

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Electronically Filed
Dec 07 2021 10:26 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO. 83021

Appeal from the Dismissal of a Petition for Writ of Habeas Corpus
Second Judicial District Court, Washoe County
The Honorable Lynne K. Simons, Department 6

APPELLANT'S APPENDIX

VOL. I

LYN E. BEGGS, ESQ.
LAW OFFICES OF
LYN E. BEGGS, PLLC
Nevada State Bar No. 6248
316 California Ave., #863
Reno, NV 89509
Tel. (775) 432-1918
COUNSEL FOR APPELLANT

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RAUL GARCIA

Case No. 83021

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CERTIFICATE OF SERVICE

I certify that I, Lyn E. Beggs, Esq., am counsel for the Appellant in this matter, and that on this date I electronically filed the foregoing Appellant's Appendix with the Clerk of the Court by using the ECF system which will send a notice of filing to all parties pursuant to the master list:

Kevin Naughton, District Attorney
Washoe County District Attorney's Office
P.O. Box 11130
Reno, NV 89520

DATED this 7th day of December, 2021.

/s/ LYN E. BEGGS
LYN E. BEGGS, ESQ.

ORIGINAL

DA #196924

RPD 193083-00

CODE 1800
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

FILED

2000 OCT 16 AM 11:23

AMY HARVEY CLERK

BY [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. C200-1849

RAUL GARCIA,
also known as
CARLOS ANTONIO RODRIGUEZ-GUZMAN,

Dept. No. 3

Defendant.

INFORMATION

RICHARD A. GAMMICK, District Attorney within and for
the County of Washoe, State of Nevada, in the name and by the
authority of the State of Nevada, informs the above entitled
Court that RAUL GARCIA, also known as CARLOS ANTONIO RODRIGUEZ-
GUZMAN, the defendant above named, has committed the crimes of:

COUNT I. SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF
FOURTEEN, a violation of NRS 200.366, a felony, (F1000) in the
manner following:

That the said defendant on the 6th of August A.D. 2000,
or thereabout, and before the filing of this Information, at and

GARCIA001

1 within the County of Washoe, State of Nevada, did willfully and
2 unlawfully subject ANNA KAREN G., a female child under the age of
3 14 years, to sexual penetration, against the victim's will and/or
4 under conditions in which the defendant knew or should have known
5 that the victim was mentally or physically incapable of resisting
6 or understanding the nature of the defendant's conduct, to wit,
7 the defendant put his finger inside the victim's vagina, at 4136
8 Neil Road, Reno, Washoe County, Nevada.

9 COUNT II. LEWDNESS WITH A CHILD UNDER THE AGE OF
10 FOURTEEN YEARS, a violation of NRS 201.230, a felony, (F650) in
11 the manner following:

12 That the said defendant on the 6th day of August A.D.
13 2000, or thereabout, and before the filing of this Information,
14 at and within the County of Washoe, State of Nevada, did
15 willfully, unlawfully, and lewdly commit a lewd or lascivious act
16 upon or with the body of ANNA KAREN G., a female child under the
17 age of fourteen years at the time that the said act was
18 committed, in that the said defendant pulled down the victim's
19 pants and/or underwear and/or touched the victim's vaginal area
20 with his tongue with the intent of arousing, appealing to, or
21 gratifying the lust, passions, or sexual desires of himself or
22 the child.

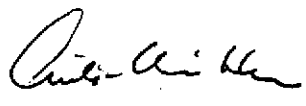
23 COUNT III. LEWDNESS WITH A CHILD UNDER THE AGE OF
24 FOURTEEN YEARS, a violation of NRS 201.230, a felony, (F650) in
25 the manner following:

26 ///

1 That the said defendant on the 6th day of August A.D.
2 2000, or thereabout, and before the filing of this Information,
3 at and within the County of Washoe, State of Nevada, did
4 willfully, unlawfully, and lewdly commit a lewd or lascivious act
5 upon or with the body of ANA KAREN G., a female child under the
6 age of fourteen years at the time that the said act was
7 committed, in that the said defendant unzipped his pants and
8 pulled the hand of the said ANNA KAREN G. toward his exposed
9 penis in an attempt to get her to touch the said penis with the
10 intent of arousing, appealing to, or gratifying the lust,
11 passions, or sexual desires of himself or the child.

12
13 All of which is contrary to the form of the Statute in
14 such case made and provided, and against the peace and dignity of
15 the State of Nevada.

16 RICHARD A. GAMMICK
17 District Attorney
 Washoe County, Nevada

18
19 By: 
20 CINDI-ELAINE HERON
21 5667
22 Deputy District Attorney
23
24
25
26

1 The following are the names and addresses of such
2 witnesses as are known to me at the time of the filing of the
3 within Information:

4
5 RENO POLICE DEPARTMENT

6 OFFICER J. HOLLADAY, #0700
7 OFFICER M. PETERSON
8 OFFICER W. RULLA

9 ANNA KAREN GOMEZ, 4136 Neil Road, Reno, Nevada

10 GEORGE PALMA, 4136 Neil Road, Reno, Nevada

11 REBECCA TERRONES, 4136 Neil Road, Reno, Nevada

12 PATIENCE WENCK, R.N., Barton Memorial Hospital

13 CUSTODIAN OF RECORDS, Barton Memorial Hospital
14
15
16
17
18
19

20 RICHARD A. GAMMICK
21 District Attorney
22 Washoe County, Nevada

23 By


CINDI-ELAINE HERON

5667

Deputy District Attorney

24
25 PCN 81688983

26 10114083

DATE, JUDGE

OFFICER OF

COURT PRESENT

APPEARANCES - HEARING

02/13/01

HONORABLE

JEROME M.

POLAHA

DEPT. NO. 3

S. Hopper

(Clerk)

J. Schonlau

JURY TRIAL

Deputy District Attorney Bruce Hahn was present for the State of Nevada. Defendant Raul Garcia was present with counsel, Deputy Public Defender Jeremy Bosler. Spanish interpreter Orlando Yaran was present for the Defendant.

At 10:35 a.m. Court convened with all parties and prospective jurors present.

Court addressed the prospective jurors and introduced the case and parties.

Clerk Hopper took role of the prospective jurors present and swore them in to answer questions touching upon their qualifications to serve as trial jurors.

Counsel addressed the prospective jurors and presented brief summation of the case.

Clerk Hopper called thirty-one (31) names to serve as the venire.

Court questioned the venire on voir dire.

Eric Martin was excused; **Martha Cooper** was called in his place.

Upon extensive questioning by Court and counsel, **Ardyna Kramp** was excused.

Clerk Hopper was ordered to take role of the five (5) new prospective jurors that had just entered the courtroom and swore them in to answer questions based upon their qualifications.

Josefa Avalos was called.

Court continued voir dire questioning.

At 11:55 a.m. Court ordered recess.

At 1:20 p.m. Court reconvened with all parties and prospective jurors present.

Spanish interpreter Marco Contreras was now present for the benefit of the Defendant.

Court continued voir dire questioning.

Mark Kirchhefer addressed the Court during voir dire and was excused; **Frederick North** was called.

Court continued voir dire questioning. State's counsel, Bruce Hahn, questioned the venire on voir dire and passed for cause. Defense counsel, Jeremy Bosler, questioned the venire on voir dire.

Counsel Bosler challenged **Josefa Avalos** for cause; SO ORDERED and prospective juror was excused without objections. **Peter Hunsader** was called in her place.

Counsel Bosler continued voir dire questioning and passed for cause.

At 2:40 p.m. Court and counsel met in chambers to complete preemptory challenges.

At 2:57 p.m. Court reconvened with all parties and prospective jurors present.

The following persons were sworn to try this case:

Michael Parmenter

Joan Gondry

Catherine Soule

Myra McDade

John Foley

Ted Rolfe

Charles LaFleur

Roy Baughman

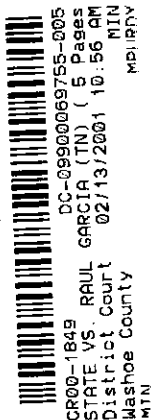
Emmagina Benedict

Thomas Short

Von Valdez

Michele Clark

Alternate - Susan Johnson



DATE, JUDGE

OFFICER OF

COURT PRESENTAPPEARANCES - HEARING

02/13/01

Cont'd.

JURY TRIAL- continued

Clerk Hopper read the Information to the jury.

Court canvassed the jury and explained the jury trial process.

Counsel Hahn presented opening statements.

Counsel Bosler presented opening statements.

Jerry Lee Straits was called by State counsel, Bruce Hahn, sworn and testified.**State's Exhibit 1** was marked for identification; offered and ordered admitted.

Witness was further direct examined; cross examined; and, redirect examined.

Anna-Karen G. was called by State counsel, Bruce Hahn, sworn and testified.**State's Exhibits 2 and 3** were marked for identification; offered and ordered admitted.

Witness was further direct examined; cross examined; redirect examined; and, recross examined.

At 5:00 p.m. Court ordered recess; jury was admonished and excused. Matter continued to

February 14, 2001 at 8:30 a.m.

Defendant remained in custody.

02/14/02

HONORABLE

JEROME M.

POLAHA

DEPT. NO. 3

S. Hopper

(Clerk)

J. Dotson

(Reporter)

JURY TRIAL - continued

Deputy District Attorney Bruce Hahn was present for the State of Nevada. Defendant was present with counsel, Deputy Public Defender Jeremy Bosler. Spanish interpreter Marco Contreras was present for the benefit of the Defendant.

At 8:50 a.m. Court reconvened with all parties and jury present.

Spanish interpreter Marcelo De Guzman was sworn to interpret testimony from the witness.

Jorge Palma was called by State's counsel, Bruce Hahn, sworn and testified; cross examined; redirect examined; and, excused.**Judy Holliday** was called by Counsel Bruce Hahn, sworn and testified.

State rested.

At 9:52 a.m. Court ordered recess; jury was admonished and excused.

At 10:15 a.m. Court reconvened with all parties present and outside the presence of the jury.

Court canvassed the Defendant pursuant to *Phillips vs. State* and the Defendant's right to testify.

Defendant informed the Court that he will not testify on his own behalf.

At 10:20 a.m. jury re-entered the courtroom.

Patience Wenck was called by defense counsel Jeremy Bosler, sworn and testified; cross examined; redirect examined; and, excused.

Spanish interpreter Orlando Yaran was sworn for the benefit of the witness.

Juan Antonio Rios-Garcia was called by defense counsel Jeremy Bosler, sworn and testified; cross examined; and, excused.**Jorge Rios-Garcia** was called by defense counsel Jeremy Bosler, sworn and testified; cross examined; redirect examined; and, excused.**Alfredo Garcia-Deleon** was called by defense counsel Jeremy Bosler, sworn and testified; cross

DATE, JUDGE
OFFICER OF

COURT PRESENT

APPEARANCES - HEARING

02/14/01

Cont'd.

JURY TRIAL- continued

examined; and, excused.

At 11:20 a.m. Court ordered recess; jury admonished and excused.

At 1:00 p.m. Court and counsel met in chambers regarding possible witness "coaching" allegations without the court reporter present.

Counsel Bosler requested to make a motion and a record.

At 1:10 p.m. Court and counsel met in the courtroom informally to settle Jury Instructions without the court reporter present.

At 1:50 p.m. Court and counsel met outside the presence of the jury to settle Jury Instructions 1 through 27 with Court Reporter Joan Dotson present.

At 2:06 p.m. Court reconvened with all parties present and outside the presence of the jury. Counsel Bosler addressed the Court regarding an offer of proof.

Deputy Earl Walling was called by Counsel Bosler, sworn and testified; cross examined.

Counsel Bosler further addressed the Court with offer of proof regarding the victim's mother coaching witnesses with arguments thereto.

Court requested Court Reporter Joan Dotson to prepare and copy witness Palma's testimony.

Court questioned witness Earl Walling and reviewed Palma's testimony through questions by State's counsel Bruce Hahn and defense counsel Jeremy Bosler.

Counsel Bosler continued arguments. Counsel Hahn presented objections to any further offer of proof or further testimony by witnesses.

Roberto Garcia was called by Counsel Bosler, sworn and testified; cross examined.

Counsel Bosler addressed the Court further with arguments in support of misconduct.

Counsel Hahn continued objections.

COURT ORDERED Motion for witness misconduct is DENIED.

At 2:55 p.m. the jury re-entered the courtroom.

Defense rested.

Court read Jury Instructions 1 through 27.

Counsel Hahn presented closing arguments.

Counsel Bosler presented closing arguments.

At 4:10 p.m. Court ordered recess; jury was admonished and excused.

At 4:30 p.m. Court reconvened with all parties and jury present.

Counsel Hahn presented rebuttal arguments.

At 4:40 p.m. Clerk Hopper swore in Bailiff Mike Allen and Law Clerk Justin Champagne to take charge of the jury during deliberations; Court ordered the jury to deliberations. Court ordered recess pending deliberations.

At 6:15 p.m. Court reconvened with all parties and jury present.

Clerk Hopper read the Verdicts as follows:

DATE, JUDGE
OFFICER OF

COURT PRESENT **APPEARANCES - HEARING**

02/14/01
Cont'd.

JURY TRIAL- continued

VERDICT

We, the jury in the above-entitled matter, find the Defendant, RAUL GARCIA, GUILTY of COUNT I: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF FOURTEEN.

DATED this 14th day of February, 2001.

Michael Parmenter
Foreperson

VERDICT

We, the jury in the above-entitled matter, find the Defendant, RAUL GARCIA, GUILTY of COUNT II: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS.

DATED this 14th day of February, 2001.

Michael Parmenter
Foreperson

VERDICT

We, the jury in the above-entitled matter, find the Defendant, RAUL GARCIA, GUILTY of COUNT III: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS.

DATED this 14th day of February, 2001.

Michael Parmenter
Foreperson

Counsel Bosler requested the jury to be polled. Upon questioned by the Clerk as to Verdicts, the jurors were unanimous as to the Verdicts entered.

The jury was thanked and excused.

Sentencing was set for March 29, 2001 at 8:30 a.m. Defendant to comply with the Division of Parole and Probation during investigation and interview for a PSI. Defendant remained in custody.

Court stood in recess.

Exhibits

STATE OF NEVADA VS. RAUL GARCIA

Case No. CR00-1849

Dept. No. 3

Date: Feb. 13, 2001

Clerk: Hopper

[illegible]

CR00-1849
STATE VS. RAUL GARCIA (TN) (2 Pages
District Court 03/29/2001 11:09 AM
Washoe County
DC
1850
MPURDY

Code: 1850

ORIGINAL

FILED

March 29, 2001
AMY HARVEY, Clerk

By C. P. Hutton
Deputy Clerk

**IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

STATE OF NEVADA,

Plaintiff,

vs.

RAUL GARCIA,

Defendant.

Case No. CR00-1849

Dept. No. 3

Reporter: J. Schonlau

J U D G M E N T

The Defendant having been found Guilty by a jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Raul Garcia is guilty of the crimes of Sexual Assault on a Child Under the Age of Fourteen, a violation of NRS 200.336, a felony, as charged in Count I of the Information; Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS 201.230, a felony, as charged in Count II of the Information and Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS 201.336, a felony, as charged in Count III of the Information, and that he be punished by imprisonment in the Nevada State Prison to the term of Life With the Possibility of Parole after a minimum of twenty (20) years has been served as to Count I. It is further ordered that he be punished by imprisonment in the Nevada State Prison for a term of Life With the Possibility of Parole after a minimum

1 of ten (10) years has been served as to Count II, to be served consecutively to the
2 sentence imposed in Count I. It is further ordered that he be punished by imprisonment in
3 the Nevada State Prison for a term of Life With the Possibility of Parole after a minimum of
4 ten (10) years has been served as to Count III, to be served consecutively to the sentence
5 imposed in Counts I and II, with credit for two hundred thirty-four (234) days time served. It
6 is further ordered that the Defendant serve a special sentence of lifetime supervision to
7 commence after any period of probation, and term of imprisonment or after any release on
8 parole. It is further ordered that the Defendant pay restitution in the amount of Eight
9 Hundred Seventy Dollars (\$870.00), the statutory Twenty-Five Dollar (\$25.00)
10 administrative assessment fee, submit to a blood sample as provided for in NRS 176.0913
11 and pay a DNA testing fee of Two Hundred Fifty Dollars (\$250.00), pay a Nine Hundred
12 Twenty-Five Dollar (\$925.00) psychosexual evaluation fee and reimburse the Washoe
13 County Public Defender's Office in the amount of Five Hundred Dollars (\$500.00) for legal
14 services rendered.

15 Dated this 29th day of March, 2001.

16
17
18 
19 JEROME M. POLAHA
20 DISTRICT JUDGE
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28


CR00-1849
STATE VS. RAUL GARCIA (TN) (2 Pages
District Court 04/30/2001 04:09 PM
Washoe County 2515
MELIRDY

ORIGINAL

FILED

2515
WASHOE COUNTY PUBLIC DEFENDER
CHERYL BOND, STATE BAR NO. 3915
P.O. BOX 30083
RENO, NEVADA 89520
(775) 328-3840
Attorney for Defendant

2001 APR 30 PM 4:09

AMY HARVEY, CLERK
BY:  DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

Case No. CR00-1849

vs.

Dept. No. 3

RAUL GARCIA,

Defendant.


NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that RAUL GARCIA, the defendant above named, hereby appeals to the Supreme Court of Nevada from the judgment entered in this action on March 29, 2001.

This is NOT a Fast Track Appeal. See NRAP 3C.

DATED this 30th day of April, 2001.

MICHAEL R. SPECCHIO
Washoe County Public
Defender

By: 
CHERYL BOND
Appellate Deputy

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CERTIFICATE OF SERVICE

I hereby certify that on **April 30, 2001**, I served a copy of the foregoing NOTICE OF APPEAL by mailing it by first class mail with sufficient postage prepaid to the following addresses:

JANETTE M. BLOOM
Clerk of the Supreme Court
Supreme Court Building
Capitol Complex
Carson City, Nevada 89701

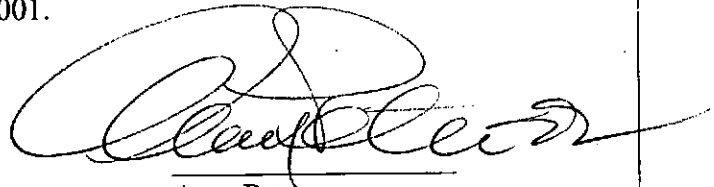
FRANKIE SUE DEL PAPA
Attorney General, State of Nevada
100 North Carson Street
Carson City, Nevada 89701

RAUL GARCIA, #68625
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

and served a copy by inter-office mail to:

RICHARD GAMMICK
Washoe County District Attorney
Attention: GARY HATLESTAD, Appellate Deputy

DATED this 30th day of April, 2001.


Amy Peterson

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 37816

FILED

OCT 29 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

Appeal From A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Jerome Polaha, District Judge

APPELLANT'S OPENING BRIEF

MICHAEL R. SPECCHIO
Washoe County Public
Defender

CHERYL BOND
Appellate Deputy

P.O. Box 30083
Reno, Nevada 89520

ATTORNEYS FOR APPELLANT

RICHARD A. GAMMICK
Washoe County District
Attorney

GARY H. HATLESTAD
Chief Appellate Deputy

P.O. Box 30083
Reno, Nevada 89520

ATTORNEYS FOR RESPONDENT

RECEIVED

OCT 29 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

MAILED ON

10/25/01

01-11075 GARCIA014

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TABLE OF AUTHORITIES

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<i>Culverson v. State</i> , 106 Nev. 484, 797 P.2d 238 (1990)	14
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	10
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<i>Nevius v. State</i> , 101 Nev. 238, 699 P.2d 1053 (1985)	14
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<i>Smith v. Horn</i> , 120 F.3d 400(3d Cir. 1997) cert. denied 522 U.S. 1109(1997)	14

1 **LEGAL ISSUES PRESENTED**

- 2
- 3 I. The district court erred in refusing to allow Mr. Garcia to present
4 evidence that the alleged victim and her father were being
5 coached during their testimony.
- 6 II. The district court erred in giving a jury instruction to bolster the
7 credibility of the alleged victim by giving the weight of law to
8 an innocent explanation for her inconsistencies during
9 testimony.

