IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR., # 1149356, Appellant,	)	CASE NO.: **81257, 81259**
	)	**E-FILE**
	)	D.C. Case No.: **A-18-784704-W**
vs.	)	**C-13-291374-1**
	)	Dept.: **XII**
STATE OF NEVADA, Respondent.	)	

APPELLANT'S APPENDIX VOLUME XI

Appeal from a Denial of Post Conviction Relief
Eighth Judicial District Court, Clark County, Nevada

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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esquire, am a person competent to serve papers and not a party to the above-entitled action and on the 29th day of October, 2020, I served copy of the foregoing: Appellant, Frederick H. Harris', Opening Brief as well as Volumes I through XI of the Appendix, as follows:

[X] Via Electronic Service to the Nevada Supreme Court, to the Eighth Judicial District Court, and to the Nevada Attorney General by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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I. COUNSEL WAS INEFFECTIVE FOR FAILING TO DO SUFFICIENT PRETRIAL PREPARATION AND INVESTIGATION AND RETAIN NECESSARY EXPERTS.

The Defendant alleged in his *pro per* Petition that counsel basically ignored him during the case. Defendant stated his attorneys barely consulted with him before his trial. The evidentiary hearing established that counsel not only ignored Defendant's request but failed to do necessary investigation or preparation pretrial. Counsel did not obtain all necessary witnesses and because of lack of preparation, counsel was unable to effectively impeach the State's witnesses.

The American Bar Association (ABA) Standards on the prosecutor and defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients. *See,* ABA Standards 4.1:

> **4.1 Duty to Investigate.**
>
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

. . .

The importance of this Standard has been recognized and cited by the Nevada Supreme Court for over 30 years. *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel, however, did not fulfill this elementary command to investigate and develop possible information that might assist his client. This failure requires reversal of the conviction.

In *Strickland v Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient.* This requires a showing that counsel made errors so serious that counsel was not functioning as the"counsel"guaranteed by the Sixth Amendment. Second, counsel must show that the deficient

performance *prejudiced* the defense. This requires showing that counsel errors are so serious as to have deprived defendant of a fair trial, a trial where the result is reliable. Unless, a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that renders the result unreliable. *Strickland* at 687.

> ...[j]udicial scrutiny of counsel performance must be highly deferential however, counsel must at a minimum conduct a reasonable investigation enabling him t make informed decisions about how best to represent his client. *Strickland, Id.* 691, 104 S.Ct. at 2066. (Emphasis added).

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

> To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of innocence or evidence which would establish reasonable doubt. Failing to establish a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. (Emphasis added)

. . .

Since the principle defense was that the main witnesses were not credible, counsel's failure

to fully investigate or prepare that defense was ineffective assistance. Consider the case of *People v. Frierson*, 599 P.2d 587 (Cal. 1979), where the court reversed for ineffective assistance of counsel, finding that counsel's failure to develop expert testimony to support a diminished capacity defense was prejudicial error. The court stated:

> In the present case, despite his admitted awareness of the possibility of developing a successful diminished capacity defense, trial counsel neglected either to seek or obtain an expert appraisal of defendant's mental condition or of the effect of the drug PCP upon his physical or mental condition. Although, unlike *Saunders*, counsel here did attempt to assert a diminished capacity defense, nevertheless it was doomed to failure in the absence of evidence supporting it." *Id.* 598, 599 (Emphasis added)

. . .

The court then continued:

> ... [W]e should not be understood as requiring that trial counsel must seek psychiatric or expert advice in every case wherein drug intoxication is a possible defense. Yet in a capital case, where it appears to be the **sole** potentially meritorious defense, and counsel has elected in fact to present such a defense at trial, counsel must be expected to take those reasonable measures to investigate the factual framework underlying the defense preliminary to exercise of an informed choice among the available tactical options, if an. In the present case, we need not speculate as to the likely prejudicial effect of counsel's omissions; for counsel's failure to take reasonable investigative measures actually resulted in the presentation to the jury of an incomplete, undeveloped diminished capacity defense." *Id.* 599 (Emphasis added)

In this case, as in *Frierson*, counsel chose a specific defense, i.e., the lack of credibility of the State's main witnesses. His failure to follow through with the necessary investigation for that defense by seeking all potential witnesses, including a necessary expert witness to support that defense theory, was ineffective assistance of counsel. Such expert testimony may have included, but not have been limited to, an expert who could have helped explain the dynamics in typical child

abuse cases and also explained the syndrome of false accusation(s) that may arise in such cases.

Defendant Harris' case can therefore be easily distinguished from a case like *People v. Williams*, 751 P.2d 395 (Cal. 1988), where the court affirmed the murder conviction, finding that defense counsel in that case was not ineffective because counsel there had actually considered the opinions of two experts on the issue of defendant's sanity. Similarly, consider the case of *People v. Apodaca*, 998 P.2d 25 (1999), in which the court found that failure to get blood stains tested was not sufficient grounds for reversal as ineffective assistance of counsel because prejudice could not be shown. The court in *Apodaca*, noted: "...even if tested such evidence would not likely have changed the outcome of the proceeding." *Id.* at 29. *See also, Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001). Defendant however submits that expert testimony on credibility of alleged sexual assault victim(s) would have been a significant factor in influencing the jurors decision.

Counsel should have also sought the services of a credible expert witness to do a pretrial psychiatric examination of the alleged victim(s). In conjunction with this, the defense also needed an expert to challenge the State's child medical experts, Dr. Mehta and Dr. Gonsdy, who testified for the State. (T.T. p. 1769), (T.T. p. 2283)

Expert assistance is a constitutional right, *see Ake v. Oklahoma,* 470 U.S. 68 (1985). An expert for the defense could have qualified an expert witness under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *See, for example, United States v. Amador-Galvan,* 9 F.3d 1414 (9th Cir. 1993). The failure to seek an expert was therefore a clear error under *Strickland v. Washington, supra,* because the Defendant was prejudiced by the lack of such an expert.

II. DEFENSE COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND* IN HANDLING THE JURY SELECTION PROCESS.

The constitutional right to counsel includes the right to question prospective jurors so the Defendant may intelligently exercise peremptory challenges. *See, Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L.Ed. 158 (1932) (defendant requires counsel's guiding hand at every step of proceedings). The Sixth Amendment guarantee of the "assistance of counsel" includes the constitutional guarantee to an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*,

504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (citing *Dennis v. United States*, 339 U.S. 162, 171-72, 70 S. Ct. 519, 94 L.Ed. 734 (1950)). It is respectfully submitted counsel was ineffective in providing adequate legal assistance in the jury selection process in several important ways.

1. Counsel Failed to File a Pretrial Motion for Sequestered Individual Voir Dire and That Failure Led to the Likelihood of an Unfair and Biased Jury.

