IN THE SUPREME COURT OF THE STATE OF NEVADA

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FREDERICK HARRIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 69093

APPEAL FROM JUDGMENT OF CONVICTION
(JURY TRIAL)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE MICHELLE LEAVITT, PRESIDING

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APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Mr. Harris' Judgment of Conviction was filed on November 2, 2015 (A.A. Vol. 7 p. 843-848). Mr. Harris filed a timely Notice of Appeal on October 27, 2015 (A.A. Vol. 7 p. 849-850).

ROUTING STATEMENT

This matter should be assigned to the Nevada Supreme Court pursuant to NRAP 17(b)(1) which states in pertinent part that the Court of Appeals is only presumptively assigned direct appeals not involving a conviction for a category A or B felony. This case involves a direct appeal of multiple category A felonies.

STATEMENT OF THE CASE

Mr. Harris was charged by way of Information with the following:

> Count 1- Child abuse, neglect, or endangerment; Count 2- Sexual Assault with a minor under fourteen years of age; Count 3- Sexual Assault with a minor under fourteen years of age; Count 4- Lewdness with a child under the age of 14; Count 5- Lewdness with a child under the age of 14; Count 6- Sexual Assault with a minor under fourteen years of age; Count 7- Lewdness with a child under the age of 14; Count 8- Sexual Assault with a minor under fourteen years of age; Count 9- Sexual Assault with a minor under fourteen years of age; Count 10- Sexual Assault with a minor under fourteen years of age; Count 11- Sexual Assault with a minor under fourteen years of age; Count 12- Lewdness with a child under the age of 14; Count 13- Sexual Assault with a minor under fourteen years of age; Count 14- Sexual Assault with a minor under fourteen years of age; Count 15- Child abuse, neglect, or endangerment; Count 16- Child abuse, neglect, or endangerment; Count 17- Child abuse, neglect, or

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On April 15, 2014, Mr. Harris was found guilty of: Eleven counts of Sexual Assault with a Minor Under Fourteen Years of Age; five counts of Lewdness with a Child Under the Age of 14; six counts of Sexual Assault with a Minor Under Sixteen Years of Age; four counts of Sexual Assault; four counts of First Degree Kidnapping; one count of Administration of a Drug to Aid in the Commission of a Crime; one count of Coercion; one count of Battery with Intent to Commit Sexual Assault; one count of Child Abuse, Neglect, or Endangerment; one count of

Pandering; and one count of Living from the Earnings of a Prostitute. Mr. Harris was found not guilty of two counts of Sexual Assault with a Minor Under Sixteen Years of Age; one count of Sexual Assault; one count of Administration of a Drug to Aid in the Commission of a Crime; four counts of Child Abuse, Neglect, or Endangerment; and one count of Battery by Strangulation.

Mr. Harris filed a Motion for a new trial on April 25, 2014 (A.A. Vol. 7 p. 816-822). The district court denied the motion for a new trial on June 13, 2014 (A.A. Vol. 8 p. 954-964).

Mr. Harris was sentenced on October 27, 2015. Mr. Harris' total aggregate sentence is life with the possibility of parole after 918 months (A.A. Vol. 22 p. 3340-3343). Mr. Harris' Judgment of Conviction was entered on November 2, 2015 (A.A. Vol. 7 p. 843-848). A timely Notice of Appeal was filed on October 27, 2015.

STATEMENT OF FACTS

A. FACTS ADDUCED AT TRIAL

Ms. T.D. has five children, V.D. (A.A. Vol. 11 p. 1466), M.D. (A.A. Vol. 11 p.1465), S.D. (A.A. Vol. 11 p.1464), and Tah. D. (A.A. Vol. 11 p. 1459), and Taq. D (A.A. Vol. 11 p.1458). In 2004, T.D. separated from the father of the children (A.A. Vol. 11 p.1522). Apparently, the children had received no formal education

(A.A. Vol. 11 p.1522).

T.D. was working as a cocktail waitress in Monroe, Louisiana when she first met Mr. Harris in July of 2004 (A.A. Vol. 11 p. 1524-1525, 1531). When Mr. Harris left to live in Las Vegas, the two still kept in touch (A.A. Vol. 11 p.1527). T.D. eventually came to Las Vegas, in December of 2004, leaving her children behind (A.A. Vol. 11 p.1528). T.D. met Mr. Harris' girlfriend, Lealer Ann Cooks (A.A. Vol. 11 p.1529). Eventually, Mr. Harris' brother went to pick up T.D.'s children from Louisiana to bring them to Las Vegas (A.A. Vol. 11 p. 1529-1530). T.D. obtained employment at Larry's Villa (A.A. Vol. 11 p.1531). T.D. then began working at Jason's deli (A.A. Vol. 11 p.1532). When the children arrived, they stayed at a residence with Ms. Anne (Ms. Anne is Lealer Ann Cooks). Mr. Harris worked for sprint/century link (A.A. Vol. 11 p.1534).

When T.D. arrived in Las Vegas, she was two months pregnant and decided to put the baby up for adoption (A.A. Vol. 11 p.1535). The adoption agency moved T.D. to Orem, Utah in May of 2005 (A.A. Vol. 11 p.1536). Prior to moving to Utah, V.D. accused Mr. Harris of fondling her (A.A. Vol. 11 p. 1536). T.D. did not believe V.D. because Mr. Harris got along with the children well.

V.D. stated that she made the sexual assault allegation because she was mad as a result of an argument she had with Mr. Harris (A.A. Vol. 11 p. 1537). After

moving to Utah, the adoption agency provided a place to live and prenatal care (A.A. Vol. 11 p. 1538). In December, T.D. returned to visit Mr. Harris for his birthday (A.A. Vol. 11 p. 1539). T.D. left the children with a neighbor in Utah (A.A. Vol. 11 p. 1539). Child protective services then removed the children based on T.D.'s abandonment (A.A. Vol. 11 p. 1540). Eventually, T.D. got her children back (A.A. Vol. 11 p. 1541). T.D. moved back to Las Vegas because she believed she could make more money working in a casino than in the hospital in Utah (A.A. Vol. 11 p. 1543). When the family returned from Utah, the four youngest children were taken to the Blankenship residence (A.A. Vol. 11 p. 1545). Whereas, V.D. was not permitted to live at that residence (A.A. Vol. 11 p. 1546). V.D. and T.D. stayed with Mr. Harris' mother, Dorothy, for approximately three weeks (A.A. Vol. 11 p. 1547). The youngest four children were enrolled in the Clark County School District (A.A. Vol. 11 p. 1547).

After returning from Utah, T.D., V.D. and Mr. Harris all went for a drive in Mr. Harris' car (A.A. Vol. 11 p. 1548). V.D. allegedly consumed alcohol given to her by Mr. Harris (A.A. Vol. 11 p. 1550). Allegedly, Mr. Harris had sexual intercourse with V.D. in the vehicle, in T.D.'s presence (A.A. Vol. 11 p. 1551). This occurred in approximately August of 2007, when V.D. was 14 years old (A.A. Vol. 11 p. 1552). During this time period, T.D. claimed she was committing

acts or prostitution (A.A. Vol. 11 p. 1554). T.D. claimed she began a life of prostitution at Mr. Harris' insistence (A.A. Vol. 11 p. 1554).

According to T.D., Mr. Harris would physically assault her (A.A. Vol. 11 p. 1556). T.D. claimed that she had to provide the money to Mr. Harris or she would be beaten. On one occasion, Mr. Harris sodomized her (A.A. Vol. 11 p. 1558). T.D. claimed she was forced to have sex with V.D. as Mr. Harris watched (A.A. Vol. 11 p. 1559-1560). According to T.D., she complied because Mr. Harris threatened to kill her and her family (A.A. Vol. 11 p. 1560). On another occasion, T.D. claims she was forced to perform oral sex on V.D. while V.D. performed oral sex on T.D. (A.A. Vol. 11 p. 1561). T.D. was ingesting cocaine, pills and drinking alcohol during the relevant time period (A.A. Vol. 11 p. 1562).

Sometime in the summer of 2008, possibly 2009, V.D. and T.D. moved into the Blankenship residence with the other children (A.A. Vol. 11 p. 1564). T.D. lived at the Blankenship residence until approximately August of 2010 (A.A. Vol. 11 p. 1566).

Ms. Anne received temporary legal custody of Tah. D. and Taq. D. (A.A. Vol. 11 p. 1566). When T.D. moved out she brought V.D., M.D., and S.D. with her (A.A. Vol. 11 p. 1567). Tah. D. and Taq. D. stayed at the Blankenship residence (A.A. Vol. 11 p. 1567). T.D. continued to have a consensual sexual

relationship with Mr. Harris after she moved out of the home in the summer of 2010 (A.A. Vol. 11 p. 1567).

In October of 2011, T.D., M.D., V.D. and S.D. moved into a residence in Henderson, Nevada (A.A. Vol. 11 p. 1569-1570). At the end of the 2011, or early 2012, V.D. made allegations to the police about Mr. Harris (A.A. Vol. 11 p. 1571). T.D. spoke to the Henderson police but claimed that she "left out a few things" (A.A. Vol. 11 p. 1573).

According to T.D., she, Ms. Anne and Mr. Harris had sex at one time together (A.A. Vol. 11 p. 1575). On one occasion, at Ms. Anne's house, T.D. claimed that she was strangled by Mr. Harris with a wire cord (A.A. Vol. 11 p. 1575-1576). During one alleged beating, T.D. explained that Mr. Harris threw "ugly work boots" at her like she was "George Bush or something" (A.A. Vol. 11 p. 1577). T.D. remembered that child protective services had received a complaint about the treatment of her children in Louisiana (A.A. Vol. 11 p. 1598-1600). At one point, child protective services removed the children from T.D.'s custody for six months while they were in Utah (A.A. Vol. 12 p. 1628). T.D. got the children back after completing a parenting class in August of 2006 (A.A. Vol. 12 p. 1628).