8 **STATEMENT OF CASE**

9 An Information was filed October 16, 2000, alleging one count of sexual assault on a
10 child under the age of fourteen and two counts of lewdness with a child under the age of
11 fourteen. APP.¹, p. 1.

12 This case proceeded to trial on February 13, 2001. TT.², p. 1. On March 29, 2001, the
13 district court sentenced Mr. Garcia to imprisonment in the Nevada State Prison for life with the
14 possibility of parole after twenty years has been served for count I, life with the possibility of
15 parole after ten years has been served for count II, consecutive to count I, and for life with the
16 possibility of parole after ten years has been served for count III, consecutive to count II, with
17 credit for two hundred thirty-four (234) days time served, and an order to pay various fines,
18 restitution, and fees totaling two thousand five hundred and seventy (2,570.00) dollars. Sent., pp.
19 10-11. A Notice of Appeal was filed on April 30, 2001. APP., p. 35.

20 **STATEMENT OF FACTS**

21 On February 13, 2001, this matter proceeded to trial. TT., p. 1. Jerry Lee Straits
22 testified that he was an investigator in the forensics section of the Washoe County Sheriff's
23 Office. TT., p. 8-9. Mr. Straits went to 4136 Neil Road on February 8. TT., p. 9-10. It was a
24

25 ¹ "APP." stands for the Joint Appendix which is being filed with this Opening Brief.

26 ² "TT." stands for the Transcript of Proceedings: Jury Trial, from February 13, 2001. "TT2." stands for the
Transcript of Proceedings: Jury Trial, Volume II, from February 14, 2001. "Sent." stands for the Transcript of
Proceedings: Sentencing from March 29, 2001. None of these transcripts have been included in the Joint Appendix
pursuant to NRAP (30(b)(1)).

1 small, two-bedroom apartment. TT., p. 15. The bedroom had windows overlooking the back
2 yard and there was no obstruction, other than mini-blinds, to seeing through the window. TT., p.
3 16-17. Mr. Straits was five feet six and a half inches tall and the window was a little high for
4 him to see through from the back yard. TT., p. 18.

5 Anna Karen G. Testified that she was eleven years old. TT., p. 19. She preferred to be
6 called Karen. TT., p. 20. She lived in the house on Neil Road. TT., p. 22. Her father had a
7 friend she knew as "Chino". TT., p. 24. Chino had lived with Karen and her family. TT., p. 59.
8 Karen went into her bedroom to draw a picture. TT., p. 27. There were two beds in that room.
9 TT., p. 27. She sat on her bed, facing her sister's bed. TT., p. 28. Chino came into the room.
10 TT., p. 28. He sat down on the other bed. TT., p. 29. Karen was wearing black shorts and a
11 white shirt with blue designs on it. TT., p. 30. Chino got on his knees on the floor. TT., p. 31.
12 He grabbed Karen's legs and tried to pull her underwear and shorts down below her knees. TT.,
13 p. 31, 49. Karen tried to push him away. TT., p. 32. She grabbed her shorts and tried to pull
14 them up. TT., p. 32. Chino then grabbed her legs with his knees and pulled them together. TT.,
15 p. 32. Then he tried to put his hand inside her private spot. TT., p. 32. Karen identified a cup
16 and pen and described the pen's relationship to the cup in terms of being on top, under, then
17 inside the cup. TT., p. 32-33. Karen said that Chino used his pointer finger to touch her private
18 spot and that the finger actually went inside her. TT., p. 36. When he did that, it hurt. TT., p.
19 36. Karen said "Ough(sic)" and Chino stopped. TT., p. 37. Chino's finger was inside her for
20 about three seconds. TT., p. 37. Karen got up and pulled her shorts up and tried to leave the
21 room. TT., p. 37. Chino got up and Karen sat on her sister's bed and fell back and Chino shut
22 the door part of the way closed. TT., p. 37-38. Chino got on top of Karen and tried to kiss her.
23 TT., p. 38. Karen kept moving her head so that Chino could not kiss her. TT., p. 39. He gave
24 up. TT., p. 39. When Karen tried to leave again, Chino closed the door part way and unzipped
25 his zipper. TT., p. 39. Chino took his private spot out. TT., p. 39. She said that he wanted to
26 force her to touch it. TT., p. 40. He asked her if she wanted to touch it and if she liked it. TT., p.
40. She said that she did not touch it and it looked like a sausage. TT., p. 40. She had never

1 seen a man's private part before and the end of it had a little dot. TT., p. 40. Karen said that
2 Chino took his private part out and grabbed it, then grabbed her hand and wanted her to touch it.
3 TT., p. 41.

4 Karen testified that Chino tried to lick her private spot. TT., p. 42. She thought it
5 happened before he put his finger inside her. TT., p. 42. It was when her shorts and underwear
6 were pulled down.. TT., p. 43. Chino "tried to go like this, and he tried to put his head in and
7 started licking it." TT., p. 43. Chino's hands were on her thighs and he was "trying to push them
8 like that." TT., p. 44. Karen was saying no. TT., p. 44. The licking lasted either one second or
9 nine (the record is not clear) and felt "gross". TT., p. 45. Karen described the licking as feeling
10 like water and kind of soft. TT., p. 45. After all of this happened, Chino left and went toward
11 the living room. TT., p. 46. Karen stayed in her room and cried. TT., p. 47. Chino came back
12 into her room and tried to pull her shorts down from the back. TT., p. 47. He pulled her shorts
13 down, but she could not remember how far. TT., p. 49. They were still above her knees. TT., p.
14 49. She pulled her shorts back up. TT., p. 51. Chino pushed her head down and tried to pull her
15 shorts and underwear down again. TT., p. 51. Karen tried to pull them up again, and during this
16 struggle, Karen's father came into the room and Karen was able to pull her shorts back up again.
17 TT., p. 52. Karen's father asked Chino what he was doing and Chino said he was just looking at
18 the decorations on the walls of Karen's room. TT., p. 53. Karen's father asked what happened
19 and Karen asked her father to tell Chino to leave. TT., p. 54. When Chino left, Karen told her
20 father what happened. TT.,p. 54. When her mother got home from work, Karen told her mom.
21 TT., p. 55. Karen's mother called the police. TT., p. 55. The police took her to an office and
22 she talked to Judy Holladay. TT., p. 56. Karen did not tell Ms. Holladay about the licking part
23 because it made her feel "yucky" inside to tell someone. TT., p. 56.

24 Karen testified that she was uncomfortable talking about any of the things she said
25 happened, but she just wanted to leave out the part about the tongue. TT., p. 61-62. She
26 admitted that on three previous occasions, once when she was under oath, she said that the first
thing Chino did was shut the door, but that this time, she said Chino did a lot of things first, then

1 tried to shut the door. TT., p. 63. She also admitted that Chino's hand would have had to go
2 under her body where she couldn't see it, to be inserted inside her, even though she had just
3 testified that she saw his finger go inside her. TT., p. 65. She did not remember which hand
4 Chino used. TT., p. 66. She said he used his ring finger, but she did not remember if it was the
5 finger that actually had a ring on it. TT., p. 66. She then said that it was not even possible that
6 he used the finger which had the ring on it. TT., p. 66. She testified that Chino did not move his
7 finger while it was inside her. TT., p. 67. Chino had to pry her legs apart with his hands because
8 she was squeezing them together. TT., p. 68. It took longer than a couple of seconds, but she
9 could not estimate how long. TT., p. 68. Chino did not leave scratches, bruises or fingernail
10 marks on her legs from trying to pry them apart. TT., p. 69. She testified that Chino did not grab
11 her when she tried to leave the room, he merely closed the door a little bit. TT., p. 70. Karen
12 could not remember ever telling Detective Holladay that she and her little sister went outside the
13 room after the first time that Chino was inside her room. TT., p. 70. She did not remember
14 testifying previously that Chino had held her by the legs when she was trying to leave the room.
15 TT., p. 78. She was not sure how long Chino had lived with them, but it might have been for
16 more than a year. TT., p. 72. Chino had never touched Karen before or done anything bad to her
17 before. TT., p. 73. She identified Mr. Garcia as Chino. TT., p. 78.

18 Jorge Palma testified that he lived at 4136 Neil road with his fiancée and her two girls.
19 TT2., p. 4. Anna Karen was eleven years old and her sister Kayla was five. TT2., p. 4. They
20 have lived there for two years. TT2., p. 4. He has known Raul Garcia for five years. TT2.,p. 5.
21 Two and a half year ago, Mr. Garcia lived with Mr. Palma and his family for about eight months.
22 TT2.,p. 6. When this incident occurred, Mr. Garcia was living in a different house with Mr.
23 Palma's father. TT2.,p. 6. Mr. Garcia's nickname was Chino. TT2.,p. 7. Mr. Palma had never
24 seen Mr. Garcia in the girls' room before, or ever playing with the girls before. TT2.,p. 7. On
25 August 6, 2000, Mr. Palma's fiancée was working and Mr. Palma was caring for the girls.
26 TT2.,p. 8-9. After running errands, Mr. Palma and Mr. Garcia went into the back yard. TT2.,p.
12. They were drinking beer. TT2.,p. 13. They talked for about thirty minutes, then Mr. Garcia

1 asked to use the bathroom. TT2.,p. 15-16. Mr. Garcia was gone about five minutes. TT2.,p. 16.
2 Mr. Garcia came out and stood by the door, then turned and said he was going to put on some
3 music. TT2.,p. 17. Mr. Palma heard the music and listened for one song. TT2.,p. 18. Then Mr.
4 Palma got up and went to find the girls. TT2.,p. 19. He saw Mr. Garcia in the girls' room.
5 TT2.,p. 20. As Mr. Palma walked into that room, he saw Karen pulling her shorts up. TT2.,p.
6 20. Mr. Palma asked Mr. Garcia "What are you doing to the girl?" TT2.,p. 25. Mr. Garcia
7 looked nervous and said he was looking at the decorations. TT2.,p. 20. Karen was nervous and
8 Mr. Palma grabbed her and asked what Mr. Garcia was doing to her. TT2.,p. 20. Karen was
9 crying and was scared. TT2.,p. 27. Mr. Palma went into the yard because he was crying and
10 upset. TT2.,p. 28. He did not see his fiancée when she came home, until she came out into the
11 yard, crying and angry. TT2.,p. 28. She called the police. TT2.,p. 28.

12 Mr. Palma was suspicious that something was wrong before he even walked into the
13 house. TT2.,p. 30. When he saw Mr. Garcia, Mr. Garcia's hands were down at his sides and a
14 little bit forward and Mr. Palma said "What are you doing to the girl?" TT2.,p. 30. He was
15 angry and his voice was angry when he questioned Mr. Garcia. TT2.,p. 31. The apartment was
16 only twenty-six feet long. TT2.,p. 31.

17 Judy Holladay testified that she was a detective in the sex crimes/child abuse division at
18 the Reno Police Department. TT2.,p. 41. On August 6, 2000, she interviewed Anna Karen
19 about this case. TT2.,p. 43. The interview was a few minutes shy of half an hour. TT2.,p. 45.
20 Detective Holladay arranged for a physical exam of Karen. TT2.,p. 46.

21 Mr. Garcia was canvassed regarding his right to testify on his own behalf. TT2.p. 49-50.
22 Mr. Garcia declined to testify. TT2.,p. 50.

23 Patience Wenck testified that she examined Anna on August 8, but she did not
24 independently recall the examination. TT2.,p. 53-54. She examined her thoroughly and found
25 no bruises, scratches,, abrasions, or lesions of any kind. TT2.,p. 55-57. Anna's hymen was intact
26 and there was no ripping or scarring of any kind. TT2.,p. 59. A fingernail could leave a tear or a
scar on the hymen. TT2.,p. 60-61. The examination was normal and there was no indication of

1 abuse. TT2.,p. 62. Based upon what Anna had said, however, Ms. Wenck was not surprised that
2 there were no physical findings. TT2.,p. 66. For a child in Anna's condition, digital penetration
3 of her vagina would be painful. TT2.,p. 67. It was equally possible for an adult male's finger to
4 penetrate Anna's vagina without causing damage to her hymen. TT2.,p. 68. Her physical
5 findings were compatible both with the report Anna gave her and with no abuse having occurred.
6 TT2.,p. 68.

7 Juan Garcia testified that he was Mr. Garcia's cousin. TT2.,p. 71. He had known Mr.
8 Garcia for about forty years. TT2.,p. 72. Mr. Garcia lived with his family for about three years.
9 TT2.,p. 73. At that time, Mr. Juan Garcia's daughter was between four and seven years old.
10 TT2.,p. 73, 77. Mr. Raul Garcia sometimes took care of the children when he lived at Mr. Juan
11 Garcia's house. TT2.,p. 75. Mr. Raul Garcia had an excellent reputation in the community for
12 good morals. TT2.,p. 75. Mr. Juan Garcia knew generally what the allegations were against Mr.
13 Raul Garcia. TT2.,p. 78. Mr. Juan Garcia also knew Anna Karen's grandfather well, but not her
14 father. TT2.,p. 78. Mr. Juan Garcia never wen to the house where Mr. Raul Garcia lived with
15 Anna Karen and her family. TT2.,p. 81.

16 Jorge Rios testified that he, too, was Mr. Garcia's cousin. TT2.,p. 83. About six years
17 before, Mr. Garcia had lived in Mr. Rios' home. TT2.,p. 83. Later, Mr. Rios got married and
18 had a five year old daughter. TT2.,p. 84. Mr. Rios' eleven year old niece sometimes played with
19 Mr. Rios younger daughter. TT2.,p. 84. Mr. Garcia had met this niece, but was closer to Mr.
20 Rios' daughter. TT2.,p. 85. Mr. Rios testified that Mr. Garcia's reputation in the Hispanic
21 community was pretty good for good morals. TT2.,p. 85. There were many people who were
22 willing to say that Mr. Garcia was a good person. TT2.,p. 85. Mr. Rios did not personally know
23 the family making the accusations in this case. TT2.,p. 86.

24 Alfredo Garcia testified that he was not related to Mr. Raul Garcia, but was his friend.
25 TT2.,p. 90. He has known Mr. Raul Garcia for about ten years. TT2.,P. 91. Mr. Alfredo Garcia
26 had one son and one eight year old daughter. TT2.,p. 91. Mr. Raul Garcia had lived with Mr.
Alfredo Garcia. TT2.,p. 92. At that time, Mr. Alfredo Garcia's daughter was about seven years

1 old. TT2.,p. 92. Mr. Alfredo Garcia also had two step-daughters who were about thirteen and
2 sixteen years old. TT2.,p. 92. Mr. Alfredo Garcia had had girls at his house who were between
3 nine and eleven years old. TT2.,p. 93. Mr. Raul Garcia had been there at the same time as those
4 girls. TT2.,p. 93. Mr. Alfredo Garcia knew Jorge Rios but not Juan Garcia. TT2.,p. 93. Mr.
5 Raul Garcia had a good reputation in the Hispanic community for good morals. TT2.,p. 94. He
6 knew Jorge Palma a little bit, but not much. TT2.,p. 95.

7 Jury instructions were settled. TT2.,p. 99. Defense counsel objected to instruction
8 number twenty. TT2.,p. 101. The case revolved around the credibility of Karen and instruction
9 twenty was duplicative and misleading and the preferred instruction was number eighteen.
10 TT2.,p. 102.

11 An offer of proof was made outside the presence of the jury. TT2.,p. 102. Earl Walling
12 testified that he was the bailiff in Department Three and worked for the Washoe County Sheriff's
13 Office. TT2.,p. 104. He was the bailiff during the course of this case. TT2.,p. 104-105. He was
14 present during Jorge Palma's testimony. TT2.,p. 105. While Mr. Palma testified, the bailiff
15 looked at Anna Karen's mother. TT2.,p. 105. The bailiff saw that Anna Karen's mother was
16 nodding her head when questions were being asked of Mr. Palma. TT2.,p. 106. When the
17 mother nodded her head yes, the bailiff saw a corresponding answer from Mr. Palma. TT2.,p.
18 106. The nods of yes or no corresponded to the answers given by Mr. Palma. TT2.,p. 106. The
19 bailiff looked once for one or two questions. TT2.,p. 106. Then he looked again and saw it
20 happen again, so " . . finally I said 'Well, this shouldn't be right,' so I just looked at her and when
21 I looked at her she stopped." TT2.,p. 106. After that, the bailiff went back to writing and when
22 he looked again he did not see her nodding. TT2.,p. 106. The bailiff probably saw the nodding
23 four or five times total. TT2.,p. 107. The mother gave the nod prior to Mr. Palma's answer
24 every time. TT2.,p. 108.

25 Defense counsel then stated that he was given a message that Alfredo Garcia's wife had
26 also been in court and had seen Anna Karen's mother doing the same thing during Anna Karen's
testimony. TT2.,p. 112-113. Mr. Alfredo Garcia told defense counsel that his wife had told him

1 this information. TT2.,p. 113. At the time, defense counsel thought that it might not be
2 considered credible because of the relationship between the parties, but changed his mind after
3 the bailiff told counsel the same thing. TT2.,p. 113. Defense counsel noted that this case
4 revolved around the credibility of Anna Karen. TT2.,p. 113. Even if the court thought the
5 evidence was slight that Anna Karen's mother was coaching her, such evidence could affect the
6 jury's determination of Anna Karen's credibility. TT2.,p. 113. Counsel asked for leave to call
7 the bailiff as a witness and Mr. Rios' wife, as well. TT2.,p. 114.

8 The prosecutor argued that Anna Karen's credibility was not the only issue because Jorge
9 Palma said that he saw her with her shorts down and Mr. Garcia near her. TT2.,p. 125. The
10 prosecutor also argued that Detective John Ferguson, District Attorney's Office Investigator
11 Mike McCloud and Marcelo Guzman were also present and they did not happen to see this
12 nodding occur. TT2.,p. 125. He also expressed a lack of confidence in the bailiff because the
13 bailiff had the gall to tell defense counsel about this problem rather than the prosecutor or the
14 court. TT2.,p. 125-126. The prosecutor then claimed that this was all a ruse on the part of the
15 defense because the defense requested a break earlier in the day when one of its witnesses was
16 not yet present and then claimed that the bailiff's observations were nothing more than a specious
17 suggestion and stated that, because the deputy used the term "nod", he could not have meant a
18 "no" answer, even though he deputy testified under oath that the nods corresponded to the yes or
19 no answer that Mr. Palma subsequently gave. TT2.,p. 126. The prosecutor rambled that it was
20 also in violation of NRS 48.035 because there could not be an effect on credibility if the
21 communication was not verbal, it would mislead the jury because it was specious, and it was a
22 waste of time (apparently because the prosecutor said so). TT2.,p. 127.

23 Roberta Garcia testified that she was Alfredo Garcia's wife. TT2.,p. 129. She was inside
24 the courtroom from 3:00 to 5:00. TT2.,p. 130. She did not know Anna Karen's mother, but
25 described her. TT2.,p. 130. Ms. Garcia watched the testimony of the young girl who was
26 dressed in pink. TT2.,p. 131. Ms. Garcia saw the mother nod her head affirmatively and shake
her head negatively. TT2.,p. 131. Ms. Garcia was not paying a lot of attention to it and so

1 could not say how long this went on. TT2.,p. 132. The lady only did that when the girl was
2 answering that she did not remember. TT2.,p. 132. She was approximately nine feet and four
3 inches away from the nodding woman. TT2.p. 133-134.

4 Defense counsel reiterated that there was nothing more significant than evidence that a
5 witness has been coached or their testimony influenced by someone who hasn't testified. TT2.,p.
6 135.

7 The court agreed with the prosecutor because " . . . one of the jobs of counsel – and this
8 goes for both the plaintiff and defendant regardless of the type of case – is to look at the witness
9 and when you ask questions and hopefully when you are looking to watch them, how they
10 respond, when the other party is asking them questions and, I don't know, common sense would
11 dictate that if she is not looking at the questioner but rather someplace else, somebody is going to
12 notice that." TT2.,p. 137. The court said that the two witnesses called by defense counsel "did
13 not make the -- make any problem obvious." TT2.,p. 137. The court found the questions that it
14 reviewed from the transcript were not material because they were repetitive. TT2.,p. 138. The
15 court refused to allow the jury to hear this evidence directly regarding the credibility of these two
16 key witnesses. TT2.,p. 138.

