana, 128 S. Ct. 1203, 1209 (U.S. 2008). Because the instant case's trial judge similarly failed to make any record of Ms. Williams' demeanor, there is an absence of "anything in the record showing that the trial judge credited the claim[s]" regarding this reason for her removal." *Snyder*, 128 S. Ct. at 1212. Without an explicit finding to this effect by the trial Court, this Court should not credit the State's claim regarding Ms. Williams' demeanor.

This type of discrimination "undermines public confidence in adjudication," and this Court must grant a new trial with a jury untainted by the State's pretextual and unconstitutional peremptory challenge. *Miller-El*, 125 S. Ct. at 2325 (citations omitted). A discriminatory motive in striking even one juror implicates equal protection under the law: "Rather, under Batson, the striking of one [minority] juror for a racial reason violates the Equal Protection Clause, even where other [minority] jurors are seated, and even when valid reasons for the striking of some [minority] jurors are shown." *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986). In removing an African-American woman from the jury for unsupported reasons, the State violated the Fifth and Fourteenth Amendments to the United States Constitution. This Court must agree that the State did not challenge similarly situated non-minority or male jurors, and reverse this case for a new trial.

IV. The Court committed reversible error by denying defense cause challenges.

Trial courts have "broad discretion in ruling on challenges for cause since these rulings involve factual determinations. The trial court is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001) (citations omitted). "When a trial judge's ruling implicates either selection or management of the jury or trial, the reviewing court must determine whether the judge's decision affects the defendant's due process right to a fair trial." *State v. Latham*, 100 Wn.2d 59, 66, 667 P.2d 56 (1983) (citations omitted).

The defense moved to excuse Ms. Jorgensen on the grounds that she indicated that she would tend to believe a child leveling an egregious charge against an adult based on her experiences working with abused foster children. (III 598). Ms. Jorgensen was equivocal when asked whether she could be fair and impartial, and stated that she "hoped" she could be fair, but that everyone has a bias from their life experiences. (III 587). When asked if she could envision a situation where she could not remain impartial, she agreed that she would have difficulty and that there would be "some bias" in her deliberations if the charges were extraordinarily disturbing. (III 588). Although the defense noted that the allegations in the instant case would

likely constitute the very kind of "extraordinary" and egregious circumstances Ms. Jorgensen contemplated, the Court denied the defense motion to remove this panelist for cause. (III 599).

The defense also moved to excuse Ms. Downer on the grounds that she indicated she would be very uncomfortable listening to child witnesses, that she believed they would be traumatized by the courtroom experience, and that she was bothered by "putting them through" the stress of a trial. (III 582-83). She answered in the affirmative when defense counsel asked whether her discomfort resulted from a deep-seated belief that "something happened" to the witnesses. (III 583-84). The Court denied the challenge. (III 600). The defense renewed the challenge the next day, when Downer reiterated that "something must have happened" to result in the State charging Williams. (III 690-91). The Court again denied the challenge. (III 692).

The Court should have granted the defense requests to remove these jurors due to their clear biases in these types of cases. In a criminal case, either side may bring a challenge for cause where facts suggest a juror may be unable to fairly adjudicate the case. NRS 175.036. Williams had the right to a jury free from prejudice and bias. If a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in

accordance with instructions and his oath, then the Court must grant the challenge for cause. *Leonard v. State*, 117 Nev. 53, 17 P.3d 397, 405 (2001). Courts should excuse jurors whose beliefs diminish a defendant's chance for a fair trial. *Thompson v. State*, 111 Nev. 439, 440 (1995). NRS 16.050(1)(f) provides that a challenge for cause may be taken when a prospective juror has "formed or expressed an unqualified opinion or belief as to the merits of the action, or the main question involved therein . . . " *Blake v. State,* 121 P.3d 567, 577 (Nev. 2005).