On one occasions, T.D. told the police she was forced by Mr. Harris to be a prostitute in 2007. Whereas, she told the jury that Mr. Harris forced her to be a

prostitute in 2005 (A.A. Vol. 12 p. 1631-1640). T.D. admitted Mr. Harris was strict on the children's regarding education (A.A. Vol. 12 p. 1648). T.D. even admitted that while under the care of Mr. Harris in his home and without her presence, her four youngest children were doing better in school than they had in their entire life (A.A. Vol. 12 p. 1648-1649). T.D. described Ms. Anne as a wonderful caretaker for her two youngest children (A.A. Vol. 12 p. 1723).

In a recorded interview, T.D. informed the police that she had never seen Mr. Harris abuse the children (A.A. Vol. 12 p. 1641). V.D. had butted heads with both Mr. Harris and Ms. Anne because of her disrespectful and abusive behavior (1658).

T.D. informed police that Mr. Harris never took money from her against her will (A.A. Vol. 12 p. 1721). In fact, T.D. told police that Mr. Harris never forced her to do "anything" (A.A. Vol. 12 p. 1722).[1]

V.D. received psychotherapy and prescription medication for therapeutic purposes in 2010 (A.A. Vol. 12 p. 1722). T.D. also recalled an incident where V.D. became angry at Mr. Harris because she blamed him for her dog going missing (A.A. Vol. 12 p. 1723). In fact, the dog escaped when utility workers were

[1] T.D. was arrested for prostitution in September/October of 2009 (A.A. Vol. 12 p. 1716).

at the residence (A.A. Vol. 12 p. 1723). T.D. previously told police that V.D. had attempted to force her way into the bedroom when she was involved in sexual relations with Mr. Harris (A.A. Vol. 12 p. 1726). T.D. recalled that it made Mr. Harris feel very uncomfortable when V.D. attempted to come into the room (A.A. Vol. 12 p. 1727-1728). This caused T.D. to be so upset with V.D. that she refused to talk to her for a period of time (A.A. Vol. 12 p. 1727-1728). V.D. previously admitted she hated Mr. Harris and that she was going to "get Mr. Harris" (A.A. Vol. 12 p. 1728). T.D. admitted that it made her very sad that Mr. Harris chose to have a relationship with Ms. Anne as opposed to herself. This also made V.D. angry (A.A. Vol. 12 p. 1736).

At the time of her trial testimony, V.D. was 21 years old (born July 21, 1992) (A.A. Vol. 13 p. 1880). V.D. was approximately eleven or twelve years old at the time she arrived in Las Vegas from Louisiana (1884). In January of 2005, V.D. was sleeping in Mr. Harris' apartment (A.A. Vol. 13 p. 1887). V.D. claims that Mr. Harris forced her to feel his penis (A.A. Vol. 13 p. 1888-1889). Then, Mr. Harris allegedly forced his finger into V.D.'s vagina (A.A. Vol. 13 p. 1890). Mr. Harris then allegedly attempted to place his penis into her vagina (A.A. Vol. 13 p. 1890-1891). V.D. was then allegedly told not to tell anyone, or she would be beaten up (A.A. Vol. 13 p. 1891).

Before the sexual assault allegation, V.D. had only witnessed physical abuse to herself and S.D. (A.A. Vol. 13 p. 1892). V.D. claimed that Mr. Harris would physically abuse her and her siblings (A.A. Vol. 13 p. 1891-1892). V.D. supposedly informed Ms. Anne about the sexual assault allegation (A.A. Vol. 13 p. 1893). Neither Ms. Anne nor Mr. Harris' mother Dorothy, believed her allegations (A.A. Vol. 13 p. 1894). Apparently, V.D.'s own mother, T.D., did not even believe her (A.A. Vol. 13 p. 1895).

Thereafter, V.D. moved to Utah where she lived between 2005 and 2007 (A.A. Vol. 13 p. 1896). In August of 2007, V.D. and the family moved back to Las Vegas (A.A. Vol. 13 p. 1898). V.D. was fifteen years old when she moved back to Las Vegas (A.A. Vol. 13 p. 1899).

On August 24, 2007, V.D. and her mother went with Mr. Harris and purchased alcohol. Later, in the car, Mr. Harris allegedly had sexual intercourse with V.D in the presence of her own mother (A.A. Vol. 13 p. 1904-1907). On another occasion, V.D claimed she had sexual intercourse with Mr. Harris at the siegel suites (A.A. Vol. 13 p. 1909). V.D. claimed Mr. Harris also digitally penetrated her at the siegel suites (A.A. Vol. 13 p. 1910). Additionally, V.D. claimed he placed a dildo in her vagina during this incident (A.A. Vol. 13 p. 1910). V.D. claimed that Mr. Harris instructed her and her mother to play with a

dildo (A.A. Vol. 13 p. 1911-1912). The incident with her mother occurred at the siegel suites on two occasions (A.A. Vol. 13 p. 1913).

Between 2007 and the summer of 2008, V.D. lived at an address on Walnut Street (A.A. Vol. 13 p. 1914). At the Walnut residence, V.D. claimed that Mr. Harris would place his penis in her vagina and utilized the dildo on several occasions (A.A. Vol. 13 p. 1916-1918). On one occasion, V.D. claimed that Mr. Harris and her had sexual intercourse at the Blankenship residence (A.A. Vol. 13 p. 1923-1924).

V.D. claimed that she reported these incidents to two teachers at Canyon Springs High School (A.A. Vol. 13 p. 1925) (the teachers were Coach Coup and Ms. Bywaters) (A.A. Vol. 13 p. 1925).

At the St. Andrews Apartment, Mr. Harris allegedly had sexual intercourse with V.D. (A.A. Vol. 13 p. 1929). In October of 2011, V.D. moved to a residence in Henderson (A.A. Vol. 13 p. 1931). V.D. only stayed in the apt for a month or two (A.A. Vol. 13 p. 1931).

V.D. complained she was beaten by Mr. Harris on multiple occasions (A.A. Vol. 14 p. 1944). Additionally, V.D. claimed she heard Mr. Harris hit her mother (A.A. Vol. 14 p. 1943-1944). Allegedly, Mr. Harris would beat V.D. with a belt, punch her or slap her (A.A. Vol. 14 p. 1944). V.D. claimed that Mr. Harris would

physically beat M.D. (A.A. Vol. 14 p. 1946). V.D. claimed that Mr. Harris would physically beat S.D. (A.A. Vol. 14 p. 1949). According to V.D., the beating of the kids occurred on a regular basis (A.A. Vol. 14 p. 1949). Mr. Harris allegedly was physically abusive to Taq. D. And Tah. D., according to V.D. (A.A. Vol. 14 p. 1955). V.D. testified that many of these beatings occurred during 2009 (A.A. Vol. 14 p. 1956).

V.D. claimed she observed Mr. Harris get under the covers with Tah. D. and then heard a wet noise (A.A. Vol. 14 p. 1957). V.D. explained that she informed Ms. Anne's daughter, Shkira, about this incident (A.A. Vol. 14 p. 1958)

V.D. informed Ms. Rose that she was being abused by Mr. Harris in approximately November or December of 2011 (A.A. Vol. 14 p. 1963, 1966). Ms. Rose then took V.D. to the Henderson Police Department (A.A. Vol. 14 p. 1965). After Henderson Police became involved, Mr. Harris never abused V.D. again (A.A. Vol. 14 p. 1967).

V.D. claimed she was first sexually assaulted in January of 2005. However, her testimony from the preliminary hearing indicated she was unsure of the date (A.A. Vol. 14 p. 2003-2006). V.D. admitted that it made her angry that she and her siblings ended up in foster care as a result of her mother leaving them to visit Mr. Harris (A.A. Vol. 14 p. 2015-2016).

V.D. claimed she informed a therapist in Utah as to the nature of Mr. Harris' prior assaults (A.A. Vol. 14 p. 2019). V.D. admitted that it made her angry that she and her family came back to Las Vegas from Utah (A.A. Vol. 14 p. 2029). V.D. admitted that her grades greatly improved while living with Mr. Harris and Ms. Anne in the Blankenship residence. In fact, her grades were F's before moving into the Blankenship residence, and D's and F's after leaving the Blankenship residence (A.A. Vol. 14 p. 2044-2047).

At one point, V.D. claimed she ran away from home (A.A. Vol. 14 p. 2064-2065). V.D. was proscribed Zoloft by a psychiatrist in 2009-2010 (A.A. Vol. 14 p. 2084-2085). According to V.D. she informed the psychiatrist about witnessing physical abuse but made no mention of sexual abuse (2086-2087). V.D. admitted writing a letter to Child Protective Services stating she wanted to stay in the house with Mr. Harris and she loved Mr. Harris (A.A. Vol. 14 p. 2092). V.D. claimed she was threatened into writing the letter (A.A. Vol. 14 p. 2092). In the letter, V.D. also stated that she loved her school and was finally obtaining good grades (A.A. Vol. 14 p. 2095).

V.D. denied ever trying to enter the bedroom when T.D. and Mr. Harris were having sex (A.A. Vol. 14 p. 2100). In fact, V.D. testified that her mother would be a liar if she told the jury that occurred (A.A. Vol. 14 p. 2100).

V.D. testified at the preliminary hearing that Mr. Harris had told her he had sex with his own daughter (A.A. Vol. 14 p. 2103-2104). During the preliminary hearing testimony, Mr. Harris' daughter was in the courtroom and became very angry about this testimony (A.A. Vol. 14 p. 2104).

When V.D. said she told Coach Coup and Ms. Bywaters about the abuse, she was specific that it was physical and sexual abuse (A.A. Vol. 14 p. 2124-2125). V.D. admitted that she told her mother she was "going to get Fred" (A.A. Vol. 14 p. 2128).