17 ARGUMENT

18 **1. The district court erred in refusing to allow Mr. Garcia to present evidence that Anna 19 Karen and Mr. Palma were being coached during their testimony.**

20 Relevant evidence is "evidence having any tendency to make the
21 existence of any fact that is of consequence to the determination of the
22 action more or less probable than it would be without the evidence."
23 NRS 48.015. Although generally admissible, relevant evidence is
24 inadmissible if its probative value is substantially outweighed by unfair
25 prejudice, if it confuses the issues, or if it amounts to the needless
26 presentation of cumulative evidence. NRS 48.025; NRS 48.035.
District courts are vested with considerable discretion in determining
the relevance and admissibility of evidence. *Atkins v. State*, 112 Nev.
1122, 1127, 923 P.2d 1119, 1123 (1996), cert. denied, 520 U.S. 1126,
117 S.Ct. 1267, 137 L.Ed.2d 346 (1997).

Castillo v. State, 114 Nev. 271, 956 P.2d 103, 107-108 (1998).

1 "A defendant must be able to expose facts from which the jury can draw inferences
2 regarding the reliability of a witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111,
3 39 L.Ed.2d 347 (1974). See also *Crew v. State*, 100 Nev.38 , 45, 675 P.2d 986 (1984).

4 In this case, defense counsel was informed by the bailiff for the court, Washoe County
5 Sheriff's Deputy Earl Walling, that he saw the mother of the alleged victim nodding her head,
6 affirmatively and negatively, after questions were asked of her husband and before her husband
7 gave his answers. Her husband's answers always corresponded to the nodding done by the
8 mother. The Deputy testified, during an offer of proof outside the presence of the jury, that he
9 was writing something about an unrelated matter and he looked up and saw the mother engaging
10 in this behavior. He looked back at his writing. Some time later, he looked up again and saw that
11 she was still doing this. The deputy stared at the mother and she ceased her nodding. The wife of
12 a defense witness also testified that she saw the mother (whom she did not know, but whom she
13 described) engaging in the same behavior while the alleged victim testified. This witness did not
14 know that she was witnessing anything particularly important at the time, so she did not focus her
15 full attention on it.

16 The court, apparently expecting perfection from all trial counsel at all times, chastised
17 counsel for not noticing this while it happened. The court then commented that: "I am up here at
18 a vantage point and I am watching her and looking back. The two witnesses, they were looking
19 like they were at a tennis match with their heads going back and forth that's one element of the –
20 question that's presented. And I just think that the two witnesses that you called did not make the
21 – make any problem obvious." TT2.,p. 137. In addition, the court commented that his review of
22 the transcript showed that the only material question was "Did you ever see the girls alone or in
23 their bedroom?" because the other questions were just a repeat of former questions. TT2.,p. 138.

24 The court failed to review the questions answered by the alleged victim during the time
25 while her mother was coaching her. The testimony of this witness was critical to the prosecution
26 because there was no physical evidence to corroborate the testimony. The only corroboration
came from Mr. Palma, the other witness who was coached by the girls mother during his

1 testimony. The person who witnessed the coaching of Anna Karen said that she recalled it
2 happening during the time that Anna Karen said she did not remember. TT2.,p. 138. This
3 occurred primarily during cross examination. Anna Karen answered most questions with a form
4 of yes, no, lack of understanding, or inability to remember during cross examination. TT., p. 57-
5 73. Cross-examination is the key to getting to the truth of a matter. If a witness is being coached
6 by an audience member during cross-examination, it renders that truth-seeking method useless.

7 In addition, the court was in error about a critical point of Mr. Garcia's testimony. One of
8 the questions to which he answered "yes" was "Were her shorts down that far?" TT2.,p. 24.
9 This was not a follow up to something Mr. Garcia had just stated. Mr. Garcia had just stated that
10 his daughter had her hands holding onto her shorts. He said nothing about the shorts being
11 down. When the prosecutor asked if the shorts were "down that far", defense counsel objected to
12 the leading nature of the question. TT2.,p. 24. This is the critical key to the father's
13 corroboration of his daughter's testimony. This could have been one of the questions to which
14 Mr. Palma received the coaching from his wife. The court even overruled the objection stating
15 "We are having a little difficulty in translation so I will allow that." TT2.,p. 24. There was a
16 problem with translation. The court allowed a crucial question to be asked in a leading fashion.
17 Then the court denied the jury the opportunity to hear the truth: Mr. Palma's wife had, during at
18 least some parts of his testimony, nodded her head in the affirmative or the negative prior to Mr.
19 Palma's giving the corresponding yes or no answer.

20 The bottom line in this case is that the credibility of the witnesses was the heart of the
21 case. The evidence of a Washoe County Sheriff's Deputy and of another audience member that
22 the alleged victim and the only witness with corroborating testimony were both coached by the
23 alleged victim's mother was critical for the jury to hear. It mattered not that the court decided
24 that he did not give that evidence much weight, even though he could see those witnesses heads
25 swinging like they were at a tennis match. It also mattered not that the trial lawyers were so busy
26 conducting the trial that they did not see the "coach" who was behind them in the audience
engaging in the silent coaching. This matter would have taken ten or fifteen minutes to present

1 to the jury. It was clearly a matter of great importance because the prosecutor objected so
2 vehemently that he accused the defense attorney of nefarious collusion with the Washoe County
3 Sheriff's Deputy. TT2.,p. 125-126. He argued that "this suggestion by Deputy Walling is so
4 specious it's not even evidence." TT2.,p. 126. The prosecutor claimed that there could be no
5 concern about credibility because the coach did not have verbal communication with the
6 witnesses. TT2.,p. 127. It would mislead the jury because it was specious. TT2.,p. 127. It was
7 a waste of time, apparently just because he said so. TT2.,p. 127.

8 The prosecutor could not have been more wrong. The fact that the Deputy told the
9 defense attorney about an issue which might be of concern to the defense attorney does not
10 automatically make the Deputy a liar. It would be for the jury to decide whether they believed
11 the Deputy's testimony. The nodding up and down and side to side by the coach is
12 communication meant to convey an answer. It does not matter whether the person uses actual
13 words to convey the answer, easily recognizable silent communication (as in this case) or some
14 sort of prearranged signal (as in a baseball pitcher and catcher who clearly communicate with
15 one another without using vocalizations). It is not the vocal aspect of communication which
16 taints a coached person's testimony but the fact of the coaching itself, in whatever form it may
17 occur.

18 The jury would not be misled by the testimony and the prosecutor could not make the
19 determination that the Deputy's evidence seemed to be good but really wasn't. It is for the jury to
20 determine whether the Deputy's observations were true or whether they were "specious". If this
21 jury was capable of hearing the testimony of the State's witnesses in this case and determining
22 what credibility and weight to give that evidence, it was surely capable of hearing two additional
23 witnesses and deciding for itself whether their evidence would affect the jury's determination of
24 credibility of other witnesses.

25 The third complaint by the prosecutor is that this would be a waste of time.
26 Nonrepetitive, relevant evidence is not a waste of time. A jury trial is supposed to be a search
for the truth. If an audience member was coaching key witnesses and that fact is hidden from the

1 jury then the jury can only find the truth by accident and not by any reliable means. This
2 particular evidence of coaching was certainly relevant in a case where the testimony of the
3 coached witnesses is the only evidence that any criminal activity took place. Clearly the
4 prosecutor was concerned that the jury might conclude that the State's two witnesses were not
5 reliable.

6 The court erred in concluding that the evidence would not be presented to the jury. The
7 court rambled in a number of different directions, from chastising counsel for not seeing what the
8 court apparently saw: tennis match style witnesses, to concluding that the evidence of coaching
9 would not be relevant to a determination of credibility because the only yes or no answers given
10 were to non material questions, to a conclusion that the two witnesses to the coaching did not
11 "make any problem obvious". First, the fact that the witnesses were apparently dividing their
12 attention between their questioner and someone else in a tennis match fashion only adds weight
13 to the allegation of coaching and the trial judge should have done something about it when he
14 first noticed it. Second, the trial court was mistaken in its conclusion that the questions which
15 the father answered with a yes or no were not material and did not even consider the questions so
16 answered by the alleged victim. The majority of the questions answered by the alleged victim n
17 cross-examination were yes or no questions. She may have been coached throughout her entire
18 cross-examination and yet the trial judge erroneously concluded that this was not material.
19 Finally, the comment by the court that the witnesses did not "make any problem obvious" was
20 completely irrelevant. Whether the witnesses should have brought this matter to the court's
21 attention immediately, rather than letting defense counsel know about it, does not change the fact
22 that the witnessed behavior occurred. Indeed, the court was apparently aware of the behavior
23 from its own observations and did nothing to stop the "tennis match" testimony, but instead
24 allowed the witnesses to continue looking to an audience member for assistance in answering.

25 The trial court erred in refusing to allow the defense to present the testimony of these
26 two witnesses to the jury. The jury was not able to reliably determine the credibility of the two

1 key State's witnesses because the jury was not given the relevant evidence to do so. Therefore,
2 Mr. Garcia's conviction must be reversed and the matter remanded for a fair trial.

3 **II. The district court erred in giving a jury instruction to bolster the credibility of the**
4 **alleged victim by giving the weight of law to an innocent explanation for her inconsistencies**
5 **during.**

6 "A jury instruction that omits or materially misdescribes an essential element of an
7 offense as defined by state law relieves the state of its obligation to prove facts constituting every
8 element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due
9 process rights." *Smith v. Horn*, 120 F.3d 400, 415 (3d Cir. 1997)(*cert. denied* 522 U.S.
10 1109(1997)).

11 A district court may refuse to give an otherwise required jury instruction which is
12 substantially covered by other instructions. *Runion v. State*, 116 Nev.Ad.Op. 111, 13 P.3d 52,
13 58-59 (2000). A district court should not give instructions which may confuse the jury or which
14 contain superfluous language. *Id.* "The district courts should tailor instructions to the facts and
15 circumstances of a case, rather than simply relying on 'stock' instructions." *Id.* See also *Jackson*
16 *v. State*, 117 Nev.Ad.Op. 12, 17 P.3d 998, 1003, fn. 6 (2001).

17 This Court has also held, in the case of specific eyewitness instructions, That such
18 specific instructions need not be given and that they are duplicative of the general instruction on
19 witness credibility and burden of proof beyond a reasonable doubt. *Nevius v. State*, 101 Nev.
20 238, 249, 699 P.2d 1053 (1985).

21 In *Culverson v. State*, this Court noted the following:

22 We note that Instruction 17 states that homicide is also justified
23 under the situation mentioned in the instruction. The use of the
24 word "also" implies that Instruction 17 is but one example of
25 when self-defense justifies a homicide. Other instructions given
26 to the jury do not require that the defendant be in actual danger
before he uses self-defense as a justification for homicide. A
careful reading of all the instructions could have led a juror to
conclude that a person may use self-defense as a justification to
homicide even if he is not in actual danger.

A juror should not be expected to be a legal expert. Jury
instructions should be clear and unambiguous. Instruction 17
may have misled the jury into concluding that Culverson was not

1 justified in shooting Smith because Smith carried a pellet gun
2 which could not have seriously harmed Culverson. Accordingly,
3 we conclude that Jury Instruction 17 was erroneous and could
4 have prejudiced the jury.
5 *Culverson v. State*, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990).

6 In this case, the court gave, without objection, instructions numbered seven, eighteen,
7 nineteen, and twenty-six. APP., pp. 12, 23, 24, 31; TT2., p. 101. However, the court also gave
8 instruction number twenty, over objection by defense counsel. APP., p. 25, TT2., p. 101-102.
9 Instruction number twenty read as follows:

10 Inconsistencies or discrepancies in the testimony of a witness, may or
11 may not cause the jury to discredit such testimony. An innocent
12 misrecollection, like failure to recollect, is not an uncommon
13 experience. In weighing the effect of a discrepancy, consider whether
14 it pertains to a matter of importance, or an unimportant detail, and
15 whether the discrepancy results from innocent error or willful
16 falsehood."

17 APP., p. 25. This instruction was improperly given to the jury. The instruction was substantially
18 covered by the other instructions: seven told the jury to decide what weight to give any
19 particular piece of evidence; eighteen told the jury to determine the credibility of witnesses and
20 gave guidelines for doing so; nineteen unnecessarily, (but without objection) specified that the
21 jury should also determine the weight and credibility of testimony of an alleged victim of sexual
22 assault and could find proof beyond a reasonable doubt in her testimony alone and without
23 independent corroboration; twenty-six told the jury to use their common sense and judgment in
24 considering the evidence. APP., pp. 12, 23, 24, 31.

25 The jury was amply informed about their duty to determine credibility and weight to be
26 given to the testimony of any witness. They were instructed on how to make that determination.
27 They were unnecessarily also told specifically to determine the weight and credibility to be given
28 the complaining witness. The jury was then told that the State did not have to prove anything
29 beyond the victim's testimony, if the jury believed her allegations beyond a reasonable doubt.
30 This instruction was substantially covered by the other above mentioned instructions, in
31 combination with the instruction on reasonable doubt, but was not objected to. However, the
32 court then went an additional step further in reducing the State's burden in the minds of the

1 jurors: it gave instruction number twenty over the objection of defense counsel. Instruction
2 twenty adds nothing essential to the instruction of the jury. They had already been told to use
3 their common sense. If, as the instruction averred, an innocent misrecollection is not uncommon,
4 then surely it was part and parcel of the jury's collective common sense. Instruction number
5 eighteen had already told the jury to consider the strength or weakness of a witness'
6 recollections, among several other factors. As in *Culverson*, these jurors should not have been
7 expected to be legal experts, able to divine some legal reasoning for the inclusion of this needless
8 and confusing instruction. Instruction number twenty was nothing more than a judicially
9 approved excuse for any discrepancy in the testimony of the victim and gave the force of law to
10 that excuse.

11 Instruction number twenty was superfluous. It distorted the law by excusing
12 discrepancies in testimony as nothing more than innocent misrecollections" in a case where the
13 only issue was credibility of the complaining witness and her father. The instruction
14 compounded the error made when the trial judge refused to allow the jury to hear critical
15 evidence regarding the credibility of these witnesses. Therefore, Mr. Garcia's conviction must be
16 reversed and the matter remanded for a fair trial without improper instruction.

17 ///

18 ///

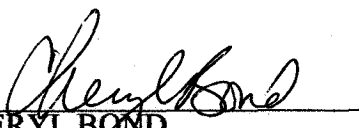
19 ///

1 CONCLUSION:

2 Based upon the foregoing, Mr. Garcia's conviction should be reversed and this matter
3 remanded for a new trial because two of the witnesses may have been coached during their
4 testimony and the jury was not allowed to hear evidence of this fact and because the jury was
5 improperly instructed that innocent misrecollections were common and therefore likely to be the
6 reason for discrepancies in a witness' testimony when the entire issue at trial was the credibility
7 of the complaining witness and her father.

8 DATED this 25th of October, 2001.

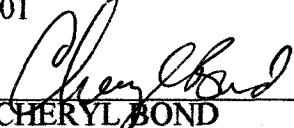
9 MICHAEL R. SPECCHIO
10 Washoe County Public Defender

11 By: 
12 CHERYL BOND
13 Appellate Deputy
14 Bar No. 3915
15 P.O. Box 30083
16 Reno, Nevada 89501
17 (702) 328-3840
18
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1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further
4 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in
5 particular NRAP 28 {e}, which requires every assertion in the brief regarding matters in the
6 record to be supported by a reference to the page of the transcript or appendix where the matter
7 relied upon is to be found. I understand that I may be subject to sanctions in the event that the
8 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate
9 Procedure.
10

11 Dated this 25th of October, 2001

12 
13 _____
14 CHERYL BOND
15 Appellate Deputy
16 Nevada Bar No. 3915
17 Washoe County Public Defender
18 P.O. Box 30083
19 Reno, Nevada 89520
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CR60-1849 DC-09900069755-033
STATE VS. RAUL GARCIA (TN) (5 Pages
District Court 04/11/2002 08:48 AM
Washoe County 4125
MURDY
hnc

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

FILED
April 11, 2002
JAMES L. LONGTIN, JR. Clerk
Deputy Clerk

No. 37816

FILED

MAR 14 2002

ORDER OF AFFIRMANCE

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count of sexual assault on a child under the age of 14 years and two counts of lewdness with a child under the age of 14 years. The district court sentenced appellant Raul Garcia to serve a prison term of life with the possibility of parole after 20 years for the sexual assault count and two consecutive prison terms of life with the possibility of parole after 10 years for the lewdness counts.

Garcia first contends that the district court erred in refusing his request to admit evidence that the victim and her mother's boyfriend Jorge Palma were being coached during their testimony. In particular, Garcia wanted to present two witnesses, the court bailiff and another individual present at the trial, to testify that they observed the victim's mother nodding or shaking her head, affirmatively or negatively, in response to questions asked by defense counsel. We conclude that the district court did not abuse its discretion in refusing to allow such testimony.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more or less probable.”¹ The district court has broad discretion with regard to the admission of evidence, and its decision to exclude evidence will not be disturbed unless manifestly wrong.² Indeed, even relevant evidence may be excluded if the district court finds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or needless presentation of cumulative evidence.³

In the instant case, we conclude that the district court did not abuse its discretion in excluding the testimony that the victim’s mother was purportedly coaching the witnesses by nodding or shaking her head in response to questions. After conducting an evidentiary hearing on the issue and reviewing the trial testimony of the victim and Palma, the district court found that the victim and Palma gave specific narrative and descriptive testimony about their observations that was not coached by the victim’s mother. While acknowledging that the victim’s mother had nodded or shaken her head in response to counsel’s questions, the district court expressly found that the victim’s mother did so in response to immaterial, leading questions that were duplicative since they merely sought the witnesses’ confirmation of narrative descriptions previously given. Because the evidence about the victim’s mother’s conduct might needlessly confuse the issue of whether Garcia committed the charged offenses, we conclude that Garcia has failed to show that the district court’s determination that this evidence was inadmissible was manifestly wrong.

¹NRS 48.015.

²Woods v. State, 101 Nev. 128, 136, 696 P.2d 464, 470 (1985); Walker v. State, 116 Nev. 670, 6 P.3d 477 (2000).

³NRS 48.035.

Garcia next contends that the district court erred in giving the jury instruction no. 20.⁴ Specifically, Garcia contends that "instruction number twenty was nothing more than a judicially approved excuse for any discrepancy in the testimony of the victim and gave the force of law to that excuse." We disagree.

NRS 175.161(2) provides that "[i]n charging the jury, the judge shall state to them all such matters of law he thinks necessary for their information in giving their verdict." The district court has broad discretion in giving a particular jury instruction, and its decision to give a particular instruction will not be reversed unless it is arbitrary or exceeds the bounds of law.⁵

In the instant case, we conclude that the district court did not err in giving instruction no. 20 because it was neither arbitrary nor a misstatement of the law.⁶ Rather, instruction no. 20 properly informed the jury that, in considering a discrepancy in a witness' testimony, it should consider the nature of the discrepancy, as well as the witness'

⁴Instruction no. 20 provides:

Inconsistencies or discrepancies in the testimony of a witness, may or may not cause the jury to discredit such testimony. An innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

⁵Jackson v. State, 117 Nev. ___, ___, 17 P.3d 998, 1000 (2001).

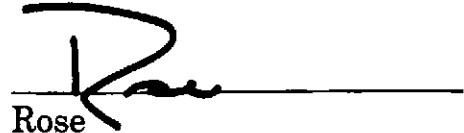
⁶Accord U.S. v. Butler, 56 F.3d 941, 945-46 (8th Cir. 1995); People v. Beardslee, 806 P.2d 1311, 1324 (Cal. 1991).


motivation to lie. Because instruction no. 20 was given to assist the jury in fulfilling its role of weighing the credibility of witnesses and gauging the weight that should be given to a witness' testimony, we conclude that the district court did not abuse its discretion in allowing it.⁷

Having considered Garcia's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Washoe District Court Clerk

⁷In so concluding, we reject Garcia's contention that our holding in Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985) warrants a ruling that instruction no. 20 was erroneous. Nevius held that a district court is not obligated to give a specific instruction with respect to eyewitness testimony, but did not hold that the district court commits reversible error if it exercises its discretion to do so. 101 Nev. at 248-49, 699 P.2d at 1060 (emphasis added).