Given the unequivocal bias inherent in these jurors' views, the court should have granted the challenges. Williams had the right to reserve and exercise peremptory challenges only in those situations where a challenge for cause would not properly lie. After the Court denied the cause challenges, Williams had no choice but to use peremptory challenges against these jurors. (III 636; 695). This situation deprived Williams of due process of law under the Fifth and Fourteenth Amendments. *Aki-Khuam v. Davis*, 339 F.3d 521, 529 (7th Cir. 2003). "A court must excuse a prospective juror if actual bias is discovered during voir dire." *U.S. v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). "Actual bias is 'bias in fact'-the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *U.S. v. Torres*, 128 F.3d 38, 43 (2d Cir.1997) (*citing U.S. v.*

Wood, 299 U.S. 123, 133 (1936)). Based on the Court's refusal to grant meritorious challenges for cause, this Court must reverse these convictions.

V. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense instructions.

In reviewing jury instructions, this Court grants district judges broad discretion and will affirm unless the district court abused that discretion. *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). In general, this Court "reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error." *Berry v. State,* 212 P.3d 1085, 1091 (Nev. 2009).

The defense proposed a presumption of innocence instruction to the following effect (See Court Exhibit 15, VI 1307-1324, at page 2):

> Gregory Williams is presumed to be innocent. In a criminal case, the State has the burden of proving with evidence that a defendant is guilty beyond a reasonable doubt. The State the burden of proving beyond a reasonable doubt every material element of the crime charged and that Gregory Williams is the person who committed the offense. Gregory Williams is presumed to be innocent unless the State proves beyond a reasonable doubt that he is guilty.
>
> Gregory Williams is not required to present evidence or prove his innocence. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

The Court rejected the instruction. (V 1180). Where the defense offers a reasonable, well-grounded jury instruction entirely supported by the evidence in the case and the relevant case law, the Court errs in rejecting the

instruction. The law entitles defendants to jury instructions on their theories of the case as disclosed by the evidence. *Barnier v. State*, 67 P.3d 320, 322, (2003) (trial court's failure to instruct on factors determinative of 'actual physical control' of vehicle in DUI case amounted to reversible error). Because this instruction offered specific guidance to jurors on the presumption of innocence, and generally comported with Nevada law, the Court should have offered the defense instruction.

The defense also proposed an instruction on witness credibility (VI 1307-1324, at page 3):

> The credibility or believability of a witness should be determined by anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are the witness's ability to see, hear, or otherwise perceive the things about which the witness testified; the witness's ability to remember and describe what happened; the witness's behavior while testifying; whether the witness understood the questions and answered them directly; whether the witness's testimony was influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided; the witness's attitude about the case or testifying; whether the witness made a statement in the past that is consistent or inconsistent with his or her testimony; whether the witness's testimony was reasonable when considering all the other evidence in the case; whether other evidence proved or disproved any fact about which the witness testified; whether the witness admitted to being untruthful; the witness's character for truthfulness; whether the witness has been convicted of a felony; whether the witness engaged in conduct that reflects on his or her believability; and was the witness promised immunity or leniency in exchange for his or her testimony.

> If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

The Court rejected the instruction. (V 1181). The proposed instruction simply highlighted Nevada law: "It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence . . ." *Hutchins v. State*, 110 Nev. 103, 109; 867 P.2d 1136, 1140 (1994) (*over'd on other grounds by Mendoza v. State*, 130 P.3d 176 (2006)). "This court has often stated that where there is conflicting testimony presented at a criminal trial, it is within the province of the jury to determine the weight and credibility of the testimony." *Deeds v. State*, 97 Nev. 216, 217; 626 P.2d 271, 272 (1981). This instruction follows California pattern criminal jury instructions and offered a more expansive level of guidance to jurors than Instruction 9. CALJIC [Cal. Jury Instns., Crim. (4th ed. 1979)] No. 105); (II 287; VI 1307-1324, at page 3). Because witness credibility was a key factor in this case, and because this instruction offered jurors helpful and specific information in evaluating credibility, the Court should have provided the defense instruction.