M.D. was born in September of 1993 and was twenty years old at the time of her trial testimony (A.A. Vol. 15 p. 2156). M.D. is V.D.'s younger sister (A.A. Vol. 15 p. 2156). M.D. did not begin attending school until 2005 (A.A. Vol. 15 p. 2159). M.D. testified that "I guess he would beat us" referring to Mr. Harris (A.A. Vol. 15 p. 2182). M.D. claimed she was beaten with a belt because Mr. Harris believed she had stolen candy (A.A. Vol. 15 p. 2183). M.D. also claimed that Mr. Harris hit and choked her on one occasion (A.A. Vol. 15 p. 2187). M.D. claimed she observed Mr. Harris punch S.D. (A.A. Vol. 15 p. 2189-2190). M.D. also testified she observed Mr. Harris physically abuse Tah. D. and Taq. D. (A.A. Vol. 15 p. 2156 2193). According to M.D., Mr. Harris had used progressive discipline. First, the child would be made to do pushups, then for further misbehavior the

child would be grounded, and finally physically punished with a belt (A.A. Vol. 15 p. 2217-2218). M.D. told police that Mr. Harris had only spanked her and never done anything else to her (A.A. Vol. 15 p. 2236). M.D. also told Henderson police that Mr. Harris was nice to her and never touched her inappropriately (A.A. Vol. 15 p. 2236). M.D. also told police that Mr. Harris was nice to V.D. (A.A. Vol. 15 p. 2238).

M.D.'s grades, while living with Mr. Harris at the Blankenship residence was approximately 2.2 and fell to 0.67 after leaving Mr. Harris' care (A.A. Vol. 15 p. 2253-2254). M.D. then dropped out of school completely (A.A. Vol. 15 p. 2255). M.D. previously testified that V.D. ran the household (A.A. Vol. 15 p. 2263).

At the time of her trial testimony, Taq. D. was thirteen years old (A.A. Vol. 16 p. 2407) (DOB 10/3/2000). At trial, Taq. D. lived with her mother, M.D., and Tah. D. (A.A. Vol. 16 p. 2408-2409). Taq. D. testified that she had fallen asleep right outside of the courtroom and was tired while testifying (A.A. Vol. 16 p. 2413). Taq. D. began living in the Blankenship residence in 2007 (A.A. Vol. 16 p. 2414). Taq. D. testified that Mr. Harris would give her a "whooping" when she would get in trouble (A.A. Vol. 16 p. 2424). Allegedly, Mr. Harris would use a belt during the "whoopings" (A.A. Vol. 16 p. 2425). Taq. D. observed Mr. Harris

allegedly punch S.D. (A.A. Vol. 16 p. 2426). Allegedly, Mr. Harris choked M.D. according to Taq. D. (A.A. Vol. 16 p. 2428). Taq. D. testified she also observed Tah. D. receive a "whooping" for receiving an RPC from school (A.A. Vol. 16 p. 2430). Taq. D. claimed Mr. Harris beat her mother with a belt (A.A. Vol. 16 p. 2433). Taq. D. claims that Mr. Harris and Tah. D. were in the laundry room and she saw Mr. Harris' hand over Tah. D.'s hand. Taq. D. also claimed she heard the sound of a belt buckle (A.A. Vol. 16 p. 2460-2463).

Taq. D. claimed she called CPS and was then removed from the Blankenship residence to child haven (A.A. Vol. 16 p. 2475). Thereafter, Taq. D. moved in with a foster mother for approximately one year until she moved back in with her mother (A.A. Vol. 16 p. 2475). Taq. D. recalled S.D. receiving a "whooping" because he was expelled from school for beating up a disabled child (A.A. Vol. 16 p. 2482-2483). Taq. D. also got in trouble for stealing a bracelet from another student at school (A.A. Vol. 16 p. 2485-2486). Taq. D. was questioned as to whether the bracelet indicated the child was a diabetic (A.A. Vol. 16 p. 2486).

Having relayed all of the alleged abuse during direct examination, Taq. D. was questioned as to why she forgot an incident where Mr. Harris allegedly placed a knife against her throat (A.A. Vol. 16 p. 2504-2505). Taq. D. claimed she told a

counselor, Ms. House about the allegations of abuse (A.A. Vol. 16 p. 2505). Taq. D. claimed she told counselor House that Mr. Harris held a knife to her throat and threatened to kill her (A.A. Vol. 16 p. 2506). Taq. D. also claimed she told Ms. House about Mr. Harris beating S.D. (A.A. Vol. 16 p. 2507).

Tah. D. was born October 9, 1999 and was 14 years old at the time of her trial testimony (A.A. Vol. 16 p. 2570).

Ms. Theresa Tibbs is a senior service family specialist in the child sex abuse unit (A.A. Vol. 16 p. 2351). In December of 2011, Ms. Tibbs became involved in allegations surrounding alleged abuse of Tah. D. and Taq. D. (A.A. Vol. 16 p. 2361). Ms. Tibbs made a home visit to the Blankenship residence (A.A. Vol. 16 p. 2363). Ms. Tibbs noted that Mr. Harris demeanor was cooperative (A.A. Vol. 16 p. 2366). Neither Tah. D. or Taq. D. told Ms. Tibbs they were fearful of anyone in the home (A.A. Vol. 16 p. 2372). Tah. D. told Ms. Tibbs that she was happy at school (A.A. Vol. 16 p. 2372). At the request of Ms. Tibbs, Mr. Harris agreed to voluntarily leave the house (A.A. Vol. 16 p. 2373). Mr. Harris did this in order to save the children from being placed in child haven (A.A. Vol. 16 p. 2374).

In January of 2012, after the investigation was completed, the case was closed (A.A. Vol. 16 p. 2375). Ms. Tibbs indicated that the biological mother, T.D., was difficult to locate (A.A. Vol. 16 p. 2386). Ms. Tibbs explained that poor

grades in school can be an indication of abuse (A.A. Vol. 16 p. 2392). Ms. Tibbs asked the girls if they wanted to live with their mother and they stated they wanted to stay where they were and only visit their mother (A.A. Vol. 16 p. 2393). The children described feeling safe at the home with Mr. Harris (A.A. Vol. 16 p. 2393).

Ms. Tibbs explained that there had been a previous investigation regarding physical abuse that had bene unsubstantiated (A.A. Vol. 16 p. 2393-2394). Ms. Tibbs noted no physical evidence of abuse (A.A. Vol. 16 p. 2394). On a subsequent visit, Ms. Tibbs noted that Tah. D. complained that Mr. Harris had been gone and she wanted him to come back (A.A. Vol. 16 p. 2395). Ms. Tibbs was told by both Tah. D. and Taq. D. that they did not believe the previous allegations made by V.D. (A.A. Vol. 16 p. 2396).

Dr. Anita Gondy is an OBGYN (A.A. Vol. 15 p. 2284). On June 27, 2012, Dr. Gondy examined Tah. D. in the presence of Ms. Leahler Cook.[2] Over the defense objection, Dr. Gondy was permitted to state that Ms. Cook brought Tah. D. in for examination based upon suspected sexual abuse (A.A. Vol. 15 p. 2288). An examination revealed the presence of HPV virus (a sexually transmitted

[2] Dr. Gondy mistakenly believed Ms. Cook was Tah. D's grandmother (A.A. Vol. 15 p. 2286).

disease) (A.A. Vol. 15 p. 2290). During the examination, Tah. D. did not speak (A.A. Vol. 15 p. 2296-2297).

The defense called Shrday Green. Ms. Green is the stepdaughter of Mr. Harris. Ms. Green lives in Houston, Texas and worked for Wells Fargo (A.A. Vol. 16 p. 2332). At the time of her trial testimony, Ms. Green was twenty-six years old and had been raised by Mr. Harris since the age of two (A.A. Vol. 16 p. 2333). Occasionally, Ms. Green explained that she and her brothers were disciplined with spankings or a belt (A.A. Vol. 16 p. 2337).

At the preliminary hearing, Ms. Green heard V.D. testify that Mr. Harris had confessed to raping Ms. Green (A.A. Vol. 16 p. 2339-2340). Ms. Green stood up from her seat in an emotional outburst stating that V.D. was "a lying bitch" and that she would kill her (A.A. Vol. 16 p. 2340-2341). Ms. Green was then held in contempt by the justice of the Peace (A.A. Vol. 16 p. 2341). Ms. Green explained that V.D.'s lies about Mr. Harris raping her sent her into an emotional outburst (A.A. Vol. 16 p. 2343). In fact, Ms. Green testified that Mr. Harris was a very protective father figure who had protected her throughout her life (A.A. Vol. 16 p. 2349).

According to Tah. D. she would be required to do push-ups if she did not complete her chores, or if she was in trouble at school (A.A. Vol. 17 p. 2604).

Tah. D. claimed that she would receive a "whooping" (beaten with a belt) if she was suspended from school (A.A. Vol. 17 p. 2605).

At the Blankenship residence, Tah. D. recalled being woken up by Mr. Harris, and taken to the laundry room (A.A. Vol. 17 p. 2632). Tah. D. claimed she was digitally penetrated by Mr. Harris (A.A. Vol. 17 p. 2634). Tah. D. stated was sexually molested by Mr. Harris on other occasions (A.A. Vol. 17 p. 2627). For instance, Tah. D. claims she was sexually assaulted in the bathroom (A.A. Vol. 17 p. 2639). Tah. D. also claimed she was sexually assaulted in the garage (A.A. Vol. 17 p. 2640-2642). The sexual assaults occurred on more than one occasion in the garage (A.A. Vol. 17 p. 2647). On one occasion, Mr. Harris allegedly placed his penis in her mouth (A.A. Vol. 17 p. 2649). Mr. Harris also allegedly touched her breasts (A.A. Vol. 17 p. 2649).

Tah. D. admitted she denied that Mr. Harris had ever hurt her when she talked to Henderson detectives (A.A. Vol. 17 p. 2658). Tah. D. also told Henderson detectives that Mr. Harris did not hurt her siblings (A.A. Vol. 17 p. 2658). According to Tah. D., the reason she failed to tell Henderson detectives about the abuse was because she "... wanted them to get up out my face" (A.A. Vol. 17 p. 2658-2659). Mr Harris was not present in the room when Tah. D. was talking to detectives (A.A. Vol. 17 p. 2659).

Tah. D. also admitted she told child protective services that Mr. Harris was not harming her (A.A. Vol. 17 p. 2660). In fact, Tah. D. told child protective services she enjoyed living with Mr. Harris (A.A. Vol. 17 p. 2660-2661).

Tah. D. testified that Mr. Harris strongly encouraged her to achieve good grades (A.A. Vol. 17 p. 2715). Additionally, Tah. D. admitted she was not permitted to skip school when she was living with Mr. Harris (A.A. Vol. 17 p. 2716). Tah. D. did not miss much school while living with Mr. Harris, but once she moved back in with her mother, she began missing school regularly (A.A. Vol. 17 p. 2716).