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: Apr 9 2007

Supreme Court Clerk, State of Nevada

By J. Richards Chief Deputy

GARCIA039

CR00-1849
STATE VS. RAUL GARCIA (TN) (D 1 Page
District Court
Washoe County
04/11/2002 08:15 AM
4145
MPURDY

IN THE SUPREME COURT OF THE STATE OF NEVADA

JL GARCIA,
ellant,
s.
E STATE OF NEVADA,
spondent.

FILED

April 11, 2002
RONALD A. LONGTIN, JR., Clerk

Supreme Court No. 37816

District Court Case No. CR001849

By: *[Signature]*
Deputy Clerk

REMITTITUR

TO: Ronald A. Longtin Jr., Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 9, 2002

Janette M. Bloom, Clerk of Court

By: *J. Richards*
Chief Deputy Clerk

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on *April 11, 2002.*

[Signature]
District Court Clerk

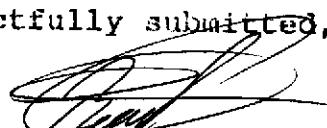
CR00P1849
POST: RAUL GARCIA (D3)
District Court 03/27/2007 11:57 AM
Washoe County
SAC 2385
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personal employment, and or securities of costs of this action.

- 5) I do not have any source of income, nor do I receive any from any source, of business, pension, annuities, or other sources.
- 6) Money, if any, placed on my prison account from outside sources would be from family, and is in the amount as is reflected from my personal financial statement.
- 7) I do not own any personal property, bonds, stocks, or any other valuable, nor does Petitioner have any personal bank accounts.
- 8) I do not have any persons dependent upon me for support.
- 9) I do now swear and affirm under the penalty of perjury, that the above facts are true, accurate and correct, to the best of my own personal knowledge, and that this is now hereby submitted without Notary, pursuant to NRS 208.165, as I am currently incarcerated.

DATED this 22 day of March, 2007.

Respectfully submitted,



Raul Garcia
Petitioner/Pro Per

CERTIFICATE OF SERVICE

I, Raul Garcia, Petitioner, do hereby affirm that I have on this 22 day of March, 2007, have dispatched and delivered via U.S. Mail, these enclosed documents to be filed with this Honorable Court, and the Clerk thereof a true and accurate copy, as well an additional copy for which I respectfully request to be stamp/filed and returned to Petitioner.

Respectfully submitted,



Raul Garcia
LCC #68625
P.O. Box 359
Lovelock, NV 89419

AFFIRMATION

I Raul Garcia, the undersigned, do hereby affirm and attest Pursuant to NRS 239B.030 that none of these enclosed documents to be filed in this District Court, Do Not Contain Any Social Security Number's.

Respectfully submitted, on this 22 day of March, 2007.

Sincerely,

A handwritten signature in black ink, appearing to be 'Raul Garcia', written over a horizontal line.

Raul Garcia
LCC #68625
P.O. Box 359
Lovelock, NV 89419

RAUL GARCIA *68625
Louislock Corr. Center
1200 Prison Rd
Louislock, NV 89419

CR00P-1849
POST: RAUL GARCIA (D3)
District Court
Washoe County
DC-99000004074-098
2 Pages
09/09/2008 09:48 AM
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IN THE Second Judicial District Court
OF THE STATE OF NEVADA
IN AND FOR THE County of Washoe

FILED
2008 SEP-9 AM 9:58
BY
HOWARD J. POWERS

Raul Garcia, } Case No. CR00P1849

PETITIONER, } DEPT. No. 3

vs.

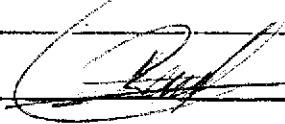
The State of Nevada, } Request For Enlargement of Time
Respondent. } (First Request)

Comes now, Raul Garcia, PETITIONER in proper person, whom now moves this Honorable Court, for this motion; Request For Enlargement of Time (First Request) to be heard Granted, so that PETITIONER may properly amend and file his Amended Petition for relief, of which PETITIONER (is) entitled.

That said request, would Grant PETITIONER, an enlargement of time of (30) days to amend said motion, that this request (is) being made in good faith, and that pursuant to the rule of law, PETITIONER is entitled to due process, as outlined in Griffin vs. State of Illinois, 351 U.S. 12, as well as Marshall vs. District Court, 80 Nev 478, 396 F.2d. 680 (1964).

that this requested motion, is legally
sought, and that Prisoners Request
to Amend, is proper pursuant to Nevada
State law.

Respectfully Submitted,



Paul Garcia # 68625

Lowell Correctional Center

1200 Prison Rd.

Lowell, NV 89419

Certification of Service

I, Paul Garcia, do hereby certify that on
this 2nd Day of September, 2008, did
dispatch, via U.S. Mail this motion; Request
for Enlargement of Time; (Eas Request) and that
said is true, accurate and correct, and
that there is NO Personal Social Security No.
herein.

CR00P1849 DC-9300036819-055
POST RAUL GARCIA (D3) 16 Pages
District Court 07/11/2012 12 11 PM
Washoe County 3565
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Raul Garcia # 68625

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner In Pro Se

FILED

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JOEY ORRINE EASTINGS
CLERK OF THE COURT

BY [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

Raul Garcia,)

Case No. CR00P1849

Petitioner,)

Dept. No. 3

-vs-

Warden LeGrand,)

Respondent.)

PETITION FOR WRIT OF HABEAS CORPUS

(Post-Conviction Relief - NRS 34.735 Petition: Form)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

GARCIA047

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Second Judicial District Court, Reno, NV.

3. Date of judgment of conviction: 3-29-01

4. Case number: CB1849

5. (a) Length of sentence: 20 to Life, 10 to Life; 10 to Life
all ran consecutive

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒

If "yes," list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged:

8. What was your plea? (check one)

- (a) Not guilty ☒
(b) Guilty _____
(c) Guilty but mentally ill _____
(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: _____

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

- (a) Jury ☒ (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No ☒

12. Did you appeal from the judgment of conviction?

Yes ☒ No _____

13. If you did appeal, answer the following:

- (a) Name of court: Nevada Supreme Court
(b) Case number or citation: 37816
(c) Result: Order of Affirmance
(d) Date of result: 3-14-02
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes _____ No ☒

16. If your answer to No. 15 was "yes," give the following information:

- (a) (1) Name of court: _____
(2) Nature of proceeding: _____
(3) Grounds raised: _____

1 (4) Did you receive an evidentiary hearing on your
2 petition, application or motion? Yes ___ No ___

3 (5) Result: _____

4 (6) Date of result: _____

5 (7) If known, citations of any written opinion or
6 date of orders entered pursuant to such result: _____

7 (b) As to any second petition, application or motion,
8 give the same information:

9 (1) Name of court: _____

10 (2) Nature of proceeding: _____

11 (3) Grounds raised: _____

12 (4) Did you receive an evidentiary hearing on your
13 petition, application or motion? Yes ___ No ___

14 (5) Result: _____

15 (6) Date of result: _____

16 (7) If known, citations of any written opinion or
17 date of orders entered pursuant to such result: _____

18 (c) As to any third or subsequent additional applications
19 or motions, give the same information as above, list them on a
20 separate sheet and attach.

21 (d) Did you appeal to the highest state or federal court
22 having jurisdiction, the result or action taken on any petition,
23 application or motion?

24 (1) First petition, application or motion?
25 Yes ___ No ___

26 Citation or date of decision: _____

27 (2) Second petition, application or motion?
28 Yes ___ No ___

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or
motions? Yes ___ No ___

1 Citation or date of decision: _____

2 (e) If you did not appeal from the adverse action on any
3 petition, application or motion, explain briefly why you did
4 not. (You must relate specific facts in response to this
5 question. Your response may be included on paper which is 8 1/2
6 by 11 inches attached to the petition. Your response may not
7 exceed five handwritten or typewritten pages in length.)
8
9

10 17. Has any ground being raised in this petition been
11 previously presented to this or any other court by way of
12 petition for habeas corpus, motion, application or any other
13 postconviction proceeding? If so, identify:
14

15 (a) Which of the grounds is the same: _____
16

17 (b) The proceedings in which these grounds were raised:
18 _____
19

20 (c) Briefly explain why you are again raising these
21 grounds. (You must relate specific facts in response to this
22 question. Your response may be included on paper which is 8 1/2
23 by 11 inches attached to the petition. Your response may not
24 exceed five handwritten or typewritten pages in length.)
25

26 18. If any of the grounds listed in Nos. 23(a), (b), (c) and
27 (d), or listed on any additional pages you have attached, were
28 not previously presented in any other court, state or federal,
list briefly what grounds were not so presented, and give your
reasons for not presenting them. (You must relate specific facts
in response to this question. Your response may be included on
paper which is 8 1/2 by 11 inches attached to the petition. Your
response may not exceed five handwritten or typewritten pages in
length.) See attached.

19 19. Are you filing this petition more than 1 year following
20 the filing of the judgment of conviction or the filing of a
21 decision on direct appeal? If so, state briefly the reasons for
22 the delay. (You must relate specific facts in response to this
23 question. Your response may be included on paper which is 8 1/2
24 by 11 inches attached to the petition. Your response may not
25 exceed five handwritten or typewritten pages in length.)
26

27 See attached
28

1 20. Do you have any petition or appeal now pending in any
2 court, either state or federal, as to the judgment under attack?

3 Yes ___ No ✓

4 If yes, state what court and the case number: _____

5 21. Give the name of each attorney who represented you in the
6 proceeding resulting in your conviction and on direct appeal:

7
8 22. Do you have any future sentences to serve after you
9 complete the sentence imposed by the judgment under attack?

Yes ___ No ✓

10 If yes, specify where and when it is to be served, if you
11 know: _____

12 23. State concisely every ground on which you claim that you
13 are being held unlawfully. Summarize briefly the facts
14 supporting each ground. If necessary you may attach pages
15 stating additional grounds and facts supporting same.

16 (a) Ground one: See Attached.

17
18 Supporting FACTS (Tell your story briefly without
19 citing cases or law.): _____

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23 (b) Ground two: _____

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25 Supporting FACTS (Tell your story briefly without
26 citing cases or law.): _____

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(c) Ground three: _____

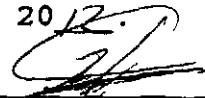
Supporting FACTS (Tell your story briefly without
citing cases or law.): _____

(d) Ground four: _____

Supporting FACTS (Tell your story briefly without
citing cases or law.): _____

WHEREFORE, petitioner prays that the court grant petitioner
relief to which he may be entitled in this proceeding.

EXECUTED at Lovelock Correctional Center on the 9th day of
the month of July of the year 2012.

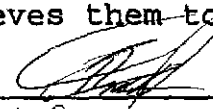

Paul Garcia #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.



Raul Garcia #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se


CERTIFICATE OF SERVICE BY MAIL

I, Raul Garcia, hereby certify, pursuant to N.R.C.P. 5(b), that on this _____ day of the month of _____ of the year 20____, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden Le Grand
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

Catherine Cortez Masto
Nevada Attorney General
100 No. Carson Street
Carson City, Nevada 89701-4717

RICHARD GAMMICK
Washoe County District Attorney
P.O. Box 30083
Reno, Nevada 89520



Raul Garcia #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

Post-Conviction Petition Question No. 18

Redundant conviction; Multiplicity of charges

1) Attorney never challenged the counts on the Information charges document.

2) Petitioner has just been made aware of the illegality of conviction and sentence.

Post-Conviction Petition Question No. 19

Petitioner's language is Spanish so it has been very difficult to get assistance in preparing a post-conviction petition. Petitioner has previously tried twice to initiate a petition as the docket sheet shows but the two individuals who were assisting got transferred to other facilities. Petitioner has just been made aware that his two counts of lewdness in relation to the sexual assault occurring from a single event are invalid and illegal. Upon newly discovered evidence of the illegality of the conviction and sentence petitioner pray the court will grant an evidentiary hearing.

Post-Conviction Petition Question No. 23

a) Petitioner's conviction and sentence are invalid and in violation of his Fifth and Fourteenth amendments to the United States Constitution which guarantees due process, and equal protection of the law due to the crimes of sexual assault and lewdness with a child under the age of fourteen are mutually exclusive and convictions for both based upon a single act cannot stand.

Supporting Facts:

NRS 201.230.(1) defines lewdness as "any lewd or lascivious act, other than acts constituting the crime of sexual assault."

Based on the actual direct testimony of the victim compared to the Information document the three counts are of one single event. The finger penetration, licking with the tongue and masturbation all allegedly happened in the first room visit.

Post-Conviction Petition Question No. 23

b) Petitioner's conviction and sentence are in violation of his fifth, sixth, and fourteenth amendments to the United States Constitution which guarantees due process of the law, equal protection of the law, and effective assistance of counsel. Appellant counsel had a conflict of interest due to the fact of being from the same public defenders office.

Supporting Facts:

Appellant counsel did not state as a ground in the appeal one of redundant conviction. This omitted issue had a reasonable probability of success.

1 CODE: 2540
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 ***

8 RAUL GARCIA,

9 Petitioner,

CASE NO: CR00P1849

10 vs.

DEPT. NO.: 3

11 THE STATE OF NEVADA,
12

13 Respondent,
14 _____/

15 **NOTICE OF ENTRY OF ORDER**

16 PLEASE TAKE NOTICE that on the 17th day of July, 2012 the Court entered a
17 decision or order in this matter, a true and correct copy of which is attached hereto.

18 You may appeal to the Supreme Court from the decision or order of the Court. If
19 you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-
20 three (33) days, after the date this notice is mailed to you. This notice was mailed on the
21 25th day of July, 2012.
22

23
24 JOEY ORDUNA HASTINGS
Clerk of the Court

25
26 By /s/ Janelle Yost
Deputy Clerk
27
28

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR00P1849

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial
4 District Court of the State of Nevada, County of Washoe; and that on the 25th day of July,
5 2012, I electronically filed the Notice of Entry of Order with the Clerk of the Court by using
6 the ECF system which will send a notice of electronic filing to:

7 Jennifer Noble, Esq.

8 I further certify that on the 25th day of July, 2012, I deposited in the Washoe County mailing
9 system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true and
10 correct copy of the Notice of Entry of Order, addressed to:
11

12 Attorney General's Office
13 100 N. Carson St.
14 Carson City, NV 89701-4717

15 Raul Garcia
16 Lovelock Correctional Center
17 1200 Prison Road
18 Lovelock, NV 89419
19

20 /s/ Janelle Yost
21 Janelle Yost
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FILED

Electronically

07-17-2012:10:45:16 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3088573

1 **CODE 2840**

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**

8
9 **RAUL GARCIA,**

10 **Petitioner,**

Case No. CR00P1849

11 **vs.**

Dept. No. 3

12 **THE STATE OF NEVADA,**

13 **Respondent.**
14 _____/

15 **ORDER**

16
17 On July 11, 2012, Petitioner filed a Motion for Appointment of Counsel and a
18 Petition for Writ of Habeas Corpus. When an appeal is taken from a conviction and a
19 petition is not filed within a year after the Supreme Court issues its remittitur, NRS
20 34.726(1) requires the petitioner to demonstrate: "(a) That the delay is not the fault of the
21 petitioner; and (b) That dismissal of the petition as untimely will unduly prejudice the
22 petitioner." The Supreme Court affirmed Petitioner's conviction and issued its remittitur on
23 March 14, 2002. Because Petitioner has not met the statutory requirements for filing the
24 present Petition, this Court hereby DENIES the Petition and the Motion.
25

26 Dated this 12th day of July, 2012.

27 
28 **JEROME POLAHA**
DISTRICT JUDGE

CERTIFICATE OF MAILING

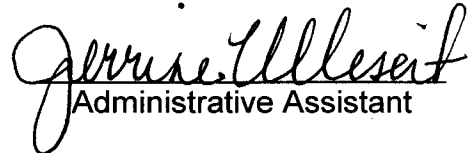
The undersigned hereby certifies that on the 20 day of July, 2012, she mailed
copies of the foregoing ORDER in Case No. CR00P1849 to the following:

The following have been served by USPS:

Richard Gammick
P.O. Box 30083
Reno, NV 89520

Catherine Cortez Masto
Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701

Raul Garcia, #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419


Administrative Assistant

DC-9900039069-049
CR00P1849
POST RAUL GARCIA (D3)
District Court 09/25/2012 03:41 PM
Washoe County
1120
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CODE 3585-
Raul Garcia #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

FILED

2012 SEP 25 PM 3:42

Petitioner In Pro Se

JOEY CORDA HASTINGS
CLERK OF THE COURT

BY J. M. [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * * * *

Raul Garcia

Case No. CR00P1849

Petitioner,

Dept. No. 03

-vs-

Warden LeGrand et.al,

Respondent.

"FIRST AMENDMENT"
"PETITION FOR WRIT OF HABEAS CORPUS"

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

REF. NRS. 34.185-
N.C.R. 2.17.-

GARCIA063

LCC LL FORM 20.080

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

PETITION

2. Name and location of court which entered the judgment of conviction under attack: Second Judicial District Court, Reno, NV.

5. (a) Length of sentence: 20 to Life; 10 to Life; 10 to Life
all ran consecutive

If "yes," list crime, case number and sentence being served at this time:

GARCIA064

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8. What was your plea? (check one)

- (a) Not guilty ☒
- (b) Guilty ☐
- (c) Guilty but mentally ill ☐
- (d) Nolo contendere ☐

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: _____

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

- (a) Jury ☒ (b) Judge without a jury ☐

11. Did you testify at the trial? Yes ☐ No ☒

12. Did you appeal from the judgment of conviction?

- Yes ☒ No ☐

13. If you did appeal, answer the following:

- (a) Name of court: Nevada Supreme Court
- (b) Case number or citation: 37816
- (c) Result: Order of Affirmance
- (d) Date of result: 3-14-02
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☐ No ☒

16. If your answer to No. 15 was "yes," give the following information:

- (a) (1) Name of court: _____
- (2) Nature of proceeding: _____
- (3) Grounds raised: _____

1 (4) Did you receive an evidentiary hearing on your
2 petition, application or motion? Yes ___ No ___

3 (5) Result: _____

4 (6) Date of result: _____

5 (7) If known, citations of any written opinion or
6 date of orders entered pursuant to such result: _____

7 (b) As to any second petition, application or motion,
8 give the same information:

9 (1) Name of court: _____

10 (2) Nature of proceeding: _____

11 (3) Grounds raised: _____

12 (4) Did you receive an evidentiary hearing on your
13 petition, application or motion? Yes ___ No ___

14 (5) Result: _____

15 (6) Date of result: _____

16 (7) If known, citations of any written opinion or
17 date of orders entered pursuant to such result: _____

18 (c) As to any third or subsequent additional applications
19 or motions, give the same information as above, list them on a
20 separate sheet and attach.

21 (d) Did you appeal to the highest state or federal court
22 having jurisdiction, the result or action taken on any petition,
23 application or motion?

24 (1) First petition, application or motion?
25 Yes ___ No ___

26 Citation or date of decision: _____

27 (2) Second petition, application or motion?
28 Yes ___ No ___

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or
motions? Yes ___ No ___

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) See attached.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

See attached

1 20. Do you have any petition or appeal now pending in any
2 court, either state or federal, as to the judgment under attack?

3 Yes ___ No ✓

4 If yes, state what court and the case number: _____

5 21. Give the name of each attorney who represented you in the
6 proceeding resulting in your conviction and on direct appeal:

7 22. Do you have any future sentences to serve after you
8 complete the sentence imposed by the judgment under attack?

9 Yes ___ No ✓

10 If yes, specify where and when it is to be served, if you
11 know: _____

12 23. State concisely every ground on which you claim that you
13 are being held unlawfully. Summarize briefly the facts
14 supporting each ground. If necessary you may attach pages
15 stating additional grounds and facts supporting same.

16 (a) Ground one: See Attached.

17 Supporting FACTS (Tell your story briefly without
18 citing cases or law.): _____

19 _____
20 _____
21 _____
22 _____

23 (b) Ground two: _____

24 Supporting FACTS (Tell your story briefly without
25 citing cases or law.): _____

26 _____
27 _____
28 _____

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(c) Ground three: _____

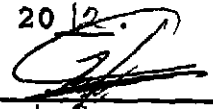
Supporting FACTS (Tell your story briefly without
citing cases or law.): _____

(d) Ground four: _____

Supporting FACTS (Tell your story briefly without
citing cases or law.): _____

WHEREFORE, petitioner prays that the court grant petitioner
relief to which he may be entitled in this proceeding.