The defense also sought an instruction regarding evidence capable of two different interpretations under *Bails v. State*.(VI 1307-1324, at page 5). The

Court rejected the instruction. (V 1182). Although this Court has held that this type of instruction is not required, this Court agrees that this instruction is permissible. *Bails v. State*, 92 Nev. 95, 97 (1976). Further, this Court does not permit trial judges to exclude proposed defense instructions on the grounds that other instructions cover similar material; thus, the Court erred in rejecting this instruction. *Crawford v. State,* 121 P.3d 582, 588 (2005) (emphasis added).

The defense also offered an instruction on reasonable doubt to the effect that jurors much reach a subjective state of near certitude under *Randolph v. State*. (VI 1307-1324, at page 6). The Court rejected the instruction. (V 1183). Admittedly, NRS 175.211 mandates the instruction provided by the Court at Instruction Five. (II 283). This Court has repeatedly affirmed the constitutionality of this instruction. *Lord v. State*, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991); *Buchanan v. State*, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003). However, the language proposed by the defense is an exact quote from *Randolph* and offers additional guidance to jurors. This court recognizes that "the reasonable doubt instruction should impress on the jury the need to reach a 'subjective state of near certitude' on the facts in issue." *Randolph v. State*, 117 Nev. 970, 980, 36 P.3d 424, 431 (2001), *citing McCullough v. State,* 99 Nev. 72, 75, 657 P.2d 1157, 1158 (1983) *(quoting*

Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)).Thus, because this Court recognizes that a "subjective state of near certitude" remains the requirement for meeting the State's burden of proof, this Court should approve of adding this language to the reasonable doubt instruction when requested by the defense. (VI 1307-1324, at p. 11).

The defense also offered several negatively worded instructions under *Crawford v. State*. (VI 1307-1324, at pages 7, 8, and 9, 14, 15). The Court rejected the instructions. (V 1184-86). The defense was entitled to specifically admonish the jury in this fashion:

> . . .[W]e have observed that this court's jurisprudence has increasingly embraced the view advocated by the dissent in Stroup, i.e., that district courts, upon request, must include "significance" instructions in support of the defense theory of the case. In our view, the majority opinion in Stroup cannot be read in harmony with a significant line of authority holding that jurors should receive a full explanation of the defense theory of the case.

Crawford v. State, 121 P.3d 582, 588 (2005) (emphasis added). This Court has emphasized the importance of granting defense-specific instructions in addition to State-proffered instructions on the same subject matter:

> . . . [T]he jurors were not expressly instructed that, in considering the charge of willful, deliberate, premeditated murder, the burden was on the State to prove beyond a reasonable doubt that Crawford did not act in the heat of passion induced by the legal provocation. Even though this principle of law could be inferred from the general instructions, this court has held that the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions. Jurors should neither be expected to

> be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.

Crawford v. State, 121 Nev. 746, 754 (2005). Similarly, the trial Court should have provided the proposed defense instructions.

The defense also sought instructions to the effect that a complaining witness must testify with "some particularity" regarding the alleged incidents of abuse: "Where multiple counts are charged, the alleged victim must testify with some particularity regarding each incident in order to uphold each charge. There must be some reliable indicia that the number of acts charged actually occurred." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 57-58 (1992) (See Court Exhibit 15 at VI 1307-1324, p. 10-11). The defense also proposed an instruction to the following effect:

> To find Gregory Williams guilty of sexual assault or lewdness with a child, you must first find that the State has proven beyond a reasonable doubt that there is some reliable indicia that the number of acts charged actually occurred. Mere conjecture on the part of the alleged victim is not enough. If you find that the State has not proven that there is a reliable indicia that the number of acts alleged actually occurred, you must find Gregory Williams not guilty of sexual assault and lewdness with a child. (VI 1307-1324, at p. 12).