Tah. D. recalled telling Henderson Police that Mr. Harris ensured the welfare of her and her siblings even after Mr. Harris moved out of the house (A.A. Vol. 17 p. 2730). Tah. D. described Mr. Harris as a good man (A.A. Vol. 17 p. 2730). Tah. D. also told police she was spanked on one occasion because she had stolen something from the store (A.A. Vol. 17 p. 2732). Tah. D. also got in trouble for at least two fights in school (A.A. Vol. 17 p. 2732-2733). In a subsequent interview, Tah. D. stated she felt safe in the home (A.A. Vol. 17 p. 2734).

Curiously, Tah. D. informed the jury she had not been sexually assaulted when she had first talked to Henderson detectives. However, on cross-examination she admitted she was twelve years old when she talked to Henderson detectives,

but eleven years old when she claims she was sexually assaulted (A.A. Vol. 17 p. 2739). Additionally, when Tah. D. first alleged she was sexually assaulted, she told CPS that the reason she wanted to be removed from the house was because she was getting in trouble. Only after complaining that she was getting in trouble did she allege that she had been sexually assaulted (A.A. Vol. 17 p. 2739-2740).

Detective Nicholas Madsen agreed there were significant differences in the two different statements given by T.D. (A.A. Vol. 19 p. 2946). There were also significant differences between statements given by both Tah. D. and M.D. (A.A. Vol. 19 p. 2946). For example, there were interviews claiming Mr. Harris had raped a child and that same child had previously told law enforcement and CPS that Mr. Harris was a good care giver (A.A. Vol. 18 p. 2926-2927).

S.D. was nineteen years old at the time of his testimony (born January 21, 1995). S.D. admitted he was in special education classes for math and English (A.A. Vol. 19 p. 2970). Since graduating high school, S.D. testified that he had been "... going to the gym, working out, focused on my reading, my music, my training, and my acknowledgments" (A.A. Vol. 19 p. 2971).

S.D. claimed he was choked into unconsciousness with a belt after getting in trouble in school at the hands of Mr. Harris (A.A. Vol. 19 p. 2975). S.D. also claimed that Mr. Harris punched him in chest and face while living at the

Blankenship residence. S.D. also claimed he witnessed his sisters being physically assaulted by Mr. Harris (A.A. Vol. 19 p. 2976). In ninth and tenth grade, S.D. received good grades including A's, B's and a couple of C's (A.A. Vol. 19 p. 2983). However, later in high school S.D. began receiving mostly F's (A.A. Vol. 19 p. 2983). Mr. Harris had encouraged S.D. to study hard and excel at school (A.A. Vol. 19 p. 2984-2985).

The defense called Hernandez Cooper, also known and Coach Coop (A.A. Vol. 19 p. 2992). Coach Coop is the head football coach at Canyon Springs High School and the psychological coordinator for the community schools of Southern Nevada (A.A. Vol. 19 p. 2992). Coach Coop knew both S.D. and V.D. (A.A. Vol. 19 p. 2993). Coach Coop did not recall ever having any type of conversation with S.D. regarding injuries he had suffered (A.A. Vol. 19 p. 2995). Nor did coach Coop ever notice any kind of injuries on S.D. (A.A. Vol. 19 p. 2995). Coach Coop explained he is classified as a mandatory reporter, meaning he has to report to counselors or child protective services any allegations made by a child that they are being abused (A.A. Vol. 19 p. 3000). On one occasion, Coach Coop had to mandatorily report a students allegations (A.A. Vol. 19 p. 3001). Coach Coop testified he was never informed by V.D. that she was sexually abused at home, otherwise, he would have immediately reported the allegation (A.A. Vol. 19 p.

3001). Coach Coop also testified he never noticed any marks on M.D. (A.A. Vol. 19 p. 3002).

Ms. Kamilah Bywaters was a special education teacher at Canyon Springs High School (A.A. Vol. 15 p. 2142-2143). V.D. was one of her students in 2007 (A.A. Vol. 15 p. 2143, 2146). Ms. Bywaters testified that she is a mandatory reporter which requires her to report any incident of abuse (A.A. Vol. 15 p. 2145). Ms. Bywaters also worked with Coach Hernandez Cooper (A.A. Vol. 15 p. 2145). Ms. Bywaters did not report any abuse to CPS because V.D. never made any type of complaint that she was physically abused (A.A. Vol. 15 p. 2145-2146).

On October 24, 2009, Officer Michael Loving responded to Ballys hotel and casino in reference to a domestic violence call involving T.D. (A.A. Vol. 19 p. 3007). T.D. claimed that Mr. Harris had slapped her repeatedly in the face (A.A. Vol. 19 p. 3010). Officers noticed no redness, bumps or bruises on Ms. Duke's face (A.A. Vol. 19 p. 3014).

Sha'karia Bailey is the daughter of Lealer Anne Cooks (A.A. Vol. 19 p. 3023). Ms. Bailey lived with Mr. Harris who was a father figure to her (A.A. Vol. 19 p. 3025). Eventually, the Duke family moved in with Mr. Harris and Ms. Anne (A.A. Vol. 19 p. 3026). Ms. Bailey was close in age to V.D. (A.A. Vol. 19 p. 3027). Ms. Bailey recalled V.D. stealing and then blaming Tah. D. and Taq. D.

(3033). On one occasion, Ms. Bailey over heard V.D. instruct to Tah. D. to inform Ms. Bailey that Mr. Harris had inappropriately touched her (3042). Ms. Bailey confronted Tah. D. who denied that any inappropriate touching had occurred (3042-3043). Tah. D. admitted that V.D. told her to make up the allegation (A.A. Vol. 19 p. 3043). On one occasion, V.D. stated she hated Mr. Harris and she was "going to make him pay" (A.A. Vol. 19 p. 3046-3047). Apparently, V.D. was angry with her mother repeatedly leaving the children and going to meet Mr. Harris (A.A. Vol. 19 p. 3047).

Ms. Bailey described V.D. as a compulsive liar (A.A. Vol. 19 p. 3049). According to the defense investigator, Dr. Gondy informed him that she did not know why she had concluded that Tah. D. had possibly been sexually abused (A.A. Vol. 19 p. 3109). This contradicted Dr. Gondy's testimony that she found possible sexual abuse based upon the STD (A.A. Vol. 19 p. 3109).

Ms. Kenyoni House was employed as a school counselor at HP Fitzgerald (A.A. Vol. 20 p. 3144). Ms. House is a mandatory reporter based on her status as a school counselor (3144). Both Taq. D. and Tah. D. were students at the school (A.A. Vol. 20 p. 3145). Ms. House testified that Taq. D. never informed her that she or her siblings were being abused (A.A. Vol. 20 p. 3146-3147). Nor did Ms. House notice any bruises on either one of the girls (A.A. Vol. 20 p. 3147). The

defense rested.

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B. FACTS ADDUCED FROM THE NOVEMBER 24, 2014 EVIDENTIARY HEARING PERTAINING TO MR. HARRIS' MOTION FOR A NEW TRIAL

Kathleen Smith is employed in the Regional Justice Center and was a deliberating juror in the case (A.A. Vol. 23 p. 3294). While Ms. Smith was at a local Wal-mart, she noticed Mrs. Harris (the defendant's mother) and said hello (A.A. Vol. 23 p. 3294). Ms. Smith recognized the defendant's mother from observing her in the courtroom (A.A. Vol. 23 p. 3295). Ms. Smith explained that on or about the third day of deliberation, a female juror (Ms. Louis) began crying and talking about abuse she had suffered in the passed (A.A. Vol. 23 p. 3297-3299). Ms. Smith recalled the juror discussing her abuse, as well as possible sexual abuse (A.A. Vol. 23 p. 3300). In fact, Ms. Smith actually wrote on paper that a juror had been discussing being a victim of sexual abuse (A.A. Vol. 23 p. 3301). Ms. Smith had been reluctant to vote guilty.

Ms. Yvonne Louis was also a juror (A.A. Vol. 23 p. 3318). Ms. Louis' mother had attacked her on previous occasions (A.A. Vol. 23 p. 3319). Ms. Louis denied being a victim of sexual abuse (A.A. Vol. 23 p. 3320).

Robert Bell was also a juror (A.A. Vol. 23 p. 3330). Mr. Bell stated that he

was indirectly "friends with Ms. Louis" (A.A. Vol. 23 p. 3335). Mr. Bell explained:

> "Actually, I was made aware of that sometime in the middle of the trial. I played music with a friend of mine and the drummer made mention of the fact that his friend also happened to be on the jury. Indirectly I kind of introduced myself while we were on the jury, but I never met her before". (A.A. Vol. 23 p. 3336).

Mr. Bell admitted he had told a friend he was on a criminal jury. When asked how Mr. Bell's friend knew that Ms. Louis was also on the jury, he stated that he snapped a photo of himself with his juror badge (A.A. Vol. 23 p. 3336). He posted the picture of himself with "the blue juror badge" on facebook (A.A. Vol. 23 p. 3336-3337).

The court then asked Mr. Bell if he took the picture of himself with the juror badge before or after the jury was impaneled. Mr. Bell stated this occurred prior to the jury being impaneled (A.A. Vol. 23 p. 3337). The district court then reminded Mr. Bell that the blue badge is not handed out until after the jury is impaneled (A.A. Vol. 23 p. 3337). The court then stated, "so when I told you don't do anything on facebook, you ignored that and posted a picture of yourself on facebook" (A.A. Vol. 23 p. 3337). The Court further stated, "do you know in my admonition I specifically say don't go on facebook, right?" Juror Bell stated, "yes" (A.A. Vol. 23 p. 3337-3338). The court then stated, "yeah. He has a picture of

himself with a blue badge, it identifies him as a department 12 juror." The court then explained,"so it would have after he was impaneled, and after he had been admonished several times not to go on facebook" (A.A. Vol. 23 p. 3339).