Defendant was charged with numerous counts of sexual assault and statutory sexual seduction and related crimes of violence. The particular facts of this case, which alleged multiple sexual assaults with children, made securing a fair and impartial jury extremely difficult. These circumstances necessitated more than minimal attorney action prior to the voir dire.

It is respectfully submitted that a meaningful voir dire, in which jurors were questioned individually and in private, was the only way to have obtained a fair jury that was not prejudiced or offended by candid questioning, that was potentially embarrassing during the voir dire process. Because of the nature of the charges in this case, any competent counsel should have filed a pretrial Motion for Sequestered Individual Voir Dire in order to adequately protect the Defendant's Sixth Amendment rights. Because defense counsel did not do that in this case, the Defendant was clearly prejudiced during the voir dire process. The failure by counsel to seek this procedure was ineffectiveness under *Strickland* because the Defendant was likely prejudiced by not securing a fair and unbiased jury.

Such a motion, if granted, would have given counsel much more flexibility to question potential jurors in private about delicate sexual matters that may have impacted their ability to serve fairly. The record reflects that numerous jurors admitted they had been the victim of sexual assault or similar crimes, or that they had close friends or family members who had been the victims of sexual crimes. (See, T.T. pgs. 1130, 1133, 1135, 1136, 1137, 1227, 1273, 1378) How many other jurors were less forthcoming because of reluctance to discuss the details of traumatic sexual encounters is unknown but it is respectfully submitted that many more jurors were reluctant to admit such matters in open court.

This may be especially true because while in the extremely public and stressful arena of a

courtroom, jurors are naturally very reticent. Even when jurors may have the courage to reveal such information in open court, it is very difficult to get totally candid answers. It is extremely difficult for counsel to discuss such delicate matters in detail while other potential jurors were present without the risk of gravely offending many jurors.

These inhibiting factors created a great dilemma for defense counsel. The failure to spot biased jurors, or to be able to deal with them appropriately when spotted, can be fatal to a defense case. The Sixth Amendment's importance in guaranteeing the Defendant a fair and impartial jury has long been recognized as paramount to a trial. It is axiomatic that the right to a jury trial is a fundamental constitutional right that must be zealously preserved. *Patton v. United States,* 281 U.S. 276, 312, 50 S.Ct. 253, 74 L.Ed.2d 854 (1930).

The right to trial by jury for serious offenses is a fundamental right 'essential for preventing miscarriages of justice and assuring fair trials are provided for all defendants.' *McMahon v. Hodge,* 225 F.Supp.2d 357 (S.D.N.Y. 2002). *See also, Duncan v. Louisiana,* 391 U.S. 145, 157-58, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The defendant deserved a untainted jury in this case. It is respectfully submitted that those jurors who admitted to having the knowledge or experience of being the victim of a sexual offense, may have then appeared more credible to other jurors on the panel. This could have been especially important if disputes arose about emotional testimony during deliberation. Any input from those jurors, who had in the past been victims of such trauma, or input from those who had been in close connection with such victims, may have greatly impacted the jury's final decision in ways that were unfair to the Defendant. This was a very close case as the jury deliberated for more than three days.

Harris submits his counsel should have been extra alert and sensitive to these dynamics in selecting the jury to cure any possible negative effects or prejudice. Defendant's counsel did not adequately explore these issues in voir dire and did nothing to protect the Defendant's rights by seeking a sequestered voir dire so jurors would not be exposed to the multiple traumas of other victims.

Many years ago in the case of *United States v. Ridley*, 134 U.S. App. D.C., 412 F.2d 1126 (1969), the court recommended that crime victims be questioned at the bench so that other jury panel

members not be tainted. The court recognized that the fundamental component of the Sixth Amendment right to trial is the right to a fair and unbiased jury of peers. A defendant's constitutional right to counsel includes the right to question prospective jurors so the defendant may intelligently exercise peremptory challenges. *See, Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (defendant requires counsel's guiding hand at every step of proceedings). The Sixth Amendment guarantees the "assistance of counsel." Part of this constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (citing *Dennis v. United States*, 339 U.S. 162, 171-72, 70 S.Ct. 519, 94 L.Ed. 734 (1950)). Juror bias is sometimes difficult to uncover, as it may be very subtle, even subconscious. For all of these reasons sequestered, individual voir dire was essential.

2. Counsel Was Ineffective During Jury Selection Because He Failed to Hire a Jury Selection Expert.

Evaluating jurors is always a complex task in any case and it was particularly difficult in this case. The jury panel was actually composed of many panel members who had experienced the trauma of sexual abuse. Many studies have shown that childhood sexual abuse is an extremely widespread phenomenon. It is however not the type of subject matter which anyone is comfortable discussing. An expert was therefore desperately needed in this case to help counsel develop searching questions to discover any hidden biases jurors may have had. A review of the questioning of a few jurors reveals the strong feelings generated by the issues surrounding the issue of child sexual assault. Consider the responses of several jurors:

> PROSPECTIVE JUROR # 050: She just kept it hidden inside for so long and now that I guess I'm older and we're friends now, you know, like mother and daughters are. As the daughter gets older she just divulged the information to me. Now I understand a lot of the issues that she had. I didn't really know when I was growing up, but now I understand like, you know, the reasons why she did a lot of the things she did.
>
> THE COURT: Did she report it?
>
> PROSPECTIVE JUROR # 050: She had told her parents and they just didn't do anything

about it, old school Italian family, sweep it under the rug kind of a thing.

THE COURT: Okay. Anything about that that would affect your ability to be fair and impartial in this case?

PROSPECTIVE JUROR # 050: Possibly, yeah.

THE COURT: Okay. Well we need to know that.

PROSPECTIVE JUROR # 050: Yes.

THE COURT: Yes, it will?

PROSPECTIVE JUROR # 050: Yes.

THE COURT: Okay. How so?

. . .

The voir dire by the court continued.

THE COURT: Okay. So, you wouldn't have any fear of any ramifications or your mom being upset with you?

PROSPECTIVE JUROR # 050: No, no.

THE COURT: Okay. So, we wouldn't have to worry about you trying to return a verdict that would make your mom happy?

PROSPECTIVE JUROR # 050: No. (T.T. pg. 1126, 1127)

Consider also an excerpt of the court's voir dire of Juror #044 about prior victimization.

. . .

PROSPECTIVE JUROR #044: Repeated incest from her father.

THE COURT: - - by her father. And then you said your aunt might really be your sister?

PROSPECTIVE JUROR #044: Um-hm.

THE COURT: Because your mom gave birth to your aunt?

PROSPECTIVE JUROR #044: Possibly.

THE COURT: Possibly. Okay.

PROSPECTIVE JUROR #044: There's a 14 year difference between them. The abuse was going on during that time because my grandmother had diabetes and we don't know. We've never tested it.

THE COURT: Okay. And you found this out - - I'm sorry - - and you found this out because your aunt told you?

PROSPECTIVE JUROR #044: Um-hm.

THE COURT: Okay. When was this disclosure made?