EXECUTED at Lovelock Correctional Center on the 20 day of
the month of September of the year 2012.

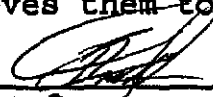

Raul Garcia #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.


Paul Garcia # 68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

CERTIFICATE OF SERVICE BY MAIL


I, Paul Garcia, hereby certify, pursuant to N.R.C.P. 5(b), that on this 20 day of the month of September of the year 2012, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden LeGrand
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

160 Catherine Cortez Masto
Nevada Attorney General
100 No. Carson Street
Carson City, Nevada 89701-4717

RICHARD GAMMICK
Washoe County District Attorney
P.O. Box 30083
Reno, Nevada 89520

SECOND JUDICIAL DISTRICT COURT
JOEY HASTINGS, CLERK OF THE COURT
75 COURT STREET
RENO, NEVADA 89501


Paul Garcia # 68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

Post-Conviction Petition Question No. 18

Redundant conviction; Multiplicity of charges

1) Attorney never challenged the counts on the Information charges document

2) Petitioner has just been made aware of the illegality of conviction and sentence.

Post-Conviction Petition Question No. 19

Petitioner's language is Spanish so it has been very difficult to get assistance in preparing a post-conviction petition. Petitioner has previously tried twice to initiate a petition as the docket sheet shows but the two individuals who were assisting got transferred to other facilities. Petitioner has just been made aware that his two counts of lewdness in relation to the sexual assault occurring from a single event are invalid and illegal. Upon newly discovered evidence of the illegality of the conviction and sentence petitioner pray the court will grant an evidentiary hearing.

Post-Conviction Petition Question No. 23

a) Petitioner's conviction and sentence are invalid and in violation of his fifth and fourteenth amendments to the United States Constitution which guarantees due process, and equal protection of the law due to the crimes of sexual assault and lewdness with a child under the age of fourteen are mutually exclusive and convictions for both based upon a single act cannot stand.

Supporting Facts:

NRS 201.230 (1) defines lewdness as "any lewd or lascivious act, other than acts constituting the crime of sexual assault."

Based on the actual direct testimony of the victim compared to the Information document the three counts are of one single event. The finger penetration, licking with the tongue and masturbation all allegedly happened in the first room visit.

Post-Conviction Petition Question No. 23

b) Petitioner's conviction and sentence are in violation of his fifth, sixth, and fourteenth amendments to the United States Constitution which guarantees due process of the law, equal protection of the law, and effective assistance of counsel. Appellant counsel had a conflict of interest due to the fact of being from the same public defenders office.

Supporting Facts:

Appellant counsel did not state as a ground in the appeal one of redundant conviction. This omitted issue had a reasonable probability of success.

68625
LCC

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37816

FILED

MAR 14 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count of sexual assault on a child under the age of 14 years and two counts of lewdness with a child under the age of 14 years. The district court sentenced appellant Raul Garcia to serve a prison term of life with the possibility of parole after 20 years for the sexual assault count and two consecutive prison terms of life with the possibility of parole after 10 years for the lewdness counts.

Garcia first contends that the district court erred in refusing his request to admit evidence that the victim and her mother's boyfriend Jorge Palma were being coached during their testimony. In particular, Garcia wanted to present two witnesses, the court bailiff and another individual present at the trial, to testify that they observed the victim's mother nodding or shaking her head, affirmatively or negatively, in response to questions asked by defense counsel. We conclude that the district court did not abuse its discretion in refusing to allow such testimony.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more or less probable."¹ The district court has broad discretion with regard to the admission of evidence, and its decision to exclude evidence will not be disturbed unless manifestly wrong.² Indeed, even relevant evidence may be excluded if the district court finds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or needless presentation of cumulative evidence.³

In the instant case, we conclude that the district court did not abuse its discretion in excluding the testimony that the victim's mother was purportedly coaching the witnesses by nodding or shaking her head in response to questions. After conducting an evidentiary hearing on the issue and reviewing the trial testimony of the victim and Palma, the district court found that the victim and Palma gave specific narrative and descriptive testimony about their observations that was not coached by the victim's mother. While acknowledging that the victim's mother had nodded or shaken her head in response to counsel's questions, the district court expressly found that the victim's mother did so in response to immaterial, leading questions that were duplicative since they merely sought the witnesses' confirmation of narrative descriptions previously given. Because the evidence about the victim's mother's conduct might needlessly confuse the issue of whether Garcia committed the charged offenses, we conclude that Garcia has failed to show that the district court's determination that this evidence was inadmissible was manifestly wrong.

¹NRS 48.015.

²Woods v. State, 101 Nev. 128, 136, 696 P.2d 464, 470 (1985); Walker v. State, 116 Nev. 670, 6 P.3d 477 (2000).

³NRS 48.035.

Garcia next contends that the district court erred in giving the jury instruction no. 20.⁴ Specifically, Garcia contends that "instruction number twenty was nothing more than a judicially approved excuse for any discrepancy in the testimony of the victim and gave the force of law to that excuse." We disagree.

NRS 175.161(2) provides that "[i]n charging the jury, the judge shall state to them all such matters of law he thinks necessary for their information in giving their verdict." The district court has broad discretion in giving a particular jury instruction, and its decision to give a particular instruction will not be reversed unless it is arbitrary or exceeds the bounds of law.⁵

In the instant case, we conclude that the district court did not err in giving instruction no. 20 because it was neither arbitrary nor a misstatement of the law.⁶ Rather, instruction no. 20 properly informed the jury that, in considering a discrepancy in a witness' testimony, it should consider the nature of the discrepancy, as well as the witness'

⁴Instruction no. 20 provides:

Inconsistencies or discrepancies in the testimony of a witness, may or may not cause the jury to discredit such testimony. An innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

⁵Jackson v. State, 117 Nev. ___, ___, 17 P.3d 998, 1000 (2001).

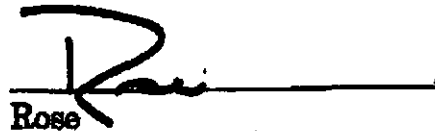
⁶Accord U.S. v. Butler, 56 F.3d 941, 945-46 (8th Cir. 1995); People v. Beardslee, 806 P.2d 1311, 1324 (Cal. 1991).

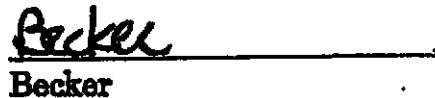
motivation to lie. Because instruction no. 20 was given to assist the jury in fulfilling its role of weighing the credibility of witnesses and gauging the weight that should be given to a witness' testimony, we conclude that the district court did not abuse its discretion in allowing it.⁷

Having considered Garcia's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Washoe District Court Clerk

⁷In so concluding, we reject Garcia's contention that our holding in Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985) warrants a ruling that instruction no. 20 was erroneous. Nevius held that a district court is not obligated to give a specific instruction with respect to eyewitness testimony, but did not hold that the district court commits reversible error if it exercises its discretion to do so. 101 Nev. at 248-49, 699 P.2d at 1060 (emphasis added).

FILED

Electronically

10-12-2012:10:31:16 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3279020

1 **CODE 2840**

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5 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
6 **IN AND FOR THE COUNTY OF WASHOE**
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8
9 **RAUL GARCIA,**

10 **Petitioner,**

Case No. CR00P1849

11 **vs.**

Dept. No. 3

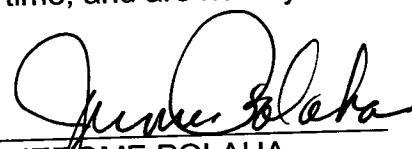
12 **THE STATE OF NEVADA,**

13 **Respondent.**

14 **ORDER**

15 On July 17, 2012, this Court denied Petitioner's Petition for Writ of Habeas Corpus
16 and Motion for Appointment of Counsel because the Petition was filed nine years after the
17 Supreme Court upheld his conviction on lewdness and sexual assault charges and
18 Petitioner had failed to satisfy NRS 34.726(1), which requires a petitioner to demonstrate
19 that (1) the late filing is not the fault of the petitioner and (2) dismissal of the petition as
20 untimely would be unduly prejudicial to the petitioner. On September 25, 2012, Petitioner
21 filed a second, identical Petition for Writ of Habeas Corpus and Motion for Appointment of
22 Counsel. Having denied the first Petition and Motion without leave to amend, the present
23 Petition and Motion are frivolous, a waste of this Court's time, and are hereby DENIED.
24

25 Dated this 12th day of October, 2012.

26 
27 JEROME POLAHA
28 DISTRICT JUDGE

CERTIFICATE OF MAILING

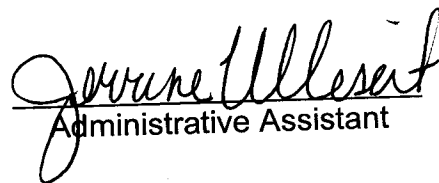
The undersigned hereby certifies that on the 12 day of October, 2012, she mailed copies of the foregoing ORDER in Case No. CR00P1849 to the following:

The following have been served by e-filing:

Jennifer Noble, Esq.

The following have been served by USPS:

Raul Garcia, #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419


Administrative Assistant

1 CODE: 2540
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 ***

8 RAUL GARCIA,

9 Petitioner,

CASE NO: CR00P1849

10 vs.

DEPT. NO.: 3

11 THE STATE OF NEVADA,
12

13 Respondents,
14 _____/

15 **NOTICE OF ENTRY OF ORDER**

16 PLEASE TAKE NOTICE that on the 12th day of October, 2012 the Court entered a
17 decision or order in this matter, a true and correct copy of which is attached hereto.

18 You may appeal to the Supreme Court from the decision or order of the Court. If
19 you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-
20 three (33) days, after the date this notice is mailed to you. This notice was mailed on the
21 17th day of October, 2012.
22

23
24 JOEY ORDUNA HASTINGS
Clerk of the Court

25
26 By /s/ Janelle Yost
Deputy Clerk
27
28

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR00P1849

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial
4 District Court of the State of Nevada, County of Washoe; and that on the 17th day of
5 October, 2012, I electronically filed the Notice of Entry of Order with the Clerk of the Court
6 by using the ECF system which will send a notice of electronic filing to:

7 Jennifer Noble, Esq.

8 I further certify that on the 17th day of October, 2012, I deposited in the Washoe County
9 mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a
10 true and correct copy of the Notice of Entry of Order, addressed to:
11

12 Attorney General's Office
13 100 N. Carson St.
14 Carson City, NV 89701-4717

15 Raul Garcia, #68625
16 Lovelock Correctional Center
17 1200 Prison Road
18 Lovelock, NV 89419
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22 /s/ Janelle Yost
23 Janelle Yost
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Joey Orduna Hastings

Clerk of the Court

Transaction # 3279020

1 **CODE 2840**

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5 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
6 **IN AND FOR THE COUNTY OF WASHOE**
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8
9 **RAUL GARCIA,**

10 **Petitioner,**

Case No. CR00P1849

11 **vs.**

Dept. No. 3

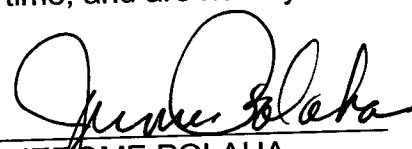
12 **THE STATE OF NEVADA,**

13 **Respondent.**

14 **ORDER**

15 On July 17, 2012, this Court denied Petitioner's Petition for Writ of Habeas Corpus
16 and Motion for Appointment of Counsel because the Petition was filed nine years after the
17 Supreme Court upheld his conviction on lewdness and sexual assault charges and
18 Petitioner had failed to satisfy NRS 34.726(1), which requires a petitioner to demonstrate
19 that (1) the late filing is not the fault of the petitioner and (2) dismissal of the petition as
20 untimely would be unduly prejudicial to the petitioner. On September 25, 2012, Petitioner
21 filed a second, identical Petition for Writ of Habeas Corpus and Motion for Appointment of
22 Counsel. Having denied the first Petition and Motion without leave to amend, the present
23 Petition and Motion are frivolous, a waste of this Court's time, and are hereby DENIED.
24

25 Dated this 12th day of October, 2012.

26 
27 JEROME POLAHA
28 DISTRICT JUDGE

CERTIFICATE OF MAILING

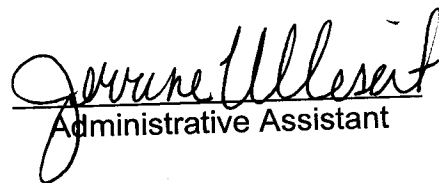
The undersigned hereby certifies that on the 12 day of October, 2012, she mailed copies of the foregoing ORDER in Case No. CR00P1849 to the following:

The following have been served by e-filing:

Jennifer Noble, Esq.

The following have been served by USPS:

Raul Garcia, #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419


Administrative Assistant

RAUL GARCIA #68625
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

FILED

2019 DEC 30 PM 1:14

JACQUELINE BRYANT
CLERK OF THE COURT

BY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

RAUL GARCIA,
DEFENDANT/MOVANT,
VS.
THE STATE OF NEVADA,
RESPONDENT.

CASE No. CR00-1849

DEPT No. 3

MOTION TO CORRECT AN ILLEGAL
SENTENCE AND VACATE JUDGMENT,
AND/OR MODIFY SENTENCE.

DATE OF HEARING: _____

TIME OF HEARING: _____

PLEASE TAKE NOTICE, THAT COMES NOW, DEFENDANT, RAUL GARCIA, IN PROPRIA PERSONA, AND WITHOUT THE ASSISTANCE OF COUNSEL IN THE ABOVE-ENTITLED ACTION MOVES THIS COURT FOR AN ORDER VACATING JUDGMENT OF CONVICTION AND CORRECTING AN ILLEGAL SENTENCE IN THE ABOVE ENTITLED CASE.

THIS MOTION IS MADE AND BASED UPON NEVADA REVISED STATUTES NRS 176.555, THE INHERENT AUTHORITY OF THE DISTRICT COURT, THE ATTACHED POINTS AND AUTHORITIES, THE DEFENDANT'S ENTIRE CASE FILE AND ALL TANGIBLE ITEMS.

DATED THIS 24 DAY OF DECEMBER, 2019.

RESPECTFULLY SUBMITTED,

RAUL GARCIA #68625
PROPER PERSON, DEFENDANT
GARCIA085

CR00-1849
STATE VS. RAUL GARCIA (TN) (9 Pages
District Court 12/30/2019 01:14 PM
Washoe County 2383

1. FACTS

DEFENDANT/MOVANT, RAUL GARCIA, STANDS CONVICTED BY WAY OF A JURY VERDICT TO THE FOLLOWING OFFENSES: COUNT 1- SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF FOURTEEN, COUNT 2- LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS, AND COUNT 3- LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS. A VIOLATION OF THE FOLLOWING NEVADA REVISED STATUTES, NRS 200.366, AND NRS 201.230, FELONIES AS CHARGED IN COUNTS 1, 2, 3 OF THE CHARGING INFORMATION.

THE HONORABLE JEROME M. POLAKA, SECOND JUDICIAL DISTRICT COURT JUDGE, SENTENCED DEFENDANT GARCIA TO LIFE WITH THE POSSIBILITY OF PAROLE AFTER A MINIMUM OF TWENTY (20) YEARS HAS BEEN SERVED AS TO COUNT 1. IT WAS FURTHER ORDERED THAT GARCIA BE PUNISHED BY IMPRISONMENT IN THE NEVADA DEPARTMENT OF CORRECTIONS FOR A TERM OF LIFE WITH THE POSSIBILITY OF PAROLE AFTER A MINIMUM OF TEN (10) YEARS HAS BEEN SERVED AS TO COUNT 2, TO BE SERVED CONSECUTIVELY TO THE SENTENCE IN COUNT 1. IT WAS FURTHER ORDERED THAT GARCIA BE PUNISHED FOR A TERM OF LIFE WITH THE POSSIBILITY OF PAROLE AFTER A MINIMUM OF TEN (10) YEARS HAS BEEN SERVED AS TO COUNT 3, TO BE SERVED CONSECUTIVELY TO THE SENTENCES IMPOSED IN COUNTS 1 AND 2.

2. JURISDICTION

THE NEVADA DISTRICT COURT HAS INHERENT AUTHORITY TO CORRECT A SENTENCE AT ANY TIME IF SUCH SENTENCE WAS BASED ON A MISTAKE OF MATERIAL FACT THAT WORKED TO THE EXTREME DETRIMENT OF THE DEFENDANT. SEE: PASSANISI V. STATE, 831 P.2d 1371 AT 1372 (NEV. 1992); STALEY V. STATE, 106 NEV. 75, 787 P.2d 396 (1990); STATE V. DISTRICT COURT, 100 NEV. 90, 677 P.2d 1044 (1984); AND WARDEN V. PETERS, 83 NEV. 1298, 429 P.2d 549 (1967). IF THE TRIAL COURT HAS INHERENT AUTHORITY TO CORRECT A SENTENCE, A FORTIORI, IT HAS AUTHORITY TO ENTERTAIN A MOTION REQUESTING IT TO EXERCISE THAT INHERENT

AUTHORITY. THIS, THIS HONORABLE COURT HAS THE AUTHORITY TO CONSIDER DEFENDANT/MOVANT'S MOTION TO VACATE JUDGMENT AND CORRECT AN ILLEGAL SENTENCE, AND/OR MODIFY SENTENCE. SEE: PASSANISI V. STATE, SUPRA, ID. AT 1372.

THIS ACTION DIFFERS FROM A PETITION FOR POST-CONVICTION RELIEF. SPECIFICALLY, BECAUSE THIS MOTION IS ADDRESSED TO THE COURT AND ITS INHERENT AUTHORITY TO CORRECT ITS OWN ALLEGED MISTAKE. THEREFORE, IT DOES NOT SHARE THE CHARACTERISTICS OF THE USUAL PETITION FOR POST-CONVICTION RELIEF.

AS NOTED ABOVE, THIS COURT HAS INHERENT AUTHORITY TO CORRECT AN ILLEGAL SENTENCE, AT ANY TIME. NEVADA REVISED STATUTE, NRS 176.555. THE SAME IS TRUE OF A SENTENCE THAT, ALTHOUGH WITHIN THE STATUTORY LIMITS, WAS ENTERED IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS. THUS, THE TIME LIMITS AND OTHER RESTRICTIONS WITH RESPECT TO A PETITION FOR POST-CONVICTION RELIEF OR HABEAS CORPUS REVIEW DO NOT APPLY TO A MOTION TO CORRECT OR VACATE OR MODIFY A SENTENCE BASED UPON A CLAIM THAT THE SENTENCE WAS OR IS ILLEGAL, OR BASED ON AN UNTRUE ASSUMPTION OF FACT THAT AMOUNTED TO A DENIAL OF DUE PROCESS OF LAW. PASSANISI V. STATE, SUPRA, ID. 1372.

NEVERTHELESS, THE NARROW TYPE OF CHALLENGE WHICH MAY BE BROUGHT PURSUANT TO THE INHERENT AUTHORITY OF THE TRIAL COURT WHICH IS RECOGNIZED IN PETERS, STATE V. DISTRICT COURT, STALEY AND PASSANISI, I.E., THE AUTHORITY TO CORRECT A SENTENCE BASED ON A MATERIAL MISTAKE OF FACT, WILL USUALLY BE IN THE FORM OF A CHALLENGE TO FACTUAL INFORMATION RELIED ON BY THE DISTRICT COURT THAT IS LATER DETERMINED TO BE FALSE. AS HERE, WHERE DEFENDANT/MOVANT GARCIA SEEKS TO SET-A-SIDE HIS SENTENCE(S) WHICH WAS ILLEG-

GARCIA087

ALLY IMPOSED UPON HIM, THAT SENTENCE(S) BEING THE CONSECUTIVE SENTENCE(S) WHICH WAS IMPOSED UPON HIM BY THE DISTRICT COURT FOR LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS.