Mr. Bell's friend, Clay Heximier observed the picture on facebook and made contact with Mr. Bell (A.A. Vol. 23 p. 3340). Mr. Bell could not explain how he would know that Ms. Louis was also on the same jury (A.A. Vol. 23 p. 3341). Mr. Bell spoke to Clay about his jury service and Ms. Louis being on the jury, a couple weeks into the trial (A.A. Vol. 23 p. 3341). After the trial, Mr. Bell continued to communicate with Ms. Louis (A.A. Vol. 23 p. 3342). In fact, Mr. Bell communicated with Ms. Louis just days prior to his evidentiary hearing testimony (A.A. Vol. 23 p. 3342).

ARGUMENT

I. MR. HARRIS WAS DENIED THE RIGHT TO CONFRONTATION BASED ON THE DISTRICT COURT'S PRECLUSION OF QUESTIONING REGARDING BIAS AND MOTIVE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During trial, defense counsel provided the court with an offer of proof as to intended cross-examination of T.D. regarding two books she had authored. Defense counsel requested permission to confront T.D. over a book she had authored entitled "Secret Revenge" (A.A. Vol. 11 p. 1512). Apparently, Ms. Duke

had indicated to the defense investigator that the book was autobiographical (A.A. Vol. 11 p. 1513).

According to the prosecution, Ms. Duke was sexually assaulted in Michigan when she was fourteen years old. Then, T.D. writes in the book, a fictional portion, that she killed the rapist in an act of revenge (A.A. Vol. 11 p. 1514-1515). The prosecutor argued that the book was irrelevant because her secret revenge did not amount to "cooked up false allegations against someone who hurt her..." (A.A. Vol. 11 p. 1515). The defense argued that the information established a motive (1516). The district court denied the defense request on relevancy grounds (A.A. Vol. 11 p. 1516).

In the next trial day, the defense again made a request to confront T.D. regarding a second book wherein Mr. Harris believed he was a character (A.A. Vol. 12 p. 1742). The second request was also denied.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witness against him". This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the confrontation clause hold a primary interest

secured by it is the right of cross examination". Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). "The United States Supreme Court has explained, "we have recognized that the exposure of a witnesses motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination". Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), Citing, Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377(1959).

The United States Supreme Court has specifically authorized impeachment by bias under the federal rules, even though those rules likewise do not specifically address the topic. United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1985) (providing that "proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witnesses testimony"). Federal courts have interpreted the federal rules of evidence in a similar fashion to this Court's rulings. For example, In Lobato v. Nevada, 120 Nev. 512, 96 P.3d 765 (2004), this Court explained,

> There are nine basic modes of impeachment. The first four involve attacks upon the competence of a witness to testify, Ie. Attacks based upon defects of perception, memory, communication, and ability to understand the oath to testify truthfully. The second four modes of impeachment involve the use of evidence of prior convictions, prior inconsistent statements, specific incidents of conduct, and ulterior

> motives for testifying. The ninth mode of impeachment, not pertinent to this appeal, permits attack upon a witnesses reputation for truthfulness and necessarily involves the use of extrinsic evidence.

Although district courts have wide discretion to control cross-examination attacking a witnesses general credibility "a trial court's discretion is ...narrowed when bias is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witnesses testimony". Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979); See also, Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984).

"Where the purpose of cross-examination is to expose bias...the examiner must be permitted to elicit any fact which might color a witnesses testimony, and the trial court's usual discretion to control the scope of cross-examination is circumscribed" Eckert v. State, 96 Nev. 96, 101, 605 P.2d 617, 620 (1980); Jones v. State, 108 Nev. 651, 659, 837 P.2d 1349, 11354 (1992).

In Lobato, this Court specifically addressed impeachment involving ulterior motives for testifying. The United States Supreme Court has found that motive and bias is almost always relevant.

This case presents an extraordinarily peculiar factual circumstance. As was noted in Mr. Harris argument regarding the failure to order independent psychological examinations, the totality of circumstances present a troubling

scenario. It must be remembered that Mr. Harris had the support of children he had raised (outside of the Duke family) and there were no previous allegations of sexual misconduct prior to this case. The defense's request to confront T.D. regarding her peculiar writing had relevancy. T.D. had written a book alleging she had been sexually assaulted and then murdered the predator in secret revenge. Therefore, the defense requested permission to confront T.D. regarding her motivations and bias and to provide a strong inference to the jury that Ms. Duke had been rejected and had conjured up a secret revenge for Mr. Harris. This could easily be construed as a valid motivation and bias especially considering Ms. Duke's other children expressed hatred for Mr. Harris. In fact, V.D. testified she was very angry that Mr. Harris had rejected her mother.

Clearly, the defense had a right to confront Ms. Duke regarding an ulterior motive for testifying. Although the district court has discretion in controlling cross examination, the discretion is narrowed when bias is the object to be shown. Obviously, questioning regarding the book would have elicited facts which would have colored Ms. Duke's testimony and presented her as a biased individual with strange notions.

In Lobato, this Court directed a harmless error analysis. NRS 178.598 directs that any error that does not affect a defendant's substantial right be

disregarded. Here, Mr. Harris' substantial right to confrontation was violated. Undoubtedly, if Mr. Harris had been given his constitutional right to confrontation, Ms. Duke would have revealed additional facts from the substance of the first book, and perhaps the second book. Additionally, the defense made two requests, over two days, to admit the evidence. Mr. Harris was denied the Sixth Amendment right to confrontation based on clearly established state and federal law.

II. MR. HARRIS WAS DENIED THE RIGHT TO CONFRONTATION WHEN THE DISTRICT COURT PERMITTED INADMISSIBLE HEARSAY TESTIMONY FROM A SEPARATELY CHARGED CO-OFFENDER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Prior to the testimony of Dr. Anita Gondy, the defense objected to Dr. Gondy being permitted to testify as to statements made by Lealer Cooks (Ms. Anne) (A.A. Vol. 15 p. 2272-2273). The defense argued that the State had informed the defense they were not going to call Ms. Cooks as a witness (A.A. Vol. 15 p. 2279). Therefore, introducing statements or allegations made by Ms. Cooks to Dr. Gondy violated the Sixth Amendment's confrontation clause (A.A. Vol. 15 p. 2274).

Apparently, Ms. Cooks brought Tah. D. and Taq. D. into Dr. Gondy's office in June of 2012, approximately a month after allegations had surfaced (A.A. Vol.

15 p. 2272-2280). During Tah. D.'s medical examination, Ms. Cooks made statements to Dr. Gondy (A.A. Vol. 15 p. 2273). During the examination, Tah. D. did not say a word (A.A. Vol. 15 p. 2273).

The State cited NRS 51.115 which states, "statements made for purposes of medical diagnoses or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule" (A.A. Vol. 15 p. 2275). The State argued that the statute is silent as to whether the statement comes from the patient or someone else (A. A. Vol. 15 p. 2275). Therefore, the State argued that the statement was admissible pursuant to NRS 51.115.

The district court was concerned that the statement was being used during the time period that there was effort to build a case against Mr. Harris (A.A. Vol. 15 p. 2276). The court recognized that Ms. Cooks (Ms. Anne) was making statements to Dr. Gondy because she believed sexual abuse may be occurring (A.A. Vol. 15 p. 2276).

The defense complained that the State's position and ultimately the court's ruling would permit anyone to be present at the medical examination of a patient and there statements would be admissible hearsay under the exception (A.A. Vol. 15 p. 2278). Nevertheless, the court denied the defense objection (A.A. Vol. 15 p.

2282).

Thereafter, Dr. Gondy testified on direct examination that Ms. Cooks told her she suspected somebody may be sexually abusing Tah. D. (A.A. Vol. 15 p. 2288).

The State continued to comment on the statements during closing argument:

> Ms. Allen talked to you about the fact that Dr. Gondy said, possible sexual abuse, but doesn't know why. Think back a little more to when she was on the stand and she actually told you that it was possible sexual abuse one month before, she told you that ***the guardian*** who had brought [Tah. D.] in told her that. ... So in the reports it specifically said, possible sexual abuse suspected one month prior. That's why she said it, ***because the guardian told her that***... (A.A. Vol. 20 p. 3235-3236) (emphasis added).

The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination" Davis v. Alaska, 415 U.S. 308, 315, 39 L.Ed.2d. 347, 94 Sup. Ct. 1105 (1974)(Quoting, Douglas v. Alabama, 380 U.S. 415, 418, 13 L.Ed. 2d. 934, 85 Sup. Ct. 1074 (1965). If a statement does not fall within a firmly rooted hearsay exception, the statement is presumptively unreliable and inadmissible for confrontation clause purposes. Idaho v. Wright, 497 U.S. 805, 818, 111 L.Ed.2d. 638, 110 Sup. Ct. 3139 (1989)(Quoting, Lee v. Illinois, 476 U.S. 530, 543, 90 L. Ed.2d. 514, 106 Sup. Ct. 2056 (1996).

The United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004) explained,

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the right...to be confronted with the witnesses against him, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of founding. Id. at 54. See also, Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409(1895) (internal citations and quotations omitted).

The United States Supreme Court in Crawford further provided:

> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Id. at 68-69.

Here, Mr. Harris was not permitted an opportunity to examine or confront Ms. Cooks. Ms. Cooks was not the individual that was being examined by the physician. Ms. Cooks was simply articulating her sinister suspicions which were then reiterated for the jury without confrontation. The defense vehemently objected pursuant to the confrontation clause.

Additionally, the States utilization of Ms. Cooks concerns were highly prejudicial and lacked any particular probative value. What difference did it make

to the finders of fact whether Ms. Cooks had brought Tah. D. to a physician for an examination because of an allegation. Moreover, it appeared Dr. Gondy had been confused about the parties present during the medical examination. Unfortunately, Ms. Cooks may have simply been repeating to Dr. Gondy allegations made by Tah. D. However, in reviewing the trial transcript, it almost portrays a picture that Ms. Cooks believed Mr. Harris was in fact guilty. Ms. Cooks became an accuser against Mr. Harris, yet, was not subject to confrontation in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

III. THE DISTRICT COURT VIOLATED THE CONFRONTATION CLAUSE BY DENYING THE DEFENSE THE OPPORTUNITY TO QUESTION WITNESSES AS TO V.D.'S PRIOR INCONSISTENT STATEMENTS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defense counsel desired to question V.D. and T.D. regarding evidence that V.D. had lost her virginity at age eleven in Louisiana (A.A. Vol. 12 p. 1696).