PROSPECTIVE JUROR #044: About ten years ago.

THE COURT: All right. And it has a pretty profound affect on you?

PROSPECTIVE JUROR #044: I was afraid [indiscernible] and then you asked a question and now here I am. Sorry.

THE COURT: That's why I hate asking these questions. And then the next question I have is there anything about that that would affect your ability to be fair and impartial to these parties?

PROSPECTIVE JUROR #044: I want to say no but I also would not think that I would be responding like this. I want to think we were beyond it and above it and educated. I don't know. I don't know that I wouldn't think about that through the whole thing. I don't know. I can't say.

THE COURT: Okay. Well I can't tell you what to think about.

PROSPECTIVE JUROR #044: I know.

THE COURT: Okay. So, there's nothing - -

PROSPECTIVE JUROR #044: I want to say going into no, but if I'm in the middle of it I don't - -

THE COURT: Okay. And let me tell you that's what I am trying to avoid. I don't want any members of the panel to get on the panel and then decide halfway into the case I can't be fair; do you understand that?

PROSPECTIVE JUROR #044: I do.

THE COURT: Okay. So, I need someone - -

PROSPECTIVE JUROR #044: I'm afraid I couldn't be.

THE COURT: Okay.

...

PROSPECTIVE JUROR #044: I'm embarrassed. I'm embarrassed to say that I couldn't be fair.

THE COURT: Okay. So, you're afraid you can't be fair? I feel terrible. I really do apologize. Who is it you think you can't be fair to?

PROSPECTIVE JUROR #044: Well the Defendant.

THE COURT: Okay. Because of the allegations?

PROSPECTIVE JUROR #044: Mm-hmm.

THE COURT: You just really think it's too overwhelming that you might not be able to be fair?

PROSPECTIVE JUROR #044: Yes that's correct.

(T.T. pg. 1138-1140) (Emphasis added)

Incest and child sexual abuse alone was on the minds of every juror who sat through the voir dire. Before opening statements the Defendant had already been prejudiced. The court had the power to appoint a jury expert. *See, Ake v. Oklahoma,* 470 U.S. 68 (1985).

The refusal to supply an indigent with necessary defense tools has been held to be reversible error where they were pivotal to the trial. *See generally, United States v. Durant,* 545 F.2d 823 (2d Cir.1976), *United States v. Bass,* 477 F.2d 723 (9th Cir.1973).

It is therefore respectfully submitted that in this case if counsel had even made a appropriate motion for the appointment of an expert jury consultant, it should have been granted. Defendant then would have gained numerous advantages when picking a jury.

(1) a consultant, after reviewing all the facts, could have provided a profile of an ideal juror;

(2) a consultant could also more importantly have provided a profile of the most important jurors to avoid;

(3) a jury consultant could have assisted counsel in preparing voir dire questions that revealed a juror's hidden biases. This would have been very helpful in challenging pro-prosecution jurors for cause;

(4) a jury consultant trained in psychology and body language could have recognized subtle signs in jurors that showed partiality to one side as another.

Defense counsel who was trying to handle multiple functions in the courtroom could not focus intently on the body language of all jurors while he was questioning, listening to questions, objectioning, taking notes, reviewing reports or doing other tasks. A jury consultant would have seen many things that counsel missed because they would be trained to look for certain things.

Because counsel however made no effort to obtain a jury consultant, despite such obvious benefits, counsel should be found to have rendered ineffective assistance of counsel during the jury selection phase of the trial.

A. Counsel Was Ineffective under *Strickland* for Failing to File a Meritorious Motion for a Defense Psychiatric Examination of the Alleged Victim(s).

There were substantial grounds for a defense psychiatric evaluation of several prosecution witnesses. Defendant submits an evidentiary hearing would have established additional grounds for a psychiatric evaluation of the alleged victim(s). Substantial case law exists for a court to order a psychiatric evaluation of the complaining witness(es) in sexual assault cases when circumstances warrant critical scrutiny of the complaining witness(es). Defense counsel never even sought a motion in this case despite indications the witnesses had mental health issues.

In the case of *Ballard v. Superior Court,* 49 Cal.Rptr. 302, 410 P.2d 838 (1966), the defendant, a doctor, was accused of rape by allegedly having sexual intercourse with a female patient while she was under anesthesia. Defendant's counsel moved that the trial court order a psychiatric evaluation of the complaining witness. The California Supreme Court held that the trial court was not required to order such an examination in all cases where the crime of rape is alleged, but the Court also held that the trial judge had the authority to do so in the sound exercise of its discretion. The Court stated:

> "In urging psychiatric interviews for complaining witnesses in sex cases, some prominent psychiatrists have explained that a woman or girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety. (Cite Om.), and

> Thus the testimony of a sympathy arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term." 410 P.2d 846 (Emphasis added)

Courts in other jurisdictions have held that it is within the discretion of the trial court to order a psychiatric examination of a complaining witness in a case where the complaining witness testimony is the critical evidence against the Defendant. *State v. Wahrlich,* 105 Ariz. 102, 459 P.2d 730 (1969); *State v. Vincent,* 450 P.2d 998 (Hawaii, 1969); *State v. Kahinu,* 498 P.2d 642 (Hawaii, 1972.)

Similarly, in *Washington v. State,* 96 Nev. 305, 608 P.2d 1101 (Nev.1980), the Nevada Supreme Court held that psychiatric examination of the victim in a sexual assault is a matter that is left to 'the sound discretion' of the trial court. In the case of *Warner v. State,* 102 Nev. 635, 729 P.2d 1359 (1986), a conviction for sexual assault was reversed because of ineffective assistance of counsel where the defense counsel did not request the Court to order a psychological examination. The Defendant believes that in the instant case, there were numerous indicia of psychological problems of the State's witness, that compelled the Court to grant a psychological evaluation. It should have resulted in reversal.

In the more recent case of *Lickey v. State,* 108 Nev. 191, 827 P.2d 824, the Nevada Supreme Court again reversed a conviction because the trial court refused to order a psychological evaluation of the victim. The Defendant submits in the instant case, as in *Lickey*, the Defendant was substantially prejudiced because he did not have the opportunity to have an independent court ordered psychiatrist examine the victim(s). The victim(s) may have been suffering from psychological problems that would have rendered her testimony inherently suspect or unreliable. Taharah was diagnosed as having "cognitive delay" and Mihalica had been diagnosed with "anxiety disorder." (See T.T. pg. 1720, 2204)

Again, in *Keeney v. State,* 109 Nev. 220, 850 P.2d 311, the Nevada Supreme Court stated:

> "Generally a psychological examination of a sexual assault victim should be permitted if the defendant has presented a compelling reason therefor." (Cite Om.) A compelling reason exists

where the corroboration evidence is de minimus or non-existent, and the defense has a reasonable basis for questioning the effect of the victim's mental state on her veracity." 109 Nev. 224, 225

Defense counsel should have at least requested an evidentiary hearing for the court to consider whether there were sufficient facts warranting the court exercising its discretion to order a psychiatric examination of the victim(s). The failure of counsel to file a motion with a request for an evidentiary hearing was error under *Strickland.*

B. Defense Counsel Was Ineffective Because He Did Not File a Motion in Limine or Trial Brief Opposing the State's Limitation of Cross-examination for Bias.