THUS IT IS CLEAR THAT THIS COURT HAS THE JURISDICTION NEEDED TO VACATE AND CORRECT THE ILLEGAL SENTENCE(S) OF DEFENDANT/MOVANT GARCIA IN THIS CASE ONLY (1), THE COURT ACTUALLY SENTENCED DEFENDANT BASED UPON A MATERIALLY FALSE ASSUMPTION OF FACT THAT WORKED TO THE DEFENDANT'S EXTREME DETRIMENT AND, (2), THE PARTICULAR MISTAKE AT ISSUE WAS THE TYPE THAT WOULD RISE TO THE LEVEL OF A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

3. ARGUMENT / POINTS AND AUTHORITIES

DEFENDANT/MOVANT RAUL GARCIA WAS CHARGED WITH THE FOLLOWING OFFENSES: COUNT 1 - SEXUAL ASSAULT ON A CHILD UNDER THE AGE FOURTEEN, COUNT 2 - LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN, AND COUNT 3 - LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN, EACH COUNT IS CONSECUTIVE TO THE OTHER. SEE ATTACHED EXHIBIT No. 1, AND No. 2.

ON OCTOBER 16, 2000, THE STATE CHARGED DEFENDANT MR. GARCIA BY WAY OF INFORMATION WITH THE FOLLOWING FELONY OFFENSES: COUNT 1 - SEXUAL ASSAULT, COUNTS 2 AND 3 LEWDNESS WITH A MINOR. THE VICTIM A TEN (10) YEAR OLD FEMALE FAMILY FRIEND ACCUSED GARCIA OF DIGITALLY PENETRATING HER WITH HIS FINGER AND UNZIPPING HIS PANTS AND EXPOSING HIS PENIS IN AN ATTEMPT TO GET THE VICTIM TO TOUCH HIS PENIS, WHEN THE MINOR VICTIM PULLED AWAY GARCIA GOT UP AND LEFT THE ROOM. APPROXIMATELY TEN (10) MINUTES LATER GARCIA RETURN BACK TO THE VICTIM'S ROOM WHERE HE PULLED DOWN THE VICTIM'S PANTS AND EXPOSED HER BUTTOCKS, AT THIS POINT

AN ADULT WITNESS WALKED INTO THE VICTIM'S BEDROOM AND ORDERED MR. GARCIA TO STOP AND LEAVE THE RESIDENCE.

ON FEBRUARY 12, 2001, A JURY RETURNED A GUILTY FINDING ON COUNT 1- SEXUAL ASSAULT, COUNT 2- LEWDNESS WITH A MINOR AND COUNT 3- LEWDNESS WITH A MINOR. ON MARCH 29, 2001, THE HONORABLE JUDGE, JEROME M. POLAKA, SENTENCED DEFENDANT GARCIA TO THREE (3) CONSECUTIVE LIFE TERMS OF INCARCERATION TOTALING A MANDATORY MINIMUM OF FORTY (40) YEARS BEFORE PAROLE ELIGIBILITY.

DEFENDANT GARCIA IS NOT CHALLENGING THE JURY VERDICT, BUT IS IN FACT CHALLENGING HIS CONSECUTIVE SENTENCE(S) FOR LEWDNESS WITH A MINOR. PURSUANT TO TRIAL TESTIMONY DEFENDANT GARCIA DIGITALLY PENETRATED THE VICTIM, AND THEN UNZIPPED HIS OWN PANTS AND EXPOSED HIS PENIS TO THE VICTIM. GARCIA CONTENDS HIS CONDUCT IMMEDIATELY SUCCEEDING THE SEXUAL ASSAULT ON THE FEMALE VICTIM WAS INCIDENTAL. THEREFORE, HIS CONVICTION FOR COUNT 2- LEWDNESS WITH A MINOR WAS REDUNDANT AND ILLEGAL SHOULD BE REVERSED. IN ADDITION, COUNT 3- SHOULD ALSO BE FOUND TO BE ILLEGALLY IMPOSED. AS IT VIOLATES GARCIA'S FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

THIS MOTION IS TO CORRECT AN ILLEGAL SENTENCE WHICH "ONLY" ADDRESSES THE FACTUAL LEGALITY OF GARCIA'S CONSECUTIVE SENTENCE(S) FOR LEWDNESS. AN "ILLEGAL SENTENCE" FOR THE PURPOSE OF A STATUTE IDENTICAL TO NRS 176.555 WAS DEFINED BY THE DISTRICT OF COLUMBIA COURT OF APPEALS AS "ONE 'AT VARIANCE WITH THE CONTROLLING SENTENCING STATUTE,' OR 'ILLEGAL' IN THE SENSE THAT THE COURT GOES BEYOND ITS AUTHORITY BY ACTING WITHOUT JURISDICTION OR IMPOSING A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM PROVIDED..." ALLEN V. UNITED STATES, 495 A.2d 1145, 1149 (D.C. 1985) (QUOTING

PRINCE V. UNITED STATES, 432 A.2d 720, 721 (D.C. 1981) AND ROBINSON V. UNITED STATES, 454 A.2d 810, 813 (D.C. 1982).

A MOTION TO CORRECT AN ILLEGAL SENTENCE IS AN APPROPRIATE VEHICLE FOR RAISING THE CLAIM THAT A SENTENCE IS FACTUALLY ILLEGAL AT ANY TIME. SEE GENERALLY, EDWARDS V. STATE, 918 P.2d 321, 324 (NEV. 1996).

DEFENDANT/MOVANT GARCIA CONTENDS THE DISTRICT COURT HAD EXCEEDED ITS AUTHORITY AND ACTED WITHOUT JURISDICTION TO IMPOSE CONSECUTIVE SENTENCE(S) FOR LEWDNESS THAT WAS INCIDENTAL TO THE SEXUAL ASSAULT.

DEFENDANT/MOVANT GARCIA WAS FOUND GUILTY ON ALL THREE COUNTS BY A JURY OF 'SEXUAL ASSAULT AND LEWDNESS'. THE DISTRICT COURT, PURSUANT TO STATUTORY GUIDELINES, SENTENCED GARCIA TO THREE CONSECUTIVE LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE ON THE SEXUAL ASSAULT AND LEWDNESS CONVICTIONS INVOLVING THE MINOR FEMALE VICTIM.

NRS 200.366(1) PROVIDES:

A PERSON WHO SUBJECTS ANOTHER PERSON TO SEXUAL PENETRATION, OR FORCES ANOTHER PERSON TO MAKE A SEXUAL PENETRATION ON HIMSELF OR ANOTHER... AGAINST THE WILL OF THE VICTIM OR UNDER CONDITIONS IN WHICH THE PERPETRATOR KNOWS OR SHOULD KNOW THAT THE VICTIM IS MENTALLY OR PHYSICALLY INCAPABLE OF RESISTING OR UNDERSTANDING THE NATURE OF CONDUCT, IS GUILTY OF SEXUAL ASSAULT.

NRS 201.230 DEFINES LEWDNESS, IN RELEVANT PART, AS THE WILLFUL AND LEWD COMMISSION OF:

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

GARCIA090

SEXUAL DESIRES OF THAT PERSON OR OF THAT CHILD.

IN BRAUNSTEIN V. STATE, 106 P.3d 1207 (NEV. 2002), THE NEVADA SUPREME COURT CONCLUDED THAT "THE CRIMES OF SEXUAL ASSAULT AND LEWDNESS ARE MUTUALLY EXCLUSIVE AND CONVICTIONS FOR BOTH BASED UPON A SINGLE ACT CANNOT STAND". REVERSAL WAS REQUIRED FOR THE "DUAL CONVICTIONS THAT DO NOT COMPORT WITH LEGISLATIVE INTENT." THE COURT WENT ON TO STATE THAT THEIR DECISION IN BRAUNSTEIN IS CONSISTENT WITH THEIR HOLDING IN TOWNSEND V. STATE, 734 P.2d 705 (NEV. 1987) THAT "IT IS CLEAR THAT LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN CANNOT BE DEEMED AN INCLUDED DEFENSE OF THE CRIME OF SEXUAL ASSAULT. THE EXPRESS LANGUAGE OF THE LEWDNESS STATUTE NRS 201.230 PRECLUDES THIS."

MR. GARCIA ARGUES HIS CONDUCT IMMEDIATELY SUBSEQUENT TO THE SEXUAL ASSAULT ON THE 10 YEAR OLD MINOR VICTIM WAS INCIDENTAL THEREFORE, HIS CONVICTION FOR COUNT 2 - LEWDNESS WITH A MINOR IS IN CONTRADICTION WITH THE LEGISLATIVE INTENT AND NRS 201.230 AND SHOULD BE REVERSED.

IN REVIEWING THE RECORD, IT APPEARS THAT GARCIA'S CONVICTIONS WERE BASED UPON THE FOLLOWING ACTIONS. FIRST, GARCIA WAS CONVICED OF SEXUAL ASSAULT WITH A CHILD UNDER THE AGE OF FOURTEEN YEARS (COUNT 1), THIS CONVICTION STEMMING FROM GARCIA'S PULLING THE VICTIM'S PANTS DOWN AND INSERTING HIS FINGER INTO HER VAGINA. THE SECOND CONVICTION AGAINST GARCIA WAS FOR LEWDNESS (COUNT 2), THIS CONVICTION STEMS FROM GARCIA THEN UNZIPPING HIS PANTS AND REMOVING HIS PENIS AND EXPOSING IT TO THE 10 YEAR OLD VICTIM. GARCIA CONTENDS THAT THE SECOND SET OR ACT, THE EXPOSING OF HIS PENIS TO THE 10 YEAR OLD VICTIM SHOULD BE MERGED INTO A SINGLE, PUNISHABLE INCIDENT. GARCIA AVERES THAT HIS CONVICTIONS SHOULD BE LIMITED TO A SINGLE ACT OF SEXUAL ASSAULT FOR INSERTING HIS FINGER

INTO THE VICTIM'S VAGINA (COUNT 1) AND A SINGLE ACT OF LEWDNESS FOR RETURNING BACK TO THE VICTIM 10 MINUTES LATER TO THE VICTIM'S BEDROOM AND PULLING DOWN HER SHORTS IN THE BACK, PARTIALLY EXPOSING HER BUTTOCKS (COUNT 3).

THIS COURT SHOULD TAKE JUDICIAL NOTICE "THAT THE NEVADA SUPREME COURT HAS DETERMINED THAT THE CRIMES OF LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN AND SEXUAL ASSAULT ARE MUTUALLY EXCLUSIVE. SEE MARTIN V. SHERIFF, 88 NEV. 303, 496 P.2D 754 (1972); CROWLEY V. STATE, 120 NEV. 30, 83 P.3D 282 (2004). LIKEWISE, IT IS CLEAR THAT LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN CANNOT BE DEEMED AN INCLUDED OFFENSE OF THE CRIME OF SEXUAL ASSAULT. THE EXPRESS LANGUAGE OF THE LEWDNESS STATUTE NRS 201.230 PRECLUDES THIS.

4. CONCLUSION:

IT IS CLEAR THAT COUNT 2 - LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN SHOULD NOT STAND. THIS HONORABLE COURT SHOULD CONCLUDE THAT COUNT 2 - LEWDNESS SHOULD MERGE INTO COUNT 1 - SEXUAL ASSAULT, GARCIA SEXUALLY ASSAULTED THE 10 YEAR OLD VICTIM BY INSERTING HIS FINGER IN HER VAGINA AND THEN UNZIPPED HIS PANTS AND EXPOSED HIS PENIS TO THE VICTIM. SUCH A HYPERTECHNICAL DIVISION OF WHAT WAS ESSENTIALLY A SINGLE ACT SHOULD NOT BE SUSTAINABLE.

DEFENDANT/MOVANT, RAUL GARCIA PRAYS FOR THE COURT TO STRIKE COUNT 2 - LEWDNESS FROM HIS JUDGMENT OF CONVICTION AND ISSUE A CORRECTED AND/OR AMENDED JUDGMENT OF CONVICTION,

DATED THIS 24 DAY OF DECEMBER, 2019.

RESPECTFULLY SUBMITTED,

RAUL GARCIA #68625

PROPER-PERSON DEFENDANT

GARCIA092


CERTIFICATE OF SERVICE

I, RAUL GARCIA, HEREBY CERTIFY PURSUANT TO NRC P 5(b), THAT ON THE 24 DAY OF DECEMBER, 2019, I HANDED TO MS. BEDEVETTE LCC LAW LIBRARY THE FOREGOING MOTION TO CORRECT AN ILLEGAL SENTENCE AND VACATE JUDGMENT, AND/OR MODIFY SENTENCE TO BE PLACED IN THE U.S. MAIL AND SENT TO:

SECOND JUDICIAL DISTRICT COURT
ATTN: CLERK OF THE COURTHOUSE
75 COURT STREET
RENO, NEVADA 89501

AND ON THE SAME DAY I MAILED A TRUE/CORRECT COPY OF THE SAME TO:

DISTRICT ATTORNEY'S OFFICE
WASHOE COUNTY
75 COURT STREET
RENO, NEVADA 89501



RAUL GARCIA #18625
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

AFFIRMATION PURSUANT TO NRS 239B.030, THIS PLEADING DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON(S).

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 RAUL GARCIA,

Case No. CR00-1849

10 Petitioner,

Dept. No. 6

11
12 vs.

13 STATE OF NEVADA,

14 Respondent.
15 _____/

16 **ORDER RE: RESPONSE FROM STATE**
17

18 Before this Court is a *Motion to Correct an Illegal Sentence and Vacate Judgment*
19 *and/or Modify Sentence* ("Motion")¹ filed by Defendant RAUL GARCIA ("Mr. Garcia"). Mr.
20 Garcia seeks correction or modification of the sentence imposed in his *Judgment of*
21 *Conviction* ("JOC"). He also requests this Court vacate his JOC.

22 On January 21, 2020, this Court entered its *Order for Withdrawal* permitting David R.
23 Houston, Esq. to withdraw from representing Mr. Garcia. On January 22, 2020, the Court
24 issued its *Order Granting Motion to Proceed Informa Pauperis*, finding Mr. Garcia qualified
25 for forma pauperis status for purposes of the relief sought. The State elected not to respond
26

27 _____
28 ¹ Although the *Motion's* title seeks to correct an illegal sentence, vacate judgment, and/or modify sentence, it appears the actual relief sought sounds in writ relief based on the *Motion's* content. Therefore, this Court shall treat the *Motion* procedurally as a post-conviction petition for writ of habeas corpus.

1 to the present *Motion*, and the matter was submitted for decision.

2 On February 5, 2020, Mr. Garcia filed a *Motion for Appointment of Counsel in*
3 *Support of Motion to Correct Illegal Sentence and Vacate Judgment and/or Modify*
4 *Sentence* (“*Appointed Counsel Motion*”). The *Appointed Counsel Motion* has not been
5 submitted for decision.
6

7 Mr. Garcia was found guilty, by jury, of the crimes of Sexual Assault on a Child Under
8 the Age of Fourteen, a violation of NRS 200.336, a felony, as charged in Count I of the
9 Information; Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS
10 201.230, a felony, as charged in Count II of the Information and Lewdness With a Child
11 Under the Age of Fourteen Years, a violation of NRS 201.336, a felony, as charged in Count
12 III of the Information. See JOC.² Mr. Garcia was sentenced to imprisonment in the Nevada
13 State Prison (“NSP”) for a term of Life With the Possibility of Parole after a minimum of
14 twenty (20) years has been served as to Count I; for a term of Life With the Possibility of
15 Parole after a minimum of ten (10) years has been served as to Count II, to be served
16 consecutively to the sentence imposed in Count I; for a term of Life With the Possibility of
17 Parole after a minimum of ten (10) years has been served as to Count III, to be served
18 consecutively to the sentence imposed in Counts I and II, with credit for two hundred thirty-
19 four (234) days time served; and serve a special sentence of lifetime supervision to
20 commence after any period of probation, and term of imprisonment or after any release on
21 parole. See JOC. The *JOC* further imposed restitution, fees, and assessments. See JOC.
22

23 In support of his *Motion*, Mr. Garcia argues he is not challenging the jury verdict, but
24 challenges his consecutive sentences for lewdness with a minor as the chain of events
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28 ² This matter originally proceeded before Judge Jerome M. Polaha in Department 3 and was transferred to Department 6.

1 immediately succeeded one another and were incidental to one another. *Motion*, p. 5. Mr.
2 Garcia contends his conviction for Count II contradicts the legislative intent of NRS 201.230.
3 *Motion*, p. 7. Therefore, Mr. Garcia posits his convictions should be limited to a single act of
4 sexual assault for digitally penetrating his victim (Count I), and a single act of lewdness for
5 returning to the victim ten minutes later to pull down her shorts (Count III). *Motion*, p. 7-8.
6

7 This Court, having reviewed the instant *Motion*, finds a response is warranted
8 pursuant to NRS 34.745. Therefore, the State shall respond within forty-five (45) days of
9 the date of this Order, unless the State wishes to defer its answer or response until after the
10 filing of any supplement by appointed counsel. See NRS 34.750(3).³ After any supplement
11 or notice of non-supplement is filed by appointed counsel, the State may file its answer or
12 response within fifteen (15) days after receipt of any supplement.
13

14 Accordingly, and good cause appearing,

15 IT IS SO ORDERED.

16 Dated this 1st day of April, 2020.
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18 
19 DISTRICT JUDGE
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³The Court will enter, by separate filing, its order appointing counsel.

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JENNIFER NOBLE, ESQ

Raul Garcia, #68625
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6
7 IN AND FOR THE COUNTY OF WASHOE

8 RAUL GARCIA,
9

10 Petitioner,

11 vs.

Case No. CR00-1849

12 STATE OF NEVADA,

Dept. No. 6

13 Respondent.
14 -----/

15 **RECOMMENDATION AND ORDER APPOINTING COUNSEL**
16 **(POST CONVICTION)**

17 The Petitioner, RAUL GARCIA, having been granted Forma Pauperis Status, and
18 District Court Judge Lynne K. Simons, having determined there is a basis to appoint counsel
19 for Petitioner and having referred the matter to the Appointed Counsel Administrator
20 accordingly, this Administrator makes the following recommendations:

21 IT IS HEREBY RECOMMENDED that Lyn E. Beggs, Esq., be appointed to represent
22 Petitioner on his Petition for Writ of Habeas Corpus (Post-Conviction), and that counsel be
23 paid pursuant to NRS 7.115 through NRS 7.165 by the State Public Defender in an amount
24 recommended by this Administrator and then approved by the Court.
25
26

1 IT IS FURTHER RECOMMENDED that Petitioner's counsel have ten (10) days from
2 the date of the Court's Order to designate what portions of the Court file counsel requests be
3 provided to her by the Clerk of the Court.

4 IT IS FURTHER RECOMMENDED that newly appointed counsel shall be placed as
5 attorney of record in Case Number CR00-1849.

6 IT IS FURTHER RECOMMENDED that counsel have forty-five (45) days from the
7 date of the receipt of record to either supplement the Petition for Writ of Habeas Corpus or to
8 file a Notice indicating that the original Petition should stand as filed.

9 IT IS FURTHER RECOMMENDED that the State of Nevada should be ordered to
10 respond to Petitioner within sixty (60) days from the date of filing and service of either the
11 Petition to Supplement or Petitioner's Notice of Non-Supplementation.

12 Dated this 15th day of May, 2020.

13 _____/S/Krista Meier_____
14 KRISTA MEIER, ESQ.
15 APPOINTED COUNSEL ADMINISTRATOR

16 **ORDER**

17 Pursuant to the Nevada Supreme Court Order in ADKT 411 and the Second Judicial
18 District Court's Model Plan to address ADKT 411, good cause appearing and in the interests of
19 justice,

20 IT IS HEREBY ORDERED that the recommendations of the Administrator are
21 confirmed, approved and adopted. As such, Lyn E. Beggs shall be appointed to represent
22 Petitioner on his Petition for Writ of Habeas Corpus (Post-Conviction).

23 DATED this 19th day of May, 2019.

24 
25 _____
26 CHIEF DISTRICT JUDGE

1 Code: 2610
2 Lyn E. Beggs
3 Bar No. 6248
4 316 California Ave. #863
5 Reno, NV 89509
6 775-432-1918
7 Attorney for Petitioner

8
9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10
11 **IN AND FOR THE COUNTY OF WASHOE**
12

13 RAUL GARICA,

14 Petitioner/Defendant, Case No: CR00-1849

15 vs. Dept. 6

16 STATE OF NEVADA,

17 Respondent.
18 _____/

19 **NOTICE OF NO SUPPLEMENT**

20 Comes now Petitioner/Defedent, Raul Garcia, by and through his counsel of record
21 and files this Notice of No Supplement to his Motion to Correct an Illegal Sentence and Vacate
22 Judgement and/or Modify Sentence filed on December 30, 2019 which this Court has
23 indicated will be treated as Petition for Writ of Habeas Corpus in the Order filed April 3,
24 2020. Upon review of the records filed in this matter together with review of the direct appeal
25 and subsequent filing, legal research and transcripts, it has been determined that the pleading
26 filed by Petitioner/Defendant on December 30, 2019 shall stand as filed.
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The undersigned does hereby affirm that the preceding document does not contain the

DATED this 11th day of March, 2021.