A. THE DISTRICT COURT DENIED MR. HARRIS THE RIGHT TO CONFRONTATION AFTER T.D. INFORMED THE JURY THAT MR. HARRIS WAS RESPONSIBLE FOR TAKING V.D.'S VIRGINITY.

During trial, T.D. had informed the jury that Mr. Harris "took [V.D.'s] virginity" (A.A. Vol. 12 p. 1697). The defense provided the district court with an offer of proof that there was "another witness who was going to testify that [V.D.]

had admitted that she had lost her virginity in Louisiana prior to coming to Nevada." (A.A. Vol. 12 p. 1697).

The defense offered the court the reasoning enunciated in Johnson v. Nevada,113 Nev. 772, 942 P.2d 167 (1997) for the proposition that this evidence was admissible. The district court denied the defense request to confront the witnesses and present this evidence.

B. THE DISTRICT COURT DENIED MR. HARRIS THE RIGHT TO CONFRONTATION EVEN AFTER V.D. TESTIFIED ON DIRECT AND CROSS EXAMINATION THAT MR. HARRIS WAS RESPONSIBLE FOR TAKING HER VIRGINITY.

After several days of trial, V.D. testified that she was a virgin until she returned from Utah. V.D. testified that she lost her virginity when she was in Nevada and Mr. Harris assaulted her (A.A. Vol. 18 p. 2824-2825). The defense then requested permission to question Detective Aguiar regarding a statement made by the defendant during questioning, where the defendant informed the detective that V.D. had admitted prior sexual conduct. In fact, the State played for the jury Mr. Harris' statement, but redacted the relevant portion requested by the defense (A.A. Vol. 18 p. 2825). Again, the defense cited to Johnson v. Nevada,113 Nev. 772, 942 P.2d 167 (1997) (A.A. Vol. 18 p. 2825). The defense made a clear record explaining "..she is very clear in her testimony that she was a virgin until he took this in August of 2007. She used those words." (A.A. Vol. 18

p. 2828). The Court was then permitted to read the unredacted portion of the defendant's statement (A.A. Vol. 18 p. 2830). On page ninety of the unredacted transcript, the court recognized that V.D. had admitted she was having sex with a girl and a friend and had become pregnant (A.A. Vol. 18 p. 2830). The defense requested permission to question Detective Aguiar as to the portion of the redacted statement which indicated V.D. had been sexually active in Utah before coming back to Las Vegas (A.A. Vol. 18 p. 2830-2831). The court again denied the defense request to confront the witness and present inconsistent testimony pursuant to the rational enunciated in Johnson.

NRS 50.090 provides guidance regarding the Rape Shield laws. One of the purposes of the rape shied law are to "protect rape victims from degrading and embarrassing disclosure of intimate details of their private lives..." Summitt v. State, 101 Nev. 159, 697 P.2d 1374, 1375 (1985).

NRS 50.090 permits the defense to challenge a victim's claims of the absence of previous sexual conduct. However, "the accused's cross examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or the victim". Johnson v. State, 113 Nev. 772, 942 P.2d 167 (1997). In Johnson, this Court explained,

> Consequently, once Nicole testified that she had never sexual intercourse prior to the night of the rape, the defense had the right to

> attempt to discredit this testimony by showing that Nicole was not a virgin. However, counsel did not cross-examine Nicole on the issue, attempt to introduce any evidence to challenge Nicole's statement, or make any relevant objection on the record in this matter. The defense may not use the appellate court's to relitigate strategic decisions made during trial. Id.

Mr. Harris made all efforts, outside the presence of the jury, to be permitted to confront T.D. and V.D. regarding claims that she had been a virgin at the time Mr. Harris had sexually assaulted her. It is important to remember, T.D.was allegedly present during the assault in the car and admitted that she subsequently had sexual relations with her own biological daughter. Outside the presence of the jury, the defense requested permission to confront T.D. as to her allegations that V.D. was a virgin prior to the assault.

Clearly, the prosecution had introduced this evidence through their own witness. Now, the defense desired to present clear contradictory evidence proving the falsehood of the State's witness's assertion. The defense was denied this opportunity even though the defense cited the Johnson case, which appears to be directly on point.

C. THE DISTRICT COURT ERRED IN DENYING THE DEFENSE THE OPPORTUNITY TO QUESTION THE DETECTIVE REGARDING PORTIONS OF THE DEFENDANT'S STATEMENT WHICH HAD BEEN REDACTED IN VIOLATION OF THE DOCTRINE OF COMPLETENESS.

The defense specifically objected to the State being permitted to introduce

portions of the defendant's statement and redacting relevant portions thereof (A.A. Vol. 18 p. 2829-2830). The Ninth Circuit has noted, "the rule of completeness is not so broad as to require the introduction of all redacted portions of a statement, without regard to content." United States v. Vallejos, 742 F.3d 902 (9th Cir. 2014). The federal rules of criminal procedure also consider the doctrine of completeness. FRE 106 provides,

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.

The purpose of the rule is to avoid misleading the jury. In other words, if the "complete statement does not serve to correct a misleading impression" in the edited statement that is created by taking something out of context, the rule of completeness will not be applied to admit the full statement. Vallejos, 742 F.3d at 905 (quoting, United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996)) (internal quotation marks omitted) see also United States v. Dorrell, 758 F.2d 427, 434-35 (9th Cir. 1985) (rule of completeness was not violated as the edited version of the confession did not distort the meaning of the statement).

The law in Nevada mirrors the federal authority cited above. See, NRS 47.120; Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996) (holding the district court abused its discretion in limiting the police detective's testimony

regarding his interview with the defendant because once the state introduced portions of the defendant's admission, the defense should have been permitted to introduce other portions of the admission by cross examination of the detective).

Therefore, Mr. Mr. Harris is entitled to a new trial as he was denied the right to confrontation in violation of the Sixth and Fourteenth amendments to the United States Constitution.

IV. MR. HARRIS RECEIVED AN UNFAIR TRIAL WHEN THE DISTRICT COURT PERMITTED PORTIONS OF LEALER ANN COOKS' (MS. ANNE) STATEMENTS TO THE POLICE IN VIOLATION OF THE UNITED STATES CONFRONTATION CLAUSE.

A. CONFRONTATION CLAUSE

Over the defense vehement objection, the court permitted the State to introduce limited portions of Ms. Cooks statements made to the police in violation of the confrontation clause. Outside the presence of the jury, the State requested permission to introduce a portion of Ms. Cooks statement to the police wherein she stated that Tah. D. And Taq. D. told Ms. Cooks that Mr. Harris had sexually assaulted Tah. D. (A. A. Vol. 18 p. 2878). The defense objected complaining that "...I can't cross examine a statement". The State rebutted the defense objection by claiming that Ms. Cooks could be called as a witness as she had already pled guilty (A. A. Vol. 18 p. 2879). Yet, the State made no effort to call the witness.

The prosecutor explained, "they are choosing not to call Lealer" (A.A. Vol. 18 p. 2882). However, the reality was that the State was required to call the witnesses against the defendant. Outside the presence of the jury, the court determined that the State would be permitted to ask limited questions of the detective (A.A. Vol. 18 p. 2882-2883).

Thereafter, the detective stated,

> That's where I, little by little, would tell her a little bit more about what I felt she knew. She would give a little more. I would push her a little bit further about what I thought she knew and she would give a little more. And it went on like that basically for the entire interview. (A. A. Vol. 18 p. 2902).

The questioning continued,

Prosecutor:	And ultimately what did she admit that she knew from the girls?
Defense Counsel:	Judge, objection. Hearsay.
The Court:	Overruled.
The Detective:	She eventually admitted that the girls had claimed that they - - that [Tah. D.] had - - I believe the word they used were molested by Fred Harris.(A. A. Vol. 8 p. 2902).

Here, the State ultimately suggested that the defense could call Ms. Cooks but had not intended to do so. Therefore, the State could call Ms. Cooks. Instead of presenting the witness against the defendant, the State circumvented the confrontation clause by calling the detective to answer a small portion of Ms. Cooks statement that benefitted the State.

The Sixth Amendment Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witness against him". The United States Supreme Court has determined that this bedrock procedural guarantee applies to both federal and state prosecutions. Pointer v. Texas, 380 U.S. 400, 406 (1965).

The United States Supreme court has determined that the text of the confrontation clause applies to witnesses against the accused, those who bear testimony. Crawford v. Washington, 541 U.S. 36, 51 (2004). "Testimony, in turn, is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. (internal quotations and citations omitted).

The United States Supreme Court has reasoned that,

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive. Id. at 52.

The United States Supreme Court held that an out of court statement may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. The

United States Supreme Court reasoned that the only indicia of reliablity sufficient to satisfy the U.S. Constitution's Confrontation Clause was "actual confrontation." Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004).

Pursuant to Crawford, hearsay evidence is to be separated into that which is testimonial and that which is non-testimonial. If the statement is testimonial, the statement should be excluded at trial unless 1) the declarant is available for cross-examination at trial, or 2) if the declarant is unavailable, the statement was previously subjected to cross-examination. Crawford 541 U.S. 36 124 S. Ct. 1354 158 L. Ed 2d 177 (2004). The Crawford Court expressly declined to address what constitutes a testimonial statement.

The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination" Davis v. Alaska, 415 U.S. 308, 315, 39 L.Ed.2d. 347, 94 Sup. Ct. 1105 (1974)(Quoting, Douglas v. Alabama, 380 U.S. 415, 418, 13 L.Ed. 2d. 934, 85 Sup. Ct. 1074 (1965). If a statement does not fall within a firmly rooted hearsay exception, the statement is presumptively unreliable and inadmissible for confrontation clause purposes. Idaho v. Wright, 497 U.S. 805, 818, 111 L.Ed.2d. 638, 110 Sup. Ct. 3139 (1989)(Quoting, Lee v. Illinois, 476 U.S. 530, 543, 90 L.

Ed.2d. 514, 106 Sup. Ct. 2056 (1996).