The courts are uniform in recognizing the importance of cross-examination. "The right to cross-examination is fundamental." *United States v. Twomey,* 806 F.2d 1136 (1st Cir.1992) "The right of cross-examination is a precious one, essential to a fair trial." *United States v. Smith,* 451 F.3d 209 (4th Cir.2006) "A full cross-examination by defense counsel is especially important when the witness is a chief government witness." *United States v. Garcia,* 13 F.3d 1464 (11th Cir.1994) (Emphasis added)

Despite the fact that the right to cross-examination is a critical right which is absolutely essential to a fair trial, the State of Nevada actually attempted to seek a substantial limitation of cross-examination for bias during Defendant's trial. The State filed a Motion in Limine to restrict cross-examination for bias. This Motion sought to greatly restrict the Defendant's fundamental constitutional right. Defense counsel however did not then respond appropriately with a counter motion in opposition. By not providing a strong motion in opposition to the State's motion or at least doing adequate legal research on this important issue, defense counsel was ineffective under *Strickland.* This issue should have been prepared thoroughly before the trial, as the necessity for a thorough and complete cross-examination for bias was obvious. Counsel should have been ready for the State's attempt to block this right. The Defendant was clearly prejudiced by his counsel's inaction in challenging the State's attempt to limit cross-examination of essential witnesses.

...

IV. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE DURING TRIAL.

Defense advocacy during trial requires constant zealous attention to the factual evidence combined with a competent knowledge of the rules of law and procedure. Defense counsel must be skilled in presenting the defense case, attacking the State's case, and have a competent grasp of all relevant rules of evidence applicable which may arise during trial. Counsel must be alert to any prosecutorial overreaching or misconduct which may arise. Careful examination of defense counsel's advocacy during this trial shows there were three (3) areas where counsel failed to meet *Strickland's* standards:

(1) Defense counsel was ineffective in attempting to impeach key defense witnesses;

(2) Defense counsel was ineffective in restraining prosecutorial misconduct and responding adequately when the prosecutor vouched for witnesses;

(3) Defense counsel was not an effective advocate during the closing argument.

A. Defense Counsel Was an Ineffective Advocate Trying to Cross-Examine the State's Witnesses.

At trial defense counsel during cross-examination, tried to unsuccessfully impeach the alleged victim, Taharah Dukes, by establishing there was a major inconsistency in prior versions of the material facts to which she had previously testified. (T.T. pg. 2720-2752) The State of Nevada vigorously objected to defense counsel's attempt to impeach her, with her prior inconsistent statements, stating that the defense had not laid an appropriate foundation to impeach the victim with her prior inconsistent statements. (T.T. p. 2736)

The defense counsel then asked the witness a number of questions about what her sister had told her about the Defendant, Fred. (T.T. pg. 2751, 52) The witness, of course, provided no helpful information to the defense. The totality of the cross-examination of Taharah Dukes was ineffective.

The prosecutor skillfully and aggressively using objections, took advantage of the defense attorney's lack of effectiveness. It became evident to the jury Defendant's trial counsel lacked understanding of evidence code rules. *Strickland* however states that the standard for an attorney's

performance is "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668 (1984) at 686. Defense counsel did not rise to the level of nominal competence demanded by *Strickland* and the Defendant was prejudiced thereby during his cross-examination of all important State witnesses.

B. Defense Counsel Was Ineffective Handling Prosecutorial Misconduct When the Prosecutor Vouched for the Credibility of Witness(es).

The prosecutor committed prosecutorial misconduct by making statements in closing argument strongly suggesting her personal opinion of the witnesses credibility. (T.T. pg. 3164, 3165, 3191, 3237, 3245, 3252) She finished her closing argument stating:

"You heard from all of the Dukes. Do you really think that they could have concocted all of this, those people that you heard on the stand? There is no way. Ladies and gentlemen, the State of Nevada cannot hold the Defendant accountable for his actions. Even the Court cannot hold the Defendant accountable for his actions. Only you can. The evidence shows that the Defendant is guilty of these charges, so please find him guilty. Thank you." (T.T. p. 3252)

Such 'vouching' has long been condemned as misconduct. This conduct should have led to an objection or motion for mistrial based upon the misconduct seeking strongly worded instructions by the court. *See, United States v. Alcantara-Castillo,* 788 F.3d 1188 (9th Cir.2015).

In this case, defense counsel's response was less that adequate to correct the serious prosecutorial abuse which occurred. Defendant submits, as the court held in *Alcantara-Castillo, supra,* the actions of the prosecutor amounted to "plain error." *Id.* 1192

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935). A "prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Maloney,* 755 F.3d 1044, 1046 (9th Cir.2014) (*en banc*) (quoting *United States v. Kojayan,* 8 F.3d 1315, 1323 (9th Cir.1993)).

Prosecutors may not "vouch" for a witness by offering their personal opinion of a witness's testimony. The conclusory statements by the prosecutors suggest that information existed outside

the record that verified the witnesses' truthfulness. *See, e.g., Weatherspoon,* 410 F.3d at 1146-48; *Combs,* 379 F.3d at 574-75; *Sanchez,* 176 F.3d at 1224. Vouching compromises the integrity of the trial and denies the defendant due process because the "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Reyes,* 577 F.3d 1069, 1077 (9th Cir.2009) (internal quotation marks omitted). *United States v. Alcantara-Castillo, Id.* 1191(Emphasis added)

Defendant respectfully urges the court to find that the lack of any effective objections or other response to this prosecutorial misconduct was error under *Strickland v. Washington.* Counsel was not adequately prepared to respond with effective argument and make appropriate objections or motions.

Even "Curative" instructions after such misconduct would have been of little use in eliminating the prejudicial cause by the deliberate actions of the State. This was a close case. The jury deliberated more than three days. It is respectfully submitted that only a mistrial could have cured the prosecutorial misconduct which denied the Defendant a fair trial. It has been held that failure to properly object is ineffective assistance of counsel under *Strickland*, 466 U.S. 668 (1984).

C. Defense Counsel Was an Ineffective Advocate During Closing Argument.

Defense counsel's closing argument did not effectively develop a reasonable doubt. (T.T. pg.3193-3233) The United States Supreme Court has held that an inadequate closing argument may be grounds for reversal in the case of *Smith v. Spisak,* 558 U.S. 139, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010). Attorney arguments are critical. The Nevada Supreme Court has actually even found it an indicia of incompetency when an attorney just fails to make an opening statement. *See, Buffalo v. State,* 111 Nev. 1139, 901 P.2d 647 (1995).