The Court rejected the instructions. (V 1187-88). The Court erred in denying the defense proposed instructions. The language contained in the proposed

instructions mirrors the language of *LaPierre*, which has direct application to the facts in the instant case:

> We are cognizant that child victims are often unable to articulate specific times of events and are oftentimes reluctant to report the abuse to anyone until quite some time after the incident. Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). We also understand that it is difficult for a child victim to recall exact instances when the abuse occurs repeatedly over a period of time. We do not require that the victim specify exact numbers of incidents, *but there must be some reliable indicia that the number of acts charged actually occurred.*

LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (emphasis added). Where the defense theory was that A.H.'s and T.H.'s recollections were too imprecise to be reliable, the facts warranted these instructions.

Nevada and federal law mandate adequate instruction on the defense theory of the case. *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52 (2000); *Brandley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002); U.S. Const. Amend. V; U.S. Const. Amend. VI; U. S. Const. Amend. XIV. When an erroneous instruction infects the entire trial, the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Jury instructions relieving States of this burden violate a defendant's

due process rights. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Because the jury instructions improperly favored the State and omitted significant defense concepts, this Court must reverse these convictions.

VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes, and convictions based on insufficient evidence violate federal and state due process guarantees.

This Court must reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Martinez v. State*, 114 Nev. 746, 961 P.2d 752 (1998). This Court has jurisdiction to determine whether the State presented evidence sufficient to sustain the conviction. *State v. Van Winkle*, 6 Nev. 340, 350 (1871). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Carl v. State,* 100 Nev. 164, 165, 678 P.2d 669 (1984); *Oriegel-Candido v. State*, 114 Nev. 378, 382, 956 P.2d 1378 (1998). The standard of review when analyzing the sufficiency of evidence in a criminal case 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." *Grey v. State*, 178 P.3d 154, 161 (Nev. 2008) (emphasis in original; internal citations omitted). In the case at bar, the State failed to prove beyond a reasonable doubt that the complaining witnesses were subjected to multiple acts of physical abuse.

First, A.H.'s testimony lacked detail and carried no corroborating physical evidence. A.H. could not remember the year or the date of the event when Williams assaulted her. (IV 913). Although she testified that her siblings were at home when this happened, no other witness saw or heard any part of the alleged incidents. (IV 916). A.H. admitted that she didn't tell Hasan about these events when the siblings talked to her about T.H. (IV 919). A.H. testified that she knew the initial incident with Williams lasted two minutes because she counted the time in her head, but she told police officers that the incident lasted for three minutes because she watched a clock. (IV 931-32). Although A.H. claimed that she had suspicions about potential inappropriate contact between Williams and T.H. (IV 911), she never informed her mother about the events giving rise to counts I and II even when the children went to Hasan specifically to express concerns about Williams' conduct in the home on two separate occasions. (IV 913). Thus, where the only evidence of these counts came from a single witness who had

failed to previously disclose these actions despite ample opportunities to do so, this Court should find insufficient evidence to support these convictions.

In addition, T.H. could not remember many details of the events she described. She could not remember whether she changed positions during the most recent incident the night before Hasan called police. (IV 847). T.H. could not remember Williams' position on the couch. (IV 848). She could not remember if Williams' penis was erect. (IV 849). She could not remember how the incident ended. She could not remember if Williams said anything to her. (IV 849). She could not remember the time of day, and she could not remember whether Williams told her not to tell anyone. (IV 851).

Regarding the second incident in the living room, T.H. could not remember whether it was daytime or night. (IV 866). She testified that the other family members were in their bedrooms. (IV 866). T.H. could not remember if her siblings' bedroom doors were open or closed. (IV 883). T.H. admitted that her entire family was home every time these events occurred, although no one saw or heard anything. (IV 889).

Regarding the incident in the guest room, T.H. admitted that she never told Detective Flink about this event. (IV 899). T.H. admitted that when she was interviewed by the defense attorney and his investigator, she stated that Williams had not done anything to her rectum. (IV 877). T.H. also testified

that she never told anyone what was happening at home and that she never told a teacher at school because it was "none of their business." (IV 882).

None of the other siblings actually saw any wrongdoing on Williams' part, although most of the instances took place in the living room of the apartment. James and A.H. admitted that they couldn't see anything when they looked under the bedroom door. (IV 801, 910). Kayla admitted that she told Detective Flink that she didn't see anything happen to T.H. or A.H. (IV 819).