Here, the State failed to follow the constitutional mandate of presenting a witness to be subjected to confrontation. Instead, the State introduced extraordinarily damaging evidence against Mr. Harris by way of presenting testimonial hearsay. The statement made to the police falls under the definition of testimonial hearsay. Moreover, the prosecutor freely admitted that Ms. Cooks was available to be called as a witness. Mr. Harris is entitled to reversal.

B. RELIABILITY

The district court allowed portions of Ms. Cooks statement without a finding of reliability. NRS 51.035 states, in pertinent part, that hearsay is not admissible unless it falls within an exception. One of these exceptions is a statement against interest. A statement against interest, in order to be admissible, must, at the time it is made:

> (a) Was so far contrary to the propriety interests of the declarant;
>
> (b) So far tended to subject the declarant to civil or criminal liability;
>
> (c) So far tended to render invalid a claim by the declarant against another; or
>
> (d) So far tended to make the declarant an object of hatred, ridicule or social disapproval that a reasonable person in the position of the declarant would have not have made the

> statement unless the declarant believed it to be true. NRS 51.345(1)

During the course of Harris' trial, the State opted to elicit particular statements from Ms. Cooks. As explained in detail above, these statements were clearly hearsay, as the State asserted that they were a statement against penal interest. However, contrary to the defense's objections, the Court opted to allow these statements to be elicited. There were no subsequent findings by this Court with regard to whether the statement elicited was trustworthy under Walker v. State, 116 Nev. 670, 76 (2000).

In the instant case, the statement was made to law enforcement after lengthy discussions, all of which was recorded. Ms. Cooks stated repeatedly throughout the statement that she did not believe the alleged victims or their claims. Further, part of the statute requires that the report of the abuse have some indicia of reliability and the person must have some belief that the abuse is true. Ms. Cooks was very clear in her statement that she did not believe the victims in this case. To simply characterize that one particular portion as a "statement against interest" was patiently incorrect. The district court erred in allowing the statement because it was never subjected to a finding of reliability.

V. MR. HARRIS SHOULD NOT HAVE BEEN CONVICTED OF KIDNAPPING AS IT WAS INCIDENTAL TO THE SEXUAL ASSAULT AND LEWDNESS COUNTS.

In the instant case, Mr. Harris was convicted of sexual assault and lewdness in addition to the kidnapping counts (counts 19, 25, 28, and 37). Mr. Harris should not have been convicted of these counts as they were incidental.

In Wright v. State, 94 Nev. 415, 417-18, 581 P. 2d 442, 443-44 (1978), this Court held that where the accused is convicted of first degree kidnapping and an associated offense, the kidnapping conviction would not lie if the movement of the victim was incidental to the associated offense and did not increase the risk of harm to the victim beyond that necessarily present in the associated offense.

Similarly, in Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006), this Court provided,

> We hold that to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion. 122 Nev. at 274.

In Pascua v. Nevada, 122 Nev. 1001, 145 P.3d 1031 (2006), this Court clarified whether dual convictions can be obtained for kidnapping and murder when the convictions arise from a single course of conduct. Id. In Pascua, this Court held that a conviction for kidnapping and murder arising from the same course of conduct was proper under the test presented in Mendoza, Supra. This

Court carefully considered the facts in Pascua's case and determined that the movement of the victim substantially exceeded that required to complete the associated crime 122 Nev. 1001, 1005.

The facts in Pascua's case are clearly different that the facts in the instant case and illustrate the necessity for the dismissal of counts four and five. In Pascua, defendants entered the victim apartment to rob him of his casino sports book ticket valued at $44,000 dollars. The assailant hit the victim with the hammer and defendants made repeated demands for money. After handing over his wallet, the victim was forced to surrender the combination to his safe but denied possession of the sports book ticket. The victim was then dragged from the kitchen to his bed. During this eight hour period, the victim was repeatedly hit in the head with a hammer. The defendant's strangled and choked the victim and actually filled his nostrils and mouth with caulking. Id.

After refusing to divulge information surrounding the sports book ticket, the victim was moved and eventually murdered. The victim was moved away from the broken window in the kitchen in attempting to make it more difficult for his discovery. Additionally, the State contended that the victim had been tied down and the defendant's had climbed on top of the victim choking him and striking him with the hammer. Id. at 106.

Pursuant to the unique facts enunciated in Pascua, this Court determined "[t]hus, the movement of Upson (the victim) could have been found by the jury to have had the independent purpose of torturing Upson into revealing the location of the sports book ticket" Id. This Court further reasoned, "[h]ence, the jury could have found that Upson's movement to the bed substantially exceeded that required to complete the associated crime, since it lessened his chances of being found or being able to escape while providing Pascua with greater opportunity to cause further harm to Upson" Id. In the instant case, Pascua's facts do not resemble the facts enunciated at trial in the instant case.

The alleged victim's movements, if any, were minimal compared to the factual scenario's cited above. Therefore, Mr. Harris' conviction as to the kidnapping counts should have been dismissed.

VI. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT MR. HARRIS' MOTION FOR A NEW TRIAL AFTER IT WAS LEARNED THAT A JUROR VIOLATED THE DISTRICT COURT'S ADMONITION.

During the evidentiary hearing on the motion for a new trial, it was learned that a juror violated the district court's admonition to the jury.

Robert Bell was a juror (A.A. Vol. 23 p. 3330). Mr. Bell stated that he was indirectly "friends with Ms. Louis" (another juror) (A.A. Vol. 23 p. 3335). Mr. Bell explained:

> "Actually, I was made aware of that sometime in the middle of the trial. I played music with a friend of mine and the drummer made mention of the fact that his friend also happened to be on the jury. Indirectly I kind of introduced myself while we were on the jury, but I never met her before". (A.A. Vol. 23 p. 3336).

Mr. Bell admitted he had told a friend he was on a criminal jury. When asked how Mr. Bell's friend knew that Ms. Louis was also on the jury, he stated that he snapped a photo of himself with his juror badge (A.A. Vol. 23 p. 3336). He posted the picture of himself with "the blue juror badge" on facebook (A.A. Vol. 23 p. 3336-3337). The court then asked Mr. Bell if he took the picture of himself with the juror badge before or after the jury was impaneled. Mr. Bell stated this occurred prior to the jury being impaneled (A.A. Vol. 23 p. 3337). The district court then reminded Mr. Bell that the blue badge is not handed out until after the jury is impaneled (A.A. Vol. 23 p. 3337). The court then stated, "so when I told you don't do anything on facebook, you ignored that and posted a picture of yourself on facebook" (A.A. Vol. 23 p. 3337). The Court further stated, "do you know in my admonition I specifically say don't go on facebook, right?" Juror Bell stated, "yes" (A.A. Vol. 23 p. 3337-3338). The court then stated, "yeah. He has a picture of himself with a blue badge, it identifies him as a department 12 juror." The court then explained,"so it would have after he was impaneled, and after he had been admonished several times not to go on facebook" (A.A. Vol. 23 p. 3339).

Mr. Bell's friend, Clay Heximier observed the picture on facebook and made contact with Mr. Bell (A.A. Vol. 23 p. 3340). Clay then made mention at the fact he was friends with Ms. Louis and she was also on the jury (A.A. Vol. 23 p. 3341). Mr. Bell could not explain how he would know that Ms. Louis was also on the same jury (A.A. Vol. 23 p. 3341). Mr. Bell spoke to Clay about his service and Ms. Louis being on the jury a couple weeks into the trial (A.A. Vol. 23 p. 3341). After the trial, Mr. Bell continued to communicate with Ms. Louis (A.A. Vol. 23 p. 3342). In fact, Mr. Bell communicated with Ms. Louis just days prior to his evidentiary hearing testimony (A.A. Vol. 23 p. 3342).

Additionally, by Mr. Bell posting his juror badge to facebook, he elicited commentary regarding the case from other people (A.A. Vol. 22 p. 3276). In fact, the comments on the facebook post included "hang him high" (A.A. Vol. 22 p. 3277).

This court has adopted a standard for appellate courts to consider in determining juror misconduct. In Meyer vs. State of Nevada, 119 Nev. 554, 561 (2003), this Court has divided jury misconduct into two categories: 1) Conduct by jurors contrary to their instructions or oath; and 2) Attempts by third parties to influence the jury process.

In Meyer, the issue was presented was whether a juror misconduct had

established prejudice. In Meyer, a material issue at trial was the source of the victims bruises and whether or not they were cause by the defendant, or if it was a reaction from medicines she was ingesting. During trial one of the jurors conducted independent research by consulting a physicians desk reference and the side effects of Accutane. The juror then discussed her findings with other jurors during deliberations. This court held that the jurors actions constituted juror misconduct because this was the introduction of extrinsic evidence. Id. at 571-72. The court found that the introduction of the outside material was prejudicial and remanded the case for a new trial. Id.

The Ninth Circuit has held, "we do not have a bright line for determining whether a defendant has suffered prejudice from an instant of juror misconduct, but instead weigh a number of factors to determine whether the jury exposure to extraneous information necessitates a new trial." These factors include:

> 1) Whether the material was actually received, and if so, how; 2) the length of the time it was available to the jury; 3) the extent to which the juror discussed and considered it; 4) whether the material was introduced before a verdict was reached, and if so what point in the deliberation, and 5) any other matters which may bear on the issue of reasonably possibility of whether the extrinsic material affected the verdict. Dickson vs. Sullivan, 849 F.2d at 406. (See also Sassounian vs. Roe, 230 F.3d 1097, 1109 (9th Cir. 2000)).

In Viray v. Nevada 111 P. 3d 1079 (Nev. 2005), this court held the removal

of a juror for violation of the admonition was appropriate. NRS 16.080 provides for the discharge or replacement of jurors who are disqualified or unable to preform their duties. This court determined that district courts can under appropriate circumstances, replace the juror with an alternate during deliberations instead of declaring a mistrial. Mckenna vs. State, 96 Nev. 811, 815, 618 P.2d 348, 349 (1980). In exercising the court's discretion, a trial court must conduct a hearing to determined if the violation of the admonition occurred and whether the misconduct was prejudicial to the defendant. "Prejudice requires an evaluation of the quality and character of the misconduct, whether other jurors have been influenced by the discussion, and the extent to which a juror who had committed misconduct can withhold any opinion until deliberations." Id.