/s/ LYN E. BEGGS
Lyn E. Beggs, Esq.
Law Offices of Lyn E. Beggs, PLLC
Nevada State Bar No. 6248
316 California Ave. #863
(775) 432-1918
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that I represent the Petitioner in this matter, and that on this date I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney’s Office
Appellate Division

DATED this 11th day of March, 2021.

/s/ LYN E. BEGGS

1 CODE No. 2645
CHRISTOPHER J. HICKS
2 #7747
One South Sierra Street
3 Reno, Nevada 89501
(775) 328-3200
4 districtattorney@da.washoecounty.us
Attorney for Respondent

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

7 IN AND FOR THE COUNTY OF WASHOE

8 ***

9 RAUL GARCIA,

10 Petitioner,

Case No. CR00-1849

11 v.

Dept. No. 6

12 THE STATE OF NEVADA,

13 Respondent.
14 _____/

15 **OPPOSITION TO MOTION TO CORRECT AN ILLEGAL SENTENCE AND**
VACATE JUDGMENT AND/OR MODIFY SENTENCE OR,
16 **IN THE ALTERNATIVE, MOTION TO DISMISS**

17 COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS,
18 District Attorney, and Kevin Naughton, Appellate Deputy, and hereby responds to the
19 Motion to Correct an Illegal Sentence and Vacate Judgment and/or Modify Sentence filed
20 by Raul Garcia (hereinafter, "Petitioner"). This Opposition, or in the alternative, Motion
21 to Dismiss is based on the pleadings and papers on file with this Court, and the following
22 points and authorities.

23 ///

24 ///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Procedural History

3 The Petitioner was convicted by a jury of three serious felonies: Count I. Sexual
4 Assault on a Child Under the age of Fourteen; Count II. Lewdness With a Child Under
5 the Age of Fourteen Years; and Count III. Lewdness With a Child Under the Age of
6 Fourteen Years. *See* Judgment filed March 29, 2001.

7 The Petitioner unsuccessfully appealed his conviction to the Nevada Supreme
8 Court. The Nevada Supreme Court entered an Order of Affirmance on March 14, 2002,
9 in docket number 37816. *See* Order of Affirmance filed before this Court on April 11,
10 2002. In its Order of Affirmance, the Nevada Supreme Court rejected the Petitioner's
11 claims that the district court had erred by excluding testimony about witness coaching
12 and that the district court had erred when instructing the jury.

13 The Petitioner has twice previously sought post-conviction relief. *See* Orders
14 filed July 17, 2012, and October 12, 2012, in case number CR00P1849. In denying both
15 of those earlier Petitions, the district court found that the Petitioner's filings were
16 untimely and that he had failed to demonstrate good cause to excuse the untimeliness of
17 his filings. *Id.*

18 On December 30, 2019, the Petitioner filed the instant Motion to Correct an
19 Illegal Sentence and Vacate Judgment and/or Modify Sentence ("Motion"). On
20 February 5, 2020, the Petitioner filed a motion for appointment of counsel. On April 1,
21 2020, the Court entered an Order Re: Response From State. In that Order, the Court
22 deemed that the Motion would be construed as a post-conviction petition for writ of
23 habeas corpus. The Court also indicated that it would be appointing counsel to the
24 Petitioner in a separate order and required the State to file a response either within 45

1 days of the date of the Order or within 10 days after counsel filed either a supplement or
2 a notice of non-supplement. On April 3, 2020, the Court entered an order appointing
3 counsel for the Petitioner. On March 11, 2021, counsel filed a Notice of No Supplement
4 on behalf of the Petitioner. This Opposition or, in the alternative, Motion to Dismiss
5 follows.

6 Argument

7 The Motion relies entirely upon the statutory and case law addressing illegal or
8 erroneous sentences. Under those standards, the Motion must be dismissed.

9 The Nevada Supreme Court has held that a motion to correct an illegal sentence
10 “address[es] only the facial legality of a sentence.” Edwards v. State, 112 Nev. 704, 708,
11 918 P.2d 321, 324 (1996). “An ‘illegal sentence’ ... [is] one at variance with the
12 controlling sentencing statute, or illegal in the sense that the court goes beyond its
13 authority by acting without jurisdiction or imposing a sentence in excess of the statutory
14 maximum provided....” *Id. quoting Allen v. United States*, 495 A.2d 1145, 1149 (D.C.
15 1985)(internal quotations omitted). A court can correct a sentence that is facially illegal
16 at any time. Edwards, 112 Nev. at 708, 918 P.2d at 324 (1996). “An illegal sentence for
17 purposes of ... NRS 176.555... [is] one at variance with the controlling sentencing statute,
18 or illegal in the sense that the court goes beyond its authority by acting without
19 jurisdiction or imposing a sentence in excess of the statutory maximum provided.” *Id.*
20 The Petitioner’s sentences are within the statutory parameters and he does not allege
21 that the Court acted without jurisdiction in imposing sentence. Thus, the Motion fails as
22 a motion to correct an illegal sentence.

23 A sentence may only be modified under very narrow circumstances. The Nevada
24 Supreme Court has held that “the district court had jurisdiction to modify appellant’s

1 sentence in this case only if (1) the district court actually sentenced appellant based on a
2 materially false assumption of fact that worked to appellant's extreme detriment, and
3 (2) the particular mistake at issue was of the type that would rise to the level of a
4 violation of due process." Passanisi v. State, 108 Nev. 318, 323, 831 P.2d 1371, 1374
5 (1992). The "materially false assumption" relates to the Court's understanding of the
6 Defendant's record at the time of sentencing. 108 Nev. at 322-323, 831 P.3d at 1373-
7 1374 ("The cases implicitly recognize [that] ... a due process violation arises only when
8 the errors result in 'materially untrue' assumptions about *a defendant's record*..."). The
9 Petitioner does not allege that the Court operated under any untrue assumption about
10 his record and it thus fails as a motion for sentence modification.

11 Instead, and in accordance with the Court's Order, "[i]ssues concerning the
12 validity of a conviction or sentence[...] must be raised in habeas proceedings." Edwards
13 v. State, 112 Nev. 704, 708, 918 P.2d 321, 324-25 (citations omitted). The State hereby
14 moves to dismiss the Motion pursuant to the applicable authority governing post-
15 conviction habeas petitions.

16 NRS 34.810(1)(b) provides that "The court shall dismiss a petition if the court
17 determines that: (b) The petitioner's conviction was the result of a trial and the grounds
18 for the petition could have been: (1) Presented to the trial court; [or] (2) Raised in a
19 direct appeal or a prior petition for a writ of habeas corpus or postconviction relief [...]
20 unless the court finds both cause for the failure to present the grounds and actual
21 prejudice to the petitioner." Here, the Petitioner was convicted as a result of a jury trial,
22 thus invoking the procedural bars set forth at NRS 34.810(1)(b). Additionally, the
23 Petitioner's claim of redundancy could have been presented to the trial court at the time
24 of sentencing or raised on direct appeal. *See e.g.*, Crowley v. State, 120 Nev. 30, 83 P.3d

1 282 (2004) (reversing a conviction for lewdness that was “incidental” to a sexual assault
2 on direct appeal). The Motion offers no cause to excuse his failure to present this issue
3 either at the time of sentencing or raising it on direct appeal.

4 Additionally, the Petitioner’s claims have been untimely filed. NRS 34.726(1)
5 requires that “[u]nless there is good cause shown for delay, a petition that challenges the
6 validity of a judgment or sentence must be filed within 1 year after entry of the judgment
7 of conviction or, if an appeal has been taken from the judgment, within 1 year after the
8 appellate court[...] issues its remittitur.” Here, the Petitioner appealed his conviction
9 and the Nevada Supreme Court issued its remittitur on April 11, 2002. *See* Remittitur
10 filed before this Court on April 11, 2002. The instant Motion was not filed within one
11 year of the remittitur and, thus, the Petitioner must demonstrate good cause for the
12 delay in filing. The Motion offers no good cause for this lengthy delay.

13 Moreover, this is the Petitioner’s third filing that has been construed as a post-
14 conviction petition for a writ of habeas corpus. As a result, it is successive and
15 constitutes an abuse of the writ for not raising this issue previously. NRS 34.810(2).

16 The State also explicitly pleads laches pursuant to NRS 34.800(2). As more than
17 5 years have elapsed between the decision on direct appeal and the filing of the instant
18 Motion, there is a “rebuttable presumption of prejudice to the State” that the Petitioner
19 must overcome.

20 Finally, even accepting the Petitioner’s assertions as true, he does not allege
21 sufficient facts as to warrant relief. At the bottom of page 7 of his Motion, the Petitioner
22 describes what he believes has given rise to redundant convictions. Specifically, the
23 Petitioner explains that he was convicted of Count 1. Sexual Assault, for “pulling the
24 victim’s pants down and inserting his finger into her vagina.” Motion, p. 7. The Motion

1 further explains that he was convicted of Count 2, Lewdness, “from Garcia then
2 unzipping his pants and removing his penis and exposing it to the 10 year old victim.
3 The Petitioner contends that the second set act, the exposing of his penis to the 10 year
4 old victim should be merged into a single, punishable incident.” *Id.*

5 Habeas claims must assert specific factual allegations that, if true, would warrant
6 relief. Nika v. State, 124 Nev. 1272, 1301, 198 P.3d 839, 858 (2008) *citing* Hargrove v.
7 State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Even if the Petitioner’s
8 assertions here are true, he would not be entitled to relief and, thus, this Court should
9 dismiss his claim without conducting an evidentiary hearing. Accepting the Petitioner’s
10 assertions as true for the purposes of this Motion to Dismiss, he fails to state a claim for
11 which this Court could grant relief. Pursuant to Crowley, the Nevada Supreme Court
12 has recognized that a lewdness conviction that is incidental to a *subsequent* sexual
13 assault is redundant and cannot be sustained. 120 Nev. at 34, 83 P.3d at 285-86 (“By
14 touching and rubbing the male victim’s penis, Crowley sought to arouse the victim and
15 create willingness to engage in sexual conduct. Crowley’s actions were not separate and
16 distinct; they were a part of the same episode. Because Crowley intended to predispose
17 the victim to his subsequent fellatio, his conduct was incidental to the sexual assault and
18 cannot support a separate lewdness conviction.”). Here, according to Petitioner’s own
19 rendition of what gave rise to these convictions, he committed sexual assault by digitally
20 penetrating a 10-year-old child *before* exposing himself to her. As a result, Garcia’s
21 convictions are not redundant because his lewdness crime was not incidental to the
22 sexual assault both because it occurred after he penetrated his victim and because his
23 exposing his penis was a separate act, not incidental to, the penetration.

24 / / /

1 Conclusion

2 The Motion fails both as a motion to correct an illegal sentence and to modify a
3 sentence. Additionally, when construed as a petition for post-conviction habeas relief,
4 the Motion is statutorily barred, successive, and subject to the doctrine of laches. The
5 Motion contains no assertions of cause to overcome the application of any of these bars.
6 Finally, even if the Petitioner's assertions are accepted as true, he has failed to allege
7 sufficient facts to warrant relief. The Petitioner's acts of first digitally penetrating the
8 10-year-old victim before later exposing his penis to her are not part of a single act so
9 that the offenses merged. For all of those reasons, the Motion should be denied.

10 **AFFIRMATION PURSUANT TO NRS 239B.030**

11 The undersigned does hereby affirm that the preceding document does not
12 contain the social security number of any person.

13 DATED: March 23, 2021.

CHRISTOPHER J. HICKS

14 District Attorney

15 By /s/ Kevin Naughton
16 KEVIN NAUGHTON
Appellate Deputy

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Lyn E. Beggs, Esq.

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Code: 2610
Lyn E. Beggs
Bar No. 6248
316 California Ave. #863
Reno, NV 89509
775-432-1918
Attorney for Petitioner

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

RAUL GARICA,

Petitioner/Defendant, Case No: CR00-1849

vs. Dept. 6

STATE OF NEVADA,

Respondent.

**REPLY TO OPPOSITION TO MOTION TO CORRECT AN ILLEGAL
SENTENCE AND VACATE JUDGEMENT AND/OR MODIFY SENTENCE OR,
IN THE ALTERNATIVE OPPOSITION TO MOTION TO DISMISS**

Comes now Petitioner/Defendant, Raul Garcia, by and through his counsel of record and files this Reply to the State's Opposition to Motion to Correct an Illegal Sentence and Vacate Judgement and/or Modify Sentence or, in the alternative, Opposition to the State's Motion to Dismiss.

POINTS AND AUTHORITIES
Statement of Facts/Procedural History

Mr. Garcia was convicted on March 29, 2001 of one count Sexual Assault on a Child Under the Age of Fourteen Years and two counts of Lewdness with a Child Under the Age of Fourteen Years after a multi-day jury trial. Mr. Garcia was sentenced to life with the

1 possibility of parole after ten years on each count; the sentence of each count running
2 consecutive to the others. At all times during the trial level proceedings, Mr. Garcia had the
3 services of a Spanish interpreter.

4 Mr. Garcia filed a timely direct appeal challenging two issues from the time of trial.
5 The direct appeal did not address any issues related to the manner in which the case had been
6 charged against Mr. Garcia and did not challenge the sentences for the lewdness convictions
7 imposed in the case.

8 Mr. Garcia filed a Petition for Writ of Habeas Corpus in July 2012 which was
9 dismissed by the Court as untimely. A First Amended Petition for Writ of Habeas Corpus
10 was filed in September 2012 which was again denied as untimely. Mr. Garcia had moved for
11 the appointment of counsel, but that request was denied.

12 Subsequently Mr. Garcia filed his Motion to Correct Illegal Sentence and Vacate
13 Judgement and/or Modify Sentence on December 30, 2019. As noted in the State's
14 Opposition/ Motion to Dismiss, this Court issued an Order on April 1, 2020 which in part
15 indicated that the Motion would be treated as a post-conviction petition for writ of habeas
16 corpus. A Notice of No Supplement was filed on March 11, 2021 and the State filed its
17 Opposition/Motion to Dismiss on March 23, 2021.

18 *Argument*

19 The State has addressed the Motion both as a motion and as a post-conviction petition.
20 Mr. Garcia renews his argument that a Motion to Correct Illegal Sentence is the proper vehicle
21 for the issues presented therein. However, as this Court has indicated it will consider the
22 Motion as a petition for post-conviction relief and accordingly Mr. Garcia shall primarily
23 address the State's Motion to Dismiss.
24

25 The State has raised several issues as to why the Motion/Petition should be dismissed
26 and/or is procedurally barred. First, the State argues that in accordance with NRS
27 34.810(1)(b) that the Court must dismiss the petition as the issues raised in Mr. Garcia's
28

1 Motion/Petition could have been either raised to the trial court or on appeal. Mr. Garcia
2 contends that while the issue of the redundancy of the lewdness charges could have been
3 raised to the trial court, his counsel did not do so. While not specifically styled as such, if
4 construed as a post-conviction petition, Mr. Garcia has clearly raised an issue of ineffective
5 assistance of both trial counsel and appellate counsel for failing to raise this issue either on
6 direct appeal or at the trial level. Mr. Garcia did raise this issue in his previous petitions for
7 writ of habeas corpus which were denied as untimely. Unfortunately, Mr. Garcia was not
8 appointed counsel at that time to address the procedural bars as the Court denied the
9 appointment of counsel and dismissed the petitions without review on the merits. Mr. Garcia
10 contends that his claims for relief are not barred by NRS 34.810(1)(b) as a claim of ineffective
11 assistance of counsel may only be raised in a post-conviction proceeding.
12

13
14 The State further argues that the Motion/Petition is procedurally barred pursuant to
15 NRS 34.726(1). Mr. Garcia admits that the Motion/Petition is not filed timely in accordance
16 with NRS 34.726. However, Mr. Garcia believes that good cause for the delay exists thus
17 allowing him to overcome the procedural bar. “To overcome these statutory procedural bars,
18 a petitioner must demonstrate good cause for the default and actual prejudice. We have
19 defined good cause as a substantial reason ... that affords a legal excuse.” Brown v. McDaniel,
20 130 Nev. Adv. Op. 60, 331 P.3d 867, 870 2014) (internal citations omitted). “To show good
21 cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: “[t]hat the
22 delay is not the fault of the petitioner” and that the petitioner will be “unduly prejudice[d]” if
23 the petition is dismissed as untimely. Under the first requirement, “a petitioner must show that
24 an impediment external to the defense prevented him or her from complying with the state
25 procedural default rules.” State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 94-95
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1 (2012)(citing Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)). See also
2 Coleman v. Thompson, 501 U.S. 722, 111 S. Ct 2546 (1991).

3 Mr. Garcia contends that due to the fact that he is a primarily Spanish-only speaker,
4 his language barrier prevented him from accessing and understanding the materials needed to
5 submit a timely petition for writ of habeas corpus prior to finding a translator/legal assistant
6 within NDOC to assist him with the filing of the instant Motion/Petition. “[E]quitable tolling
7 may be justified if language barriers actually prevent timely filing” of a post-conviction
8 filings. Mendoza v. Carey, 449 F.3d 1065, 1069 (9th Cir. 2006). Here, Mr. Garcia asserts that
9 his language barrier did indeed prevent timely filing. He contends that NDOC does not
10 provide interpreters or legal materials in Spanish or other languages. While Mr. Garcia filed
11 a petition in 2012, it was with basic assistance and no access to appropriate legal advice. Mr.
12 Garcia asserts that the time to file a petition should be equitably tolled due to his language
13 barrier.
14

15
16 The State has also pleaded laches pursuant to NRS 34.800(2). While Mr. Garcia
17 concedes that if he was challenging the facts presented at trial or was requesting an evidentiary
18 hearing requiring the testimony of witnesses from the original proceedings, laches may be
19 applicable here. However, Mr. Garcia is simply claiming in part that his counsel was
20 ineffective for failing to address the redundancy of the charges filed in this matter of which
21 he was convicted. It is a purely legal argument not requiring the testimony of anyone other
22 than potentially his trial counsel and appellate counsel if he was granted an evidentiary hearing
23 in the matter.
24

25
26 Finally, outside of the procedural bars addressed by the State, the State claims that
27 Mr. Garcia has not raised grounds/issues in his Motion/Petition that are sufficient to
28 warrant relief. Mr. Garcia respectfully disagrees. A habeas petitioner is not entitled to an

1 evidentiary hearing if the factual allegations are belied or repelled by the record.” Thomas
2 v. State 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)(citing Hargrove v. State, 100 Nev. 498,
3 686 P.2d 222 (1984)). However, a petitioner need not set forth an exact recitation of what
4 a witness will testify to, rather the petitioner must provide the witness’s name “or
5 descriptions of their intended testimony.” Hargrove, 100 Nev. at 503, 686 P.2d at 225.
6 Mr. Garcia did not draft his Motion as a petition for writ of habeas corpus and therefore it
7 is not pled in the matter that such a petition would be pled. However, Mr. Garcia has
8 clearly set forth the issues regarding the redundancy of the charges in this matter. The
9 Court has construed this pleading to be a petition for writ of habeas corpus; construed in
10 that manner, the Motion clearly can be interpreted to raise an issue of ineffective
11 assistance of counsel. The claims in the Motion/Petition are pled with enough specificity
12 that it clearly meets the standards of *Hargrove*.
13
14

15 The State has also argued that even if his assertions are true, he has not raised a
16 claim upon which he would be entitled to relief. The State states that pursuant to Crowley
17 v. State a lewdness conviction incidental to a subsequent sexual assault cannot be upheld
18 but argues that is not the case here. 120 Nev. 30, 83 P.3d 282 (2004). Mr. Garcia disagrees
19 with the position of the State and renews the argument set forth in his Motion/Petition that
20 the act of lewdness he claims was redundant was not separate from the sexual assault and
21 can therefore not be upheld. This claim requires review on the merits and cannot be
22 summarily dismissed.
23
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25 CONCLUSION

26 Mr. Garcia contends that he supported his grounds/issues raised in his
27 Motion/Petition that entitle him to an evidentiary hearing. Mr. Garcia believes that he has
28

1 overcome the procedural bars in this matter and that the issues raised should be review on
2 their merits and requests that he be granted an evidentiary hearing in this matter.