The closing argument was extremely important in this case as in any criminal case as it was the last opportunity for counsel to present a well structured persuasive plea to the jury that the Defendant was innocent and that a reasonable doubt existed on some or all of the charges. That was especially important in such a complex case which was also a close case. A significant amount of energy and planning were necessary to have prepared a competent, well reasoned closing argument

that could have persuaded the jury. As the Supreme Court noted in *Buffalo, supra:*

> ". . . Defense counsel's failure to make an opening statement, failure to consider legal defenses of self defense and defense of others, failure to spend any time in legal research, and general failure to present a cognizable defense rather clearly resulted in rendering the trial "unreliable." " *Id.* (Emphasis added) *Buffalo, Id.* 1149

. . .

In this case counsel's closing argument was ineffective under Strickland and it therefore rendered the trial 'unreliable' as in *Buffalo v. State, supra.*

V. DEFENSE COUNSEL WAS AN INEFFECTIVE ADVOCATE AT SENTENCING.

Defendant was sentenced to an extraordinarily lengthy and harsh sentence of life with the possibility of parole after 918 months, or seventy-six and a half years. *See,* Judgment of Conviction, November 2, 2015. Defendant respectfully submits that his trial counsel was grossly ineffective in preparing for the sentencing and in arguing for a just and proportionate sentence consistent with the Eighth Amendment.

Counsel did not file a Sentencing Memorandum, nor did counsel call any witnesses to provide mitigation testimony for Frederick Harris at the sentencing hearing. This lack of any mitigation evidence resulted in a sentence extraordinarily long and disproportionate. The State, by contrast, called the victim and provided the court victim impact statements. (See, Sentencing Transcript, November 2, 2015)

Although Frederick Harris was convicted of multiple serious charges, it cannot be presumed that his sentence of life with eligibility for parole in 918 months or 76 years, is consistent with the Eighth Amendment, even though it was within statutory guidelines. Defendant submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation. The sentence imposed by the court gave no consideration to any mitigating circumstances in the Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012).

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments

follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983).

Defendant is aware that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *See, United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). However, Defendant submits that a punishment within the limits of statutory guidelines may sometimes, in rare cases, exceed the limits of the Constitution. *See, Weems, supra,* stating . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment unconstitutional or the sentence to be considered so unreasonably disproportionate as to shock the conscious.

Defendant submits the punishment he received in this case far exceeded any reasonable sentence. This was a direct result of counsel's ineffectiveness as the sentence was grossly harsh and disproportionate. It was unconstitutional in violation of the Eighth Amendment's cruel and unusual punishment clause and it should therefore be reversed.

VI. DEFENSE COUNSEL WAS INEFFECTIVE AS AN ADVOCATE IN PREPARING AND ARGUING FOR THE MOTION FOR A NEW TRIAL.

Issues occurred at trial and during the jury deliberation that should have resulted in a new trial. Defense counsel filed a Motion for a New Trial pursuant to NRS 176.515 on April 28, 2014, which was deemed timely by the Deputy District Attorney which raised three issues concerning evidentiary matters during the trial.

The State filed an Opposition to the Defendant's New Trial Motion on June 13, 2014. On July 9, 2014, Defendant filed a Reply to State's Response and a Supplement to Defendant's Motion

for a New Trial. That Supplement raised the issue of juror misconduct during deliberation. That issue, of juror misconduct, was granted a evidentiary hearing on November 24, 2014. The District Court however denied the Motion for a New Trial on June 30, 2015. The Nevada Supreme Court, in a brief one sentence Order of Affirmance denied Defendant's appeal, stating that . . . "any misconduct by jurors was not prejudicial." (*See*, Order of Affirmance, November 28, 2017, p. 2, citing *Meyer v. State,* 119 Nev. 554, 561, 80 P.3d 447 (2003))

Defendant however respectfully submits there was substantial evidence of prejudicial juror misconduct by one juror discovered by defense counsel's investigator. This evidence of misconduct was sufficient to have very likely prejudiced the jury and denied Defendant a fair trial. It is respectfully submitted there was at least a reasonable probability the jury was prejudiced. *See, Williams v.Davis,* 90 F.3d at 496; *People v. Brown,* 399 N.E.2d 51, 53 (N.Y. 1979); *see also United States v. Keating,* 147 F.3d 895, 900 (9th Cir.1998); *United States v. Berry,* 64 F.3d 305, 307 (7th Cir.1995) (reasonable possibility misconduct affected verdict); *State v. Smith,* 573 N.W.2d 14, 18 (Iowa 1997) (reasonable probability misconduct affected verdict).

The likely reason the District Court exercised its discretion not to grant a new trial was because the key witness for the Defendant, Kathleen Smith, wouldn't decisively affirm her prior statements she made concerning serious misconduct when she testified under oath at the evidentiary hearing on November 24, 2014. (Transcript, 11/24/14, hearing pg. 22-23) This inconsistency in the defense witness's testimony at the evidentiary hearing was such that the trial judge chose to exercise discretion and deny the Motion for New Trial.

According to the Affidavit of Harrison Mayo, Jr., investigator for the Defendant, the witness, Kathleen Smith, had originally advised him about juror misconduct she had observed. He stated her observations to him in his Affidavit, dated July 9, 2014, which was filed with the Motion for New Trial. The relevant part of Mayo's Affidavit stated: . . .

> "5. That Ms. Allen and I interviewed this juror, Ms. Smith, and she disclosed that during deliberations, another juror started talking about being sexually abused as a child. She described this juror as being juror number seven (7), Yvonne Lewis. Ms. Smith

further said that Ms. Lewis became emotional during deliberations and began crying while she talked about her own experiences of sexual abuse.

6. That after she said she had been sexually abused, she began talking about the Defendant, Fred Harris, needing to be punished for what he did.

7. That after Ms. Allen made changes to the Affidavit as requested by Ms. Smith, she now does not want to get involved."

Mayo then asked Ms. Smith to make minor changes to the Affidavit, which had been prepared for her. Defense counsel however did not get Ms. Smith's signature on the revised Affidavit before the evidentiary hearing. Unfortunately for the Defendant, because counsel had not completed the task of preparing Ms. Smith's revised Affidavit **and** obtaining her signature to the revised Affidavit **before** the evidentiary hearing, the witness would not fully acknowledge the facts contained in the revised Affidavit in court. (Transcript, E.H., 11/24/2014, pg. 22-24)

Defendant directs the court to the testimony of Kathleen Smith at the evidentiary hearing on November 24, 2014, where she testified about Yvonne Lewis' statement during jury deliberations, and explained why she would not sign the prepared Affidavit under questioning by defense counsel.

. . .

Q. Are you saying that Yvonne Lewis, that juror that's sitting outside actually said that she was sexually abused?

A. From what I recall.

Q. Are you saying that she actually said that she was basing her verdict on the fact that she had been sexually abused and, therefore, she believed the victims?