Moreover, in State of Nevada v. Rosemary Vandecar, 2015 Nev. Unpub. Lexis 248 (Mar. 2, 2015) (No. 61649) (unpublished disposition), this Court concluded the district court did not abuse its discretion by removing a juror who told the jury pool that he made statements to his wife regarding the case.

This court has held that deliberations must begin anew after substitute juror has been seated. See Brake vs. Nevada, 113 Nev. 579, 939 P.2d 1029 (1997), Carol vs. Nevada 111 Nev. 371, 892 P.2d 586 (1995).

In the instant case, the jurors violation of the admonition prejudiced Mr.

Harris. The quality and character of the misconduct was not minor. Therefore, the district erred in denying the motion for a new trial. Mr. Harris is entitled to a new trial.

VII. THE DISTRICT COURT ERRED IN DENYING MR. HARRIS' MOTION FOR A NEW TRIAL REGARDING JUROR MISCONDUCT.

Mr. Harris filed a motion for a new trial on April 28, 2014. After the trial concluded, it was discovered that there was instance of juror misconduct. In an interview with Juror number 8, Ms. Smith, it was discovered that during deliberations, Juror number 7, Yvonne Lewis, was not truthful during voir dire.

During the evidentiary hearing on the motion for a new trial, Ms. Smith testified she was at a local Wal-mart, she noticed Mrs. Harris (the defendant's mother) and said hello (A.A. Vol. 23 p. 3294). Ms. Smith recognized the defendant's mother from observing her in the courtroom (A.A. Vol. 23 p. 3295). Ms. Smith explained that on or about the third day of deliberation, a female juror (Ms. Louis) began crying and talking about abuse she had suffered in the passed (A.A. Vol. 23 p. 3297-3299). Ms. Smith recalled the juror commented on her being beaten, as well as possible sexual abuse (A.A. Vol. 23 p. 3300). In fact, Ms. Smith actually wrote on paper that a juror had been discussing being a victim of sexual abuse (A.A. Vol. 23 p. 3301). Ms. Smith had been reluctant to vote guilty.

Ms. Louis testified at the evidentiary hearing that her mother had attacked her on previous occasions (A.A. Vol. 23 p. 3319). Ms. Louis denied being a victim of sexual abuse (A.A. Vol. 23 p. 3320).

The instant case involved 46 counts of sexual abuse/assault. As a result, jurors were asked if they were ever the victims of physical or sexual abuse during questioning during voir dire. Juror number 7 did not disclose sexual abuse, only disclosing during deliberations, while crying, and calling for the conviction of the defendant (A.A. Vol.7 p. 837-838).

This is directly on point with the facts in Canada v. State, 944 P.2d 781, 113 Nev. 938 (1997). In Canada, the jury in this murder trial was tainted by a juror who failed to disclose during voir dire that his own father was murdered. Other jurors stated that he would have noted to convict no matter what and kept referring to his own father's murder.

Mr. Harris' case was a contentious sexual abuse case. The jurors were picked over meticulously and asked about abuse of all kinds. This particular juror talked about physical abuse from her mother, but failed to disclose sexual abuse of any kind.

However, during jury deliberation, she broke down crying and referred to sexual abuse and knowing how it felt to be sexually abused. She was also pushing

for Mr. Harris' conviction and need to be punished (A.A. Vol. 7 p. 837-841).

In Lopez v. State, 105 Nev. 68, 769 P.2d 1276 (1989), this Court held that where a juror failed to reveal potentially prejudicial information during voir dire, the relevant inquiry is whether the juror is guilty of intentional concealment. Id. at 89, 1290. This Court in Lopez stated that it is the trial court's discretion to determine this information. "A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted." Lane v. State, 110 Nev. 1156, 1164, 881 P.2d 1358, 1364 (1994). This Court must ocnsider "whether the issue of guilt is close, the quantity and character of the error, and the gravity of the crime charged." Rowbottom v. State., 105 Nev. 472, 486, 779 P.2d 934, 943 (1989).

In the instant case, Harris was charged with 46 felony counts, most of which he was facing a life sentence. There were days of jury deliberation, indicating jurors were holding out on guilt and finally, a juror who, after lying about sexual abuse, was calling for the punishment of Mr. Harris during deliberation. Therefore, Mr. Harris is entitled to reversal.

VIII. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO CONVICT MR. HARRIS OF THE CHARGES AGAINST HIM.

This Court has stated that when the sufficiency of evidence is challenged on appeal, "[t]he relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact

could have found essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250 ,681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319,61 LED. 2d 560, 99 S.Ct. 2781 (1979)).

The facts adduced at trial were particularly unusual. Moreover, it does not go unnoticed that the jury rejected the accusers allegations of physical abuse.[3]

T.D. and her children all testified in great detail regarding the physical abuse they endured. Not only did the Duke family allege that Mr. Harris had physically abused each one of them, they also testified that they observed the abuse against other family members. Yet, the jury rejected these charges. On the other hand, returned guilty verdicts as to numerous sexually related crimes without any corroboration. Curiously, this leads to the conclusion that the jury believed the Duke family members beyond a reasonable doubt regarding the allegations of sexual abuse but rejected those same family members testimony as to the physical abuse allegations. Obviously, the Duke family had substantial difficulties with credibility. To make the determination that jury found the Dukes to be credible directly contradicts the numerous judgment acquittals regarding allegations of physical abuse.

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[3] The jury returned not guilty verdicts associated with child abuse and neglect in counts 1, 15-18, and not guilty of battery by strangulation (count 45).

The Duke's were involved in a child protective services investigation in Louisiana prior to arriving in Las Vegas. Subsequently, the Duke's were involved in a child protective service investigation in Utah when Mr. Harris was living in Las Vegas. In fact, the children were removed because T.D. decided to come back to Las Vegas to spend time with Mr. Harris, leaving her children in Utah. Interestingly enough, T.D. returned from Utah to Las Vegas even after allegations had surfaced that Mr. Harris had allegedly sexually assaulted V.D. This fact alone is suspicious. The idea that T.D. would return from a safe haven in Utah to Las Vegas, to visit with an individual who had been accused of predatory behavior on her children is grounds for significant speculation.

During trial, evidence was elicited that proved that the children's grades remarkably improved when they were under the guidance of Mr. Harris. Once the children were removed from Mr. Harris' presence, the Duke children's grades plummeted. Again, it appears unusual that a child's grades would greatly improve during the time period that sexual molestation is occurring and the grades drop when the molestation ceases.

When Henderson officials initially investigated allegations of sexual abuse, Tah. D. and Taq. D. vehemently denied abuse was occurring in the household stating that they thought the world of Mr. Harris. Tah. D. and Taq. D. both praised

Mr. Harris and the lifestyle they were living under his care. T.D. claimed that she did not even believe V.D.'s allegations, initially. Henderson officials who conducted a thorough investigation, but did not press charges. Hence, not only did the jury reject many of the allegations made by the Duke family, the Henderson investigating agency arrived at the conclusion that prosecution was not necessary.

The Duke children were referred to as liars by witnesses in the trial. In fact, V.D. was referred to as a habitual liar. On one occasion, S.D. brutally assaulted a disabled child in the bathroom and was expelled from school. The Duke children had been accused of theft. T.D. admitted to having sexual relations with her own biological daughter.

Contrasting the Duke family with Mr. Harris is remarkable. Mr. Harris was a hard working man employed by Embarq/Century Link. Mr. Harris insisted that the children study hard at school and behave. Allegations were made that Mr. Harris would become frustrated with the children when they would lie, cheat, steal and assault other people. Mr. Harris' mother was described as a caring individual who also assisted with raising the Duke children. Mr. Harris' girlfriend's adult daughter, praised Mr. Harris' parenting skills and described the Duke children as habitual liars. Mr. Harris' own daughter praised his parenting skills and actually had a verbal outburst in court when she heard V.D. on the witness stand claiming

that Mr. Harris had raped her. Mr. Harris is approximately fifty years old (DOB 12/6/65). Mr. Harris had raised children successfully and his downfall came when he began to assist the Duke family.

Unusually, Mr. Harris insisted that V.D. not be permitted into the same household with himself and the other children after she had made the initial allegation of sexual assault. Yet, the State's theory was that Mr. Harris continued to sexually abuse V.D. A reasonable person must ponder why a sexual predator would not want the object of his perverted desires to be present in the home where he could abuse the victim. This is much more consistent with Mr. Harris taking precautions to preclude the false accuser from his presence to ensure his own safety.

Not only did Mr. Harris have a good hard working character, but the Duke children admitted that they had a hatred for Mr. Harris. In fact, both V.D. and T.D. admitted they were angry Mr. Harris had rejected T.D. in favor of Ms. Anne.

Also troubling is the district court's preclusion of a book T.D. had been drafting regarding a sexual assault and her "secret revenge". A careful review of the facts establishes that the Duke children may have accomplished their mother's ultimate motive described by T.D. in her book, "secret revenge".

To make matters worse, the Duke children openly testified that they had informed responsible teachers and counselors at the Clark County School District that they were being physically and sexually abused. Yet, Mr. Harris paraded in those named teachers and counselors who all denied the children made any such revelations.

Cleverly, the skilled prosecutor simply questioned each of the mandatary reporters on the penalty for failing to report sexual assault allegations Presumably, the prosecutor was requesting that the jury make the inference that the Duke children were telling the truth, the mandatory reporters were lying to spare them liability for failure to report. However, it is difficult to comprehend how reasonable people could differ on these facts. It seems the Dukes are habitually lying. This is proven by the teachers and counselors testimony that the Duke children did not reveal allegations as they claimed under penalty of perjury.

A careful review of the inconsistencies and peculiar nature of the accusers demonstrates that a rational finder of fact, reviewing the facts in the light most favorable to the State, could not have found beyond a reasonable doubt that Mr. Harris was guilty of any of the charges.

IX. MR. HARRIS' CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Harris would respectfully request that this Court reverse his conviction based upon cumulative errors at trial.

CONCLUSION

Based on the above, Mr. Harris would respectfully request that this Court reverse his convictions.

DATED this 16th day of June, 2016.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 14,000 words, to wit,15,358 words.

Finally, I hereby certify that I have read this amended appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 16th day of June, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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