3 **Affirmation Pursuant to NRS 239B.030**

4
5 The undersigned does hereby affirm that the preceding document does not contain the
6 Social Security Number of any person.

7
8 DATED this 30th day of March, 2021.

9
10 /s/ LYN E. BEGGS

11 Lyn E. Beggs, Esq.
12 Law Offices of Lyn E. Beggs, PLLC
13 Nevada State Bar No. 6248
14 316 California Ave. #863
15 (775) 432-1918
16 Attorney for Petitioner
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Kevin Naughton, Deputy District Attorney
Washoe County District Attorney's Office
Appellate Division

/s/ LYN E. BEGGS

1 **CODE 2540**

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4
5 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
6 **IN AND FOR THE COUNTY OF WASHOE**

7
8 **STATE OF NEVADA,**

9 **Plaintiff,**

Case No: CR00-1849

10 **vs.**

Dept. No: 6

11
12 **RAUL GARCIA,**

13 **Defendant.**

14 _____ /
15 **NOTICE OF ENTRY OF ORDER**

16
17 PLEASE TAKE NOTICE that on April 30, 2021, the Court entered a decision or
18 order in this matter, a true and correct copy of which is attached hereto.

19 Dated May 3, 2021.

20
21 _____
22 **ALICIA LERUD**

Clerk of the Court

23 _____
24 **/s/N. Mason**

N. Mason-Deputy Clerk

1 **CERTIFICATE OF SERVICE**

2 Case No. CR00-1849

3 Pursuant to NRCP 5 (b), I certify that I am an employee of the Second
4 Judicial District Court; that on May 3, 2021, I electronically filed the Notice of Entry of
5 Order with the Court System which will send a notice of electronic filing to the following:
6

7 DIV. OF PAROLE & PROBATION
8 JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA
9 LYN E. BEGGS, ESQ. for RAUL GARCIA (TN)
10 KEVIN P. NAUGHTON, ESQ. for STATE OF NEVADA

11 I further certify that on May 3, 2021, I deposited in the Washoe
12 County mailing system for postage and mailing with the U.S. Postal Service in Reno,
13 Nevada, a true copy of the attached document, addressed to:

14 Attorney General's Office
15 100 N. Carson Street
16 Carson City, NV 89701-4717

17 Raul Garcia (#68625)
18 Lovelock Correctional Center
19 1200 Prison Rd.
20 Lovelock, NV 89419

21 The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the
22 preceding document does not contain the personal information of any person.

23 Dated May 3, 2021.

24 /s/N. Mason
25 N. Mason- Deputy Clerk
26
27
28

1 CODE NO.
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 STATE OF NEVADA,

Case No. CR00-1849

10 Plaintiff,

Dept. No. 6

11
12 vs.

13 RAUL GARCIA,

14 Defendant.
15 _____/

16 **ORDER DISMISSING MOTION TO CORRECT AN ILLEGAL**
17 **SENTENCE AND VACATE JUDGMENT AND/OR MODIFY SENTENCE**

18 Before this Court is the *Motion to Correct an Illegal Sentence and Vacate Judgment,*
19 *and/or Modify Sentence* ("Motion") filed by Defendant RAUL GARCIA ("Mr. Garcia") on
20 December 30, 2019.
21

22 On January 21, 2020, this Court entered its *Order for Withdrawal* permitting David R.
23 Houston, Esq. to withdraw from representing Mr. Garcia. On January 22, 2020, the Court
24 issued its *Order Granting Motion to Proceed Informa Pauperis*, finding Mr. Garcia qualified
25 for forma pauperis status. Mr. Garcia then filed his *Request for Submission* for the instant
26 *Motion* on February 4, 2020.
27

28 //

1 On April 1, 2020, the Court entered the *Order Re: Response from the State* and on
2 April 3, 2020, the Court entered the *Order Granting Motion for Appointment of Counsel in*
3 *Support of Motion to Correct an Illegal Sentence and Vacate Judgment and/or Modify*
4 *Sentence* (“*April Order*”) in which the Court indicated it would construe the *Motion* as a post-
5 conviction petition for writ of habeas corpus. *April Order*, p. 1, n.1.
6

7 On March 11, 2021, counsel for Mr. Garcia, Lyn E. Beggs, Esq. filed the *Notice of No*
8 *Supplement*.

9 Plaintiff THE STATE OF NEVADA (“the State”) filed the *Opposition to Motion to*
10 *Correct an Illegal Sentence and Vacate Judgment and/or Modify Sentence* (“*Opposition*”).
11

12 Mr. Garcia filed his *Reply to Opposition to Motion to Correct an Illegal Sentence and*
13 *Vacate Judgment and/or Modify Sentence or in the Alternative Opposition to Motion to*
14 *Dismiss* (“*Reply*”) and the matter was again submitted for the Court’s consideration.
15

16 **I. FACTUAL AND PROCEDURAL HISTORY.**

17 Pursuant to the *Judgment of Conviction* (“*JOC*”) entered March 29, 2001, Mr. Garcia
18 was found guilty of the crimes as charged in the *Information* of: Count I - Sexual Assault on
19 a Child Under the Age of Fourteen, a violation of NRS 200.336, a felony; Count II -
20 Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS 201.230, a
21 felony; and, Count III - Lewdness With a Child Under the Age of Fourteen Years, a violation
22 of NRS 201.336, a felony. See *JOC*. Mr. Garcia was sentenced to imprisonment in the
23 Nevada State Prison (“NSP”) for terms of: Count I - Life With the Possibility of Parole after a
24 minimum of twenty (20) years; Count II - Life With the Possibility of Parole after a minimum
25 of ten (10) years; and Count III - Life With the Possibility of Parole after a minimum of ten
26 (10) years has been served as to Count III. The sentence on Count II was imposed to run
27
28

1 consecutively to the sentence on Count I. The sentence on Count III was imposed to run
2 consecutively to the sentences on Count I and Count II. Credit for two hundred thirty-four
3 (234) days time served was granted. The JOC also imposed a special sentence of lifetime
4 supervision to commence after any period of probation, term of imprisonment or after any
5 release on parole. See JOC.

7 Mr. Garcia filed a direct appeal, and, on March 14, 2002, the Nevada Supreme Court
8 entered its *Order of Affirmance*, finding the Court did not err when it rejected Mr. Garcia's
9 argument the victim's mother was coaching her boyfriend and the victim while defense
10 counsel was questioning them. The Nevada Supreme Court further found the Court did not
11 err in providing the jury with certain instructions.

13 In July, 2012, Mr. Garcia filed his first *Petition for Writ of Habeas*, which the Court
14 dismissed as untimely. Then, in September, 2012, Mr. Garcia then filed his *First Amended*
15 *Petition for Writ of Habeas Corpus*, which the Court also dismissed as untimely.¹

17 In his *Motion*, Mr. Garcia argues he is not challenging the jury verdict, but challenges
18 his consecutive sentences for lewdness with a minor as the chain of events that form the
19 basis for the charges immediately succeeded one another and were incidental to one
20 another. *Motion*, p. 5. Mr. Garcia contends his conviction for Count II contradicts the
21 legislative intent of NRS 201.230. *Motion*, p. 7. Therefore, Mr. Garcia posits his convictions
22 should be limited to a single act of sexual assault for digitally penetrating his victim (Count
23 I), and a single act of lewdness for returning to the victim after approximately 10 minutes to
24 pull down her shorts (Count III). *Motion*, p. 7-8.

26 In the *Opposition*, the State argues the *Motion* is improper under the legal standards
27 for illegal or erroneous sentences because the sentences are within the statutory
28

¹ These filings and orders are memorialized in CR00P1849.

1 parameters and, therefore, they are not at variance with the statutory maximums.
2 *Opposition*, p. 3. The State asserts issues concerning the validity of a sentence must be
3 raised in habeas proceedings pursuant to Edwards v. State, 112 Nev. 704, 708, 918 P.2d
4 321, 324-25, (1996). Therefore, the State moves to dismiss the *Motion* pursuant to authority
5 governing post-conviction habeas petitions. *Opposition*, p. 4. The State argues the *Motion*
6 must be dismissed because Mr. Garcia did not show good cause for failing to raise this
7 issue at the trial level or in his direct appeal. *Opposition*, pp. 4-5. The State notes Mr.
8 Garcia's *Motion* is also untimely as it was filed more than a year after the Nevada Supreme
9 Court issued its *Remittitur* on April 11, 2002. *Opposition*, p. 5. The State further asserts Mr.
10 Garcia is guilty of laches. Id. Lastly, the State posits, even accepting Mr. Garcia's
11 assertions as true, relief is not warranted because the lewdness was not incidental to the
12 sexual assault. *Opposition*, p. 6.

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15 In the *Reply*, Mr. Garcia states his argument was not raised to the trial court but
16 should have been and this Court may construe this argument as one of ineffective
17 assistance of both trial and appellate counsel. *Reply*, p. 3. Mr. Garcia argues good cause
18 exists to overcome the procedural bar in NRS 34.726(1) because he is a Spanish-only
19 speaker and his language barrier prevented him from timely filing. *Reply*, p. 4. Mr. Garcia
20 argues laches is inapplicable as he is not challenging the facts presented at trial and would
21 only need trial and appellate counsel to testify. Id. In addition, Mr. Garcia contends he
22 stated his claims in the *Motion* with enough specificity that it meets the standards of
23 Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). *Reply*, p. 5.

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1 **II. APPLICABLE LAW AND ANALYSIS.**

2 The Court evaluates the *Motion* as a post-conviction petition for writ of habeas
3 corpus, as indicated in its *April Order*.
4

5 **A. PROCEDURAL BAR.**

6 Successive petitions, such as Mr. Garcia's, are subject to mandatory dismissal
7 pursuant to Chapter 34 of the Nevada Revised Statutes. "Application of the statutory
8 procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth
9 Judicial Dist. Court ex rel. County of Clark, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).
10
11 Successive petitions must be dismissed pursuant to NRS 34.810 if the grounds for the
12 petition were already raised on direct appeal or in a prior petition for writ of habeas corpus
13 and considered on the merits or the grounds could have been raised in a prior petition.
14 NRS 34.810; Brown v. McDaniel, 130 Nev. 565, 568-69, 331 P.3d 867, 870 (2014); State v.
15 Eighth Judicial Dist. Court, 121 Nev. at 232.
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17 Similarly, "if it plainly appears on the face" of a second or successive petition and the
18 documents or the records on file with the court, the petitioner is not entitled to relief, then the
19 court shall enter an order for summary dismissal. NRS 34.745(4). In order to overcome the
20 bar to successive petitions, "the petitioner has the burden of pleading and proving specific
21 facts that demonstrate" good cause for failing to present the claim and "[a]ctual prejudice to
22 the petitioner." NRS 34.810(3)(a)-(b).
23

24 Good cause is defined as "a substantial reason that affords a legal excuse." Brown,
25 130 Nev. at 569, 331 P.3d at 870 (internal quotations omitted). To show good cause, the
26 petitioner must demonstrate "an impediment external to the defense prevented him from
27 complying with procedural rules." Id. An "impediment external to the defense may be
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1 demonstrated by a showing that the factual or legal basis for the claim was not reasonably
2 available to counsel or that some interference by officials made compliance impracticable.”
3 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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5 The Ninth Circuit Court of Appeals has found “equitable tolling may be justified if
6 language barriers actually prevent timely filing” of post-conviction filings. Mendoza v. Carey,
7 449 F.3d 1065, 1069 (9th Cir. 2006). However, the “existence of a translator who can read
8 and write English and who assists a petitioner during appellate proceedings renders
9 equitable tolling inapplicable for that petitioner.” Id., at 1070 (citing Cobas v. Burgess, 306
10 F.3d 441, 444 (6th Cir. 2002).

11
12 Here, good cause does not exist to overcome the untimeliness of Mr. Garcia’s
13 *Motion*. Mr. Garcia alleges language was a barrier to timely filing petitions for post-
14 conviction relief. *Reply*, p. 4. However, Mr. Garcia also states he was assisted with the
15 filing of his petitions in 2012. Id. This is further evidenced by Mr. Garcia filing multiple
16 motions for appointment of counsel and multiple motions to proceed *in forma pauperis*
17 between July and October of 2012 according to the record in CR00P1849. Additionally, Mr.
18 Garcia was aware he had to provide good cause to overcome the procedural bar of NRS
19 34.726(1) as early as July 17, 2012, yet he failed to do so in his September petition and in
20 the *Motion* despite clearly having assistance and notice to do so. See Order entered
21 October 12, 2012. As such, Mr. Garcia does not have good cause to excuse the untimely
22 filing of his petitions and the instant *Motion*. Nevertheless, the Court examines the merits of
23 Mr. Garcia’s claims.

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1 **B. INEFFECTIVE ASSISTANCE OF COUNSEL.**

2 Claims of ineffective assistance of counsel are evaluated under the test established
3 in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). A court's evaluation
4 "begins with the strong presumption that counsel's conduct falls within the wide range of
5 reasonable professional assistance." Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25,
6 32 (2004) (internal quotations omitted). A defendant must "overcome the presumption that,
7 under the circumstances, the challenged action might be considered sound trial strategy."
8 Id. (internal quotations omitted).

9 Within that context, the petitioner must demonstrate the following:
10

11 [T]hat his counsel's performance was deficient, falling below an objective
12 standard of reasonableness, and that counsel's deficient performance
13 prejudiced the defense. To establish prejudice based on counsel's deficient
14 performance, a petitioner must show that, but for counsel's errors, there is a
15 reasonable probability that the outcome would have been different.

16 Id. (internal quotations omitted). "Deficient" representation is "representation that falls
17 below an objective standard of reasonableness." Kirksey v. State, 112 Nev. 980, 988, 923
18 P.2d 1102, 1107. "A fair assessment of attorney performance requires that every effort be
19 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
20 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the
21 time." 112 Nev. at 987-88.

22 A petitioner must demonstrate prejudice "by showing a reasonable probability that
23 but for counsel's errors, the result of the trial would have been different." Nika v. State, 124
24 Nev. 1272, 1279, 198 P.3d 839, 844 (2008). A "reasonable probability" is a probability
25 sufficient to undermine confidence in the outcome of trial. Riley v. State, 110 Nev. 638, 646,
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1 878 P.2d 272, 278 (1994). "The defendant carries the affirmative burden of establishing
2 prejudice." Id., citing Strickland, 466 U.S. at 693-94.

3 A habeas corpus petitioner "must prove the disputed factual allegations underlying
4 his ineffective-assistance claim by a preponderance of the evidence." Id. at 1012. A court
5 may evaluate the issue of deficient performance and prejudice in either order and need not
6 consider both issues if the petitioner fails to make a sufficient showing on one. Means, 120
7 Nev. at 1011, 103 P.3d at 32.

9 Lastly, a petitioner has a right to a post-conviction evidentiary hearing when a
10 petitioner asserts claims supported by specific factual allegations not belied by the record
11 that, if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502-03,
12 686 P.2d 222 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the
13 record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46
14 P.3d 1228, 1230 (2002).

16 Mr. Garcia does not have a colorable claim for relief. The Court has reviewed the
17 record and based on the *Information* filed on October 16, 2000, Mr. Garcia was charged
18 with the following counts which described his acts as follows:

20 Count I – Sexual Assault on A Child Under the Age of Fourteen, a violation of NRS
21 200.366, a felony. "[T]o wit, the defendant put his finger inside the victim's vagina."

23 Count II – Lewdness with a Child Under the Age of Fourteen Years, a violation of
24 NRS 201.230, a felony. "[T]he said defendant pulled down the victim's pants and/or
25 underwear and/or touched the victim's vaginal area with his tongue with the intent of
26 arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the
27 child."
28

1 Count III – Lewdness with a Child Under the Age of Fourteen Years, a violation of
2 NRS 201.230, a felony,

3 [T]he said defendant unzipped his pants and pulled the hand of the said
4 [victim] toward his exposed penis in an attempt to get her to touch the said
5 penis with the intent of arousing, appealing to, or gratifying the lust, passions
6 or sexual desires of himself or of the child.

7 *Information.* Mr. Garcia's counts cannot be consolidated because, as he readily
8 admits, his counts were punctuated by "approximately ten (10) minutes" and because
9 two separate instances of lewdness occurred. *Motion*, pp. 4-5. Mr. Garcia relies on
10 Crowley for the proposition his convictions for Count I of sexual assault and Count II
11 of lewdness are redundant as they arose out of the same incident and are therefore
12 mutually exclusive. 120 Nev. 30, 34, 83 P.3d 282, 285 (2004). However, Crowley is
13 factually different and therefore inapplicable here. Crowley involved one continuous
14 assault on the victim wherein there was no break. 120 Nev. at 34, 83 P.3d at 285. In
15 Mr. Garcia's case, the sexual assault was a separate assault from the lewdness.
16 And, the lewd acts undertaken were different and, in fact, performed on the victim by
17 Mr. Garcia and the other on Mr. Garcia at his instance, creating separate acts that
18 were not incidental to one another.
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21 Furthermore, separate instances of lewdness and sexual assault have been upheld
22 when there is a temporal gap between the instances, despite a short time interval between
23 the instances. Wright v. State, 106 Nev. 647, 799 P.2d 548 (1990) (finding separate
24 convictions for sexual assault warranted when Wright paused to wait for a car to pass);
25 Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987). As both Wright and
26 Townsend were decided prior to Mr. Garcia's conviction on March 29, 2001, it was not
27 objectively unreasonable for either trial or appellate counsel to refrain from make the
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1 argument the acts were incidental to one another based on the existing case law. Finally,
2 Crowley was not decided until 2004, four (4) years after Mr. Garcia's conviction. Therefore,
3 it was unavailable as a basis to argue the lewdness was incidental to the sexual assault.
4

5 Thus, the Court concludes Mr. Garcia has not asserted specific factual allegations
6 which, if true, would warrant relief. Nike, 124 Nev. at 1301, 198 P.3d at 858.

7 **III. CONCLUSION AND ORDER.**

8 Mr. Garcia's *Motion* is both untimely and fails to make a claim for deficient
9 representation. As Mr. Garcia's *Motion* is procedurally barred, it must be summarily
10 dismissed.
11

12 Accordingly, and good cause appearing,

13 **IT IS HEREBY ORDERED** Mr. Garcia's *Motion to Correct an Illegal Sentence and*
14 *Vacate Judgment and/or Modify Sentence* is SUMMARILY DISMISSED.

15 Dated this 30th day of April, 2021.
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19 DISTRICT JUDGE
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2 *Lyn E. Beggs, Esq.*
3 *Law Offices of Lyn E. Beggs, PLLC*
4 *Nevada State Bar No. 6248*
5 *316 California Ave., #863*
6 *Reno, NV 89509*
7 *(775) 432-1918*
8 *ATTORNEY FOR PETITIONER*

9 **IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**

11 RAUL GARICA,

12 Petitioner/Defendant,

Case No: CR00-1849

13 vs.

Dept. 6

14 STATE OF NEVADA,

15 Respondent.

16 _____/
17 NOTICE OF APPEAL

18 NOTICE IS HEREBY GIVEN that Petitioner/Defendant RAUL GARICA hereby
19 appeals to the Supreme Court of the State of Nevada from the Order filed on April 30, 2021,
20 dismissing Petitioner/Defendant's Motion to Correct an Illegal Sentence and Vacate
21 Judgment and/or Modify Sentence filed in the above referenced cases with Notice of Entry of
22 Order being filed on May 3, 2021.

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Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 1st day of June, 2021.

/s/ LYN E. BEGGS
Lyn E. Beggs, Esq.
Law Offices of Lyn E. Beggs, PLLC
316 California Ave., #863
Reno, NV 89509
(775) 432-1918
ATTORNEY FOR PETITIONER

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Kevin Naughton, Deputy District Attorney
Washoe County District Attorney's Office
Appellate Division

/s/ LYN E. BEGGS