A. I didn't say that. I said it appeared. My perception was.

Q. And you're saying that everybody was calm up until the third day, that it was the last day that this happened?

A. Was saying everybody was calm?

Q. Well, that's what you said at first.

A. Oh.

Q. How were the jurors? They were calm. Everybody was calm.

A. So what is your question? I didn't understand the question.

Q. Is that your position that everything was calm the first day and calm the second day and that things got heated the third day?

A. From what I recall.

Q. Were you trying to get a job with my office, the District Attorney's office?

A. I have been, yes.

Q. And is that why you refused to sign the affidavit that Ms. Allen gave you?

A. No.

Q. Then why wouldn't you sign it?

A. I didn't feel comfortable at that time, I didn't -

Q. 'Cause it wasn't true?

A. No, I'm not saying that.

Q. Then why didn't you sign it?

A. I just didn't.

Q. Why?

A. I didn't.

Q. Well, I understand. But why?

MS. ALLEN: Objection, Your Honor, asked and answered.

MS. LUZAICH: She's not answering it.

THE COURT: You need to answer why. 'Cause you had to have a reason why you didn't sign the affidavit. I mean you're the one that initiated the communication with the Defendant's mother.

THE WITNESS: I just - I just changed my mind about it; I just didn't sign it.

MS. LUZAICH: 'Cause it wasn't true?

THE WITNESS: I didn't say that.

MS. ALLEN: Objection, Your Honor, asked and answered.

THE COURT: Was the affidavit true that Ms. Allen gave you to sign?

THE WITNESS: Yes, it was true but I didn't sign it.

THE COURT: Okay. It was true but you didn't want to sign it.

THE WITNESS: Right.

THE COURT: And why didn't you want to sign it?

THE WITNESS: 'Cause I just changed my mind about it that's all.

THE COURT: You changed your mind about what?

THE WITNESS: About signing the affidavit.

THE COURT: Oh, okay. So you told Ms. Allen you would sign an affidavit -

THE WITNESS: Yeah, and then change -

THE COURT: - and then you changed your mind?

THE WITNESS: Yes.

THE COURT: You didn't change your mind about the information that was in there, though?

THE WITNESS: No, no.

THE COURT: Okay.

(Transcript November 24, 2014, pgs. 22-24)

The transcript reflects a reluctance of the witness to acknowledge what she had previously told investigator Mayo. This reluctance clearly prejudiced the Defendant in arguing the Motion for New Trial. The witness had clearly acknowledged previously to defense counsel's investigator that another juror had what could only be described as an emotional breakdown during deliberations. That juror was said to have been tearfully crying and upset when discussing her own sexual assault. (Nov. 24 transcript pg. 10-11) This most certainly influenced a deadlocked jury.

For some reason however Kathleen Smith then changed her mind and would not testify to all the facts at the evidentiary hearing, giving evasive and unresponsive testimony. (Nov. 24 transcript pg. 22-24) Counsel was unable to persuade her to explain what circumstances had changed her mind or why she wouldn't sign the prepared Affidavit. (Nov. 24 transcript pg. 18 -20) Was there simply a loss of memory by the juror, Kathleen Smith, or some sort of pressure which was never discovered?

It was established she was trying to get a job with the County. (Nov. 24 transcript pg. 22, 25) Although the defense began the Motion for New Trial to the verdict aside with solid facts of juror misconduct with prepared Affidavit by counsel's investigator, the failure of counsel to actually obtain the witness' signature of the juror referenced on the prepared Affidavit doomed the Motion for New Trial to failure. This was error under *Strickland v. Washington, supra*, which requires reversal. It was then impossible to prove the facts necessary to establish the Motion for New Trial without a clear and unambiguous statement from the witness, Kathleen Smith, whose testimony at the hearing was inconclusive.

VII. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BY NOT ADEQUATELY RESEARCHING THE LAW TO CHOOSE THE BEST ISSUE FOR A REVERSAL.

The Nevada Supreme Court has previously considered the issue ineffective assistance of counsel on appeal. In *Kirksey v. State,* 112 Nev. 980 (1996), the Supreme Court noted:

> "The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State,* 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. *See Jones v. Barnes,* 463 U.S. 745, 751-54 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. *Daniel v. Overton,* 845 F.Supp. 1170, 1176 (E.D. Mich. 1994); *Leaks v. United States,* 841 F.Supp. 536, 541 (S.D.N.Y. 1994), *aff'd,* 47 F.3d 1157 (2d Cir.), *cert. den.,* __ U.S. __ , 116 S.Ct. 327 (1995). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. *Duhamel v. Collins,* 955 F.2d 962, 967 (5th Cir.1992); *Heath,* 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. *Heath,* 941 F.2d at 1132. *Kirksey, Id.* 998 (Emphasis added)

Reviewing the Defendant's Appellate Brief for effectiveness, it is clear that defense counsel did not meet Strickland's standard of reasonably effective assistance on appeal. The waiver of any appellate issues or failure to raise any issues by appellate counsel must be reasonable. *Kirksey*, *Id.* If an appellate issue had a very good chance of success or even just a reasonable chance of success, it is respectfully submitted . . . that defense counsel erred by failing to raise such an issue on appeal.

The failure of counsel to raise the best or most meritorious issues on appeal may be grounds for reversal of his conviction. *Banks v. Reynolds,* 54 F.3d 1508 (10th Cir.1995). It is respectfully submitted that counsel in this case failed in getting a reversal of the case because he overlooked the most meritorious issues on appeal that may have reversed the conviction. Potential issues overlooked by defense counsel that may have been more meritorious than the issues actually raised include:

1.The court erred in sentencing the Defendant to a sentence of life, with a minimum of 918 months. That was cruel and unusual punishment in violation of the Eighth Amendment;

2.The court erred by limiting cross-examination;

3.The court committed plain error by not restraining excessive prosecutorial misconduct.

Effective appellate advocacy in this case, as in any case, required several distinct but interrelated skills including:

Careful review and analysis of the entire record to recognize the important appellate issues. The requires a basic understanding of criminal law, constitutional law and the laws of evidence and trial procedures;

Organizing the record to include all the material facts;

Understanding and researching the law as it applies to the case;

Writing a persuasive appellate brief that incorporates all the material facts with the relevant case law and other authorities;

Counsel had to be aware of recent changes in the law and be willing to challenge settled law and precedent when necessary.

It is respectfully submitted counsel did not apply all of these necessary skills effectively in preparing Defendant's appeal. His lack of effectiveness in preparing the Defendant's direct appeal was evident and requires reversal under *Strickland.*

In *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court found appellate counsel was ineffective for not effectively rebutting the prosecutor's theory with expert testimony. It is respectfully submitted that in this case counsel was also ineffective under *Strickland* because there were several potential winning issues on appeal. Defendant was clearly prejudiced by his attorney's failure to raise significant appellate issues that could have resulted in reversing the conviction.