Although the State's case rested in part on physical evidence, Dr. Vergara testified that T.H.'s hymen was intact. (V 1144). Vergara testified that there were no lesions in the genital and rectal areas, and no local redness or hymenal or rectal tears. (V 1153-55). Although the State presented extensive testimony about the DNA evidence obtained in this case, even the most sophisticated DNA testing can be rendered unreliable by human error in testing and interpretation, and by careless or inadequate lab protocols. In fact, the State's forensic scientist, Robertson, admitted that the FBI had advised all national forensic laboratories that the FBI database used in DNA cases contained discrepancies and errors. (V 1045).

Robertson admitted that when she first conducted the presumptive test for the presence of semen on T.H.'s vaginal swab, the result was negative. (V

1058). Robertson admitted that vaginal fluid can sometimes cause a false positive in the presumptive test for semen, and that the presumptive test on the underwear samples resulted in a weak positive for semen. (V 1059-60). Robertson admitted that the rectal swab presumptive test was also negative. (V 1060). Robertson admitted that certain bodily fluids, like saliva or vaginal fluid, can trigger positive results for semen in a second lab test called a P30 test. (V 1064-65).

Further, the amount of sperm cells Robertson allegedly identified on the slides fell far below the expected range of cells in a sample that size. Robertson admitted that a millileter of semen could contain some ten to fifty million sperm cells. (V 1068). However, in the vaginal swab microscopic test slides she reviewed, Robertson admitted that she saw only two sperm cells on one slide and five sperm cells on the other, when one would expect millions of sperm cells to be present. (V 1071-72). Robertson admitted that on the underwear sample slides, she saw ten sperm cells on the first examination of Item 1.6.1, and "plus two" upon her second review of the slide (i.e., she saw cells in several views of the slide). (V 1073, 1098). On Item 1.6.2, she observed four sperm cells upon the initial examination, and plus two on the second examination. (V 1073). On Item 1.6.3, she observed eight cells on the first review, and plus two on the second analysis. (V 1073-

74).

On the rectal swab sample, Item 1.3, she viewed two sperm cells on the slide and plus one, meaning she saw one to very few cells, on the second review. (V 1075, 1098).

Robertson also admitted that several of the genetic markers she analyzed in these samples were below the "interpretive threshold." (V 1106-09). Robertson admitted that the nucleus portion of the epithelial cell, as well as other mucosal cells, could cause results similar to positive results for sperm cells in the lab tests she conducted. (V 1077). Robertson admitted that only the forensic technician conducting the test can distinguish between certain cells being viewed on the slides, making the actual test results dependent upon the skills and subjective interpretation of the analyst conducting the tests. (V 1077). Robertson admitted that it was possible for transference or carry-over between the epithelial and sperm fractions in a sample. (V 1084). Robertson also admitted that she could make no conclusions regarding the minor contributors in the underwear sample epithelial fractions of Items 1.6.2 and 1.6.3. (V 1088).

Thus, the DNA evidence was not infallible, and the physical evidence in this case could have been cross-contaminated in the lab, could have been misidentified by the technician as the wrong type of cell, causing false

positive results, and could have been compromised by carry-over between the various types of cells being tested. The presence of DNA evidence does not automatically render a case proven beyond a reasonable doubt; couple with the inconsistencies and lack of detail in much of the complaining witnesses' testimony, this Court should find insufficient evidence.

VII. The Court abused its discretion in denying Williams' motion to dismiss counsel.

On March 28, 2016, Williams filed a pro per motion to dismiss counsel on the grounds that he believed his trial attorney was ineffective, had refused to allow him to participate in his own defense, and had refused to properly investigate his defenses. (I 246). His motion averred that there had been a "complete breakdown" in communications. (I 246). The Court conducted a brief hearing and denied the motion. (II 435-38).). This Court reviews a district court's denial of a motion to dismiss counsel for an abuse of discretion. *Garcia v. State,* 121 Nev. 327, 337, 113 P.3d 836, 843 (2005). When reviewing a denial of a motion to substitute counsel, this Court considers three factors: "(1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints." *Young v. State,* 120 Nev.