Consider *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir.1995), where the court in reversing stated:

> ". . . When a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue. *Cook,* 45 F.3d at 392-93; *Dixon*, 1 F.3d at 1083. Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel," id. at 1083 n.5, because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. *See, Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983). Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *see Tapia v. Tansy,* 926 F.2d 1554, 1564 (10th Cir.), *cert. den.,* 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d 84 (1991). However, "an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." *Cook,* 45 F.3d at 394-95 (citing *Page v. United States,* 884 F.2d 300, 302 (7th Cir.1989)).

. . .

> In this case, Mr. Banks' appellate counsel failed to raise either the *Brady* claim or the ineffective assistance of trial counsel claim on direct appeal. These were not frivolous or weak claims amenable to being winnowed out of an otherwise strong brief. They were clearly meritorious. *Id.* 1515 (Emphasis added)

. . .

. . .

As in *Banks,* counsel here failed to effectively raise several non-frivolous claims that would have been a likely winner on appeal. This was ineffectiveness under *Strickland.*

(1) Defendant submits the extraordinary lengthy sentence the Defendant received should have been an appellate issue. Even though courts have held the usual role is that a sentence within statutory guidelines is presumptively valid, *see Glegola v. State,* 110 Nev. 344, 348 (1994); *United States v. Moriarty,* 429 F.3d 1012 (11th Cir.2005), a minimum of 76+ years was disproportionately lengthy and cruel sentence, exceeding the sentence of many homicide cases. The issue of the extraordinarily harsh sentence should have been raised on direct appeal as a violation of the Defendant's Eighth Amendment rights.

(2) Defendant also submits the court erred in limiting the Defendant's right to cross-examination of essential witnesses in this case.

(3)The court erred by not restraining prejudicial prosecutorial misconduct which was plain error. The prosecutor discussed the credibility of State witnesses in a way that suggested the prosecutor's personal opinion. This was a form of vouching which violated the Defendant's Fourteenth Amendment due process rights.

Because one or more of these issues were meritorious in that they may have succeeded, an appeal and a competent counsel analyzing all the facts and law should have determined these issues had merit, counsel did not fulfill his duty under *Strickland* to provide effective assistance on appeal.

VIII. CUMULATIVE ERROR BY COUNSEL REQUIRES REVERSAL OF THE CONVICTION.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It is respectfully submitted that even when considered separately, the eight (8) errors or omissions of counsel were of such a magnitude that they each require reversal. Certainly it is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State,* 119 Nev. 498. *See also, Sipsas v. State,*102 Nev. at 123, 216 P.2d at 235 (1986), which stated: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial." (Emphasis added)

Prejudice to the Defendant resulted from the cumulative impact of the multiple deficiencies. *Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. den., 440 U.S. 970, *Harris by and through Ramseyer v. Wood,* 61 F.3d 1432 (9th Cir.1995). The multiple errors of counsel in this case when cumulated together then require reversal. A quantitative analysis makes that clear. *See, VanCleave, Rachel.* When is Error Not an Error? Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

The relevant factors for a court to consider in evaluating a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also, Big Pond v. State,* 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003), *United States v. Dado,* 759 F.2d 550 (6th Cir.2014), *Mak v. Blodgett,* 970 F.2d 614 (9th Cir.1992), *Rodriguez v. Hake,* 928 F.2d 534 (2d Cir.1991).

The seriousness of the multiple charges required vigorous attorney advocacy both pretrial and during trial. Failure to adequately prepare and investigate and failure to file necessary motions was clear error under *Strickland, supra*, and *Kimmelman v. Morrison*, 477 U.S. 375 (1986). Defense counsel also failed to zealously and competently represent Defendant during trial and on appeal. The result was an extraordinarily lengthy sentence for the Defendant.

CONCLUSION

The Defendant, Frederick H. Harris, respectfully submits for the reasons stated, that he has met his burden under *Strickland v. Washington,* to show he received ineffective assistance of counsel in this case. Wherefore, this Honorable Court should reverse his conviction and order such relief as proper.

DATED this 4th day of November, 2019.

Respectfully submitted,

/s/ Terrence M. Jackson
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Terry.jackson.esq@gmail.com
Counsel for Petitioner/Defendant *Frederick H. Harris*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., I am a person competent to serve papers and not a party to the above-entitled action and on the 4th day of November, 2019, I served copy of the foregoing: Petitioner /Defendant's, Frederick H. Harris, SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Petitioner/Appellant as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FREDRICK HAROLD HARRIS JR., #0972945

Defendant.

CASE NO: **A-18-784704-W**
C-13-291374-1

DEPT NO: **XII**

STATE'S RESPONSE TO PETITIONERS'S SUPPLEMENTAL POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: **APRIL 23, 2020**
TIME OF HEARING: **8:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and files this State's Response to Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On July 23, 2013, Defendant Frederick Harris ("Petitioner") was charged by way of Information with the following: Counts 1, 15-18: Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508); Counts 2-3, 6, 8-11, 13-14, 21- 22: Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 4-5, 7, 12, 20: Lewdness with a Child Under the Age of 14 (Category A Felony - NRS 201.230); Counts 19, 25, 28, 37: First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320); Count 23: Coercion (Sexually Motivated) (Category B Felony - NRS 207.190); Counts 24 and 27: Administration of a Drug to Aid in the Commission of a Crime (Category B Felony - NRS 200.405); Counts 26, 29-35: Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 36, 39-41: Sexual Assault (Category A Felony - NRS 200.364, 200.366); Count 38: Battery with Intent to Commit Sexual Assault (Category A Felony - NRS 200.400); Count 42: Pandering (Category C Felony - NRS 201.300); Count 44: Living from the Earnings of a Prostitute (Category D Felony - NRS 201.320); and Count 45: Battery by Strangulation (Category C Felony - NRS 200.481).

A jury trial commenced on March 25, 2014. 9 AA 999. On April 15, 2014, after hearing 12 days of evidence and after approximately two days of deliberation, the jury found Petitioner guilty of the following: eleven counts of Sexual Assault With a Minor Under Fourteen Years of Age; five counts of Lewdness With a Child Under the Age of 14; six counts of Sexual Assault With a Minor Under Sixteen Years of Age; four counts of Sexual Assault; four counts of First Degree Kidnapping; one count of Administration of a Drug to Aid in the Commission of a Crime; one count of Coercion (Sexually Motivated); one count of Battery With Intent to Commit Sexual Assault; one count of Child Abuse, Neglect or Endangerment; one count of Pandering; and one count of Living From the Earnings of a Prostitute. The jury found Defendant not guilty of the following: two counts of Sexual Assault With a Minor Under Sixteen Years of Age; one count of Sexual Assault; one count of Administration of a Drug to Aid in the Commission of a Crime; four counts of Child Abuse, Neglect or Endangerment;

and one count of Battery by Strangulation.