963, 968, 102 P.3d 572, 576 (2004). Here, although the Court conducted an inquiry into some of the complaints, and although the motion was filed the day before trial, Williams made a detailed and extensive record about the nature of his conflict with his defense attorney. (II 437). "[I]f the complete collapse of the attorney-client relationship is evident, a refusal to substitute counsel violates a defendant's Sixth Amendment rights." *Id.* at 969, 102 P.3d at 576. Here, Williams offered compelling evidence that the attorney-client relationship had completely collapsed, and the Court erred in denying the motion.

VIII. The sentence imposed amounts to cruel and unusual punishment.

The Court sentenced Williams to life in prison with a minimum mandatory sentence of 115 years before parole eligibility. Thus, the Court sentenced appellant to spend the rest his natural life in prison and appellant received a more severe punishment than many who commit premeditated, deliberate murder.

Article 1, §6 of the Nevada Constitution states: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, nor shall witnesses be unreasonably detained." See also U.S. Const. Amend. VIII. The federal and state constitutions do not explicitly define "cruel and unusual punishment." In *Thompson v.*

Oklahoma, 487 U.S. 815 (1988), the U.S. Supreme Court noted that the authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishment, but made no attempt to define the contours of that category. They delegated that task to future generations of judges guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

In *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989), the Nevada Supreme Court cited former United States Supreme Court Justice Frank Murphy, in an unpublished draft opinion:

> More than any other provision in the constitution, the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in defining what is cruel and unusual apart from our conscience. A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith and the dignity of the human personality.

Id. at 529-30. In *Schmidt v. State*, 94 Nev. 665, 668, (1978), the Nevada Supreme Court stated that a legislatively enacted statute is presumed valid. However, a sentence is unconstitutional "if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity..." *Id.*

Condemning a man to spend the rest of his natural life in prison (the same sentence a first-degree murderer would receive) for conduct that, if it occurred, suggests a mental disorder that could be amenable to eventual treatment and rehabilitation after a prison sentence, offends fundamental notions of human dignity. This Court must determine whether the conduct warrants the same sentence as that imposed upon those who, with premeditation and deliberation, take the lives of other human beings. This analysis renders the statutorily mandated 35-to-life sexual assault sentence nothing short of cruel and unusual, particularly where several such sentences are imposed consecutively, as in the instant case. Thus, this Court should strike the sentence imposed.

In a fractured decision noting the difficulty of proportionality review, the Arizona Supreme Court recognized the evolution of societal standards and their effects on sentencing review in a case involving statutory sexual seduction: "The "minimum" sentence imposed in this case, however, for consensual sexual intercourse with two willing post-pubescent girls is comparable to the minimum sentence imposable had Defendant been provoked, become violent, killed the girls, and been convicted of second degree murder. See A.R.S. § 13-604.01(1)(a)." *State v. Bartlett*, 171 Ariz. 302, 308 (1992). Because Williams' sentence requires a minimum of 115

years of imprisonment, this Court should strike this sentence as amounting to cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and Article I, Section 6 of the Nevada Constitution.

IX. Cumulative error warrants reversal of this conviction under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* Even where the State may have presented enough evidence to convict in an otherwise fair trial, where one cannot say without reservation that the verdict would have been the same in the absence of cumulative error, then this Court must grant a new trial. *Witherow v. State*, 104 Nev. 721, 725, 765 P.2d 1153 (1988). This Court should find that even if any individual error did not rise to reversible error, the cumulative effect of these errors force the conclusion that reversal is necessary.

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CONCLUSION

Based on the foregoing argument, this Court must reverse these convictions and remand for a new trial.

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CERTIFICATE OF COMPLIANCE

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This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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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 21st day of February, 2017.

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