Petitioner filed a Motion for New Trial on April 28, 2014. The State filed an Opposition on June 13, 2014. Petitioner's Motion was denied on June 30, 2015.

On November 2, 2014, Petitioner was adjudged guilty of the following: OF COUNT 2 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT3-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 5 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT6-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 8 -SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 9 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 10 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 11 - SEXUAL ASSAULT WTIH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 12- LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 13- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 14 -SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 16 - CHILD ABUSE, NEGLECT OR ENDANGERMENT (F); COUNT 19 - FIRST DEGREE KIDNAPPING (F); COUNT 20 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 21- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 22- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 23 -COEROON (SEXUALLY MOTIVATED) (F); COUNT 24- ADMINISTRATION OF A DRUG TO AID IN THE COMMISSION OF A CRIME (F); COUNT 25 - FIRST DEGREE KIDNAPPING (F); COUNT 26 -SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 28 - FIRST DEGREE KIDNAPPING (F); COUNT 29 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 31 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 33 -

SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 34- SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 35 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 36 – SEXUAL ASSAULT (F); COUNT 37 - FIRST DEGREE KIDNAPPING (F); COUNT 38- BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (F); COUNT 39- SEXUAL ASSAULT (F); COUNT 40- SEXUAL ASSAULT (F); COUNT 41 SEXUAL ASSAULT (F); COUNT 42 - PANDERING (F); AND, COUNT 44 – LIVING FROM THE EARNINGS OF A PROSTITUTE (F); COUNTS 1 , 15, 17, 18, 27, 30, 32, 43, and 45 were dismissed.

Petitioner was sentenced as follows: COUNT 2 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 3 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 4 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 5 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 6 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 7 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 8 – LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 9 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 10 - LIFE with a MINIMUM Parole Eligibility of THIRTY FNE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 11 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 12- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 13 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 14 - LIFE with a MINIMUM Parole Eligibility of THIRTY

FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 16 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 19 – LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 20- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 21 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 22- LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 23 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 24 - to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); COUNT 25 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 26 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 28 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 29 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 31 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 33 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 34 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 35 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 36 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 37 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 38 - LIFE with a MINIMUM Parole Eligibility of TWO (2) YEARS in the

Nevada Department of Corrections (NDC); COUNT 39- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 40 - LIFE with a MIN MUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 41 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 42- to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); and COUNT 44 - to a MINIMUM of EIGHTEEN (18) MONTHS and a MAXIMUM of FORTY EIGHT (48) MONTHS in the Nevada Department of Corrections (NDC); COUNTS 2, 3, 6, 8, 9, 10, 11,13, and 14 are to run CONCURRENT with each other; COUNT 21 to run CONSECUTIVE to COUNT 22; COUNTS 4, 5, 7, 12, and 20 are to run CONCURRENT with each other and to the other Counts; COUNT 16 to run CONCURRENT to the other Counts; COUNTS 19, 25, 28, and 37 are to run CONCURRENT with each other and to the other Counts; COUNT 23 to run CONCURRENT to the other Counts; COUNT 24 to run CONCURRENT to the other Counts; COUNTS 26, 29, 31, 33, 34, and 35 are to run CONCURRENT with each other and CONSECUTIVE to the other Counts; COUNTS 36, 39, 40, and 41 are to run CONCURRENT with each other; COUNT 38 to run CONCURRENT to the other Counts; and, COUNT 42 to run CONSECUTIVE to COUNT 44, with NINE HUNDRED SEVENTY NINE (979) DAYS CREDIT FOR TIME SERVED. Petitioner's AGGREGATE TOTAL SENTENCE is LIFE with a MINIMUM sentence of SEVEN HUNDRED TWENTY (720) MONTHS.

On October 27, 2015, Petitioner filed a Notice of Appeal.

On November 2, 2015, the Court filed the Judgment of Conviction.

On November 14, 2016, the Court filed an Amended Judgment of Conviction.

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

On November 16, 2018, Petitioner filed a Petition for Writ of Habeas Corpus. On June 6, 2019, the Court appointed petitioner post-conviction counsel. On June 20, 2019, Mr. Jackson confirmed as counsel. On November 1, 2019, Petitioner filed his Supplemental Points

and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition").

STATEMENT OF FACTS

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

At some point in 2005, T.D. and her children moved to Utah where they stayed for about two years. When they returned to Las Vegas in July of 2007, T.D. and her eldest child, V.D., moved into Petitioner's mother's house. The other four children went to live with Petitioner and Miss Ann on Blankenship Street. T.D. and V.D. moved several times over the next year before moving into the Blankenship house. From 2008 to 2010, Petitioner, Miss Ann, T.D. and T.D.'s five children lived at Blankenship. In 2010, T.D., V.D., M.D., and S.D., moved out of the Blankenship house and into an apartment in Henderson, while Tah. D. and Taq. D. remained at Blankenship with Petitioner and Miss Ann. Tah. D. and Taq. D. joined their mom and siblings in Henderson for the summer of 2012, before returning to the house on Blankenship. Taq. D. and Tah. D. were removed from Petitioner and Miss Ann's home in the Fall of 2012 and lived with a foster family for about a year before being reunited with T.D., who they resided with at the time of trial.

T.D. was working as a cocktail waitress in Louisiana where she lived with her five children when she met Petitioner in 2004. T.D.'s children, who ranged in age from toddlers to twelve years old, were enrolled in school for the first time in 2004. Petitioner, a Las Vegas resident, was visiting Louisiana and met T.D. at the bar where she worked. Shortly thereafter, T.D. left Louisiana for Las Vegas, while her children stayed behind. While neighbors periodically checked on the children, twelve-year-old V.D. was primarily responsible for the care of her younger siblings. A few days after T.D.'s arrival in Las Vegas, Petitioner's brother picked up T.D.'s children and moved them from Louisiana to Las Vegas.

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

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

About a week after this assault, V.D. told Miss Ann what Petitioner had done to her. Miss Ann informed Petitioner's mother, as well as T.D. Miss Ann, Petitioner, and Petitioner's mother confronted V.D., who they berated for reporting this assault and told her they did not believe her. At that time, no one reported the abuse or sexual assault to authorities. Subsequently, T.D. and her five children left Las Vegas and moved to Utah. They lived in Utah for approximately one-and-a half years, before T.D. returned to Las Vegas alone. While T.D. was in Las Vegas, her children were taken into state custody in Utah. T.D. returned to Utah and over the course of six months participated in parenting classes and was reunited with her children. Shortly after, she abruptly moved back to Las Vegas, this time taking her children with her.

When T.D. and her children moved back to Las Vegas in the summer of 2007, Miss Ann and Petitioner were living together in a house on Blankenship Street. T.D.'s four youngest children moved into that house, while T.D. and V.D. moved into the house of Petitioner's mother. 11 AA 1544-47. Petitioner committed another sexual assault on V.D., who was 15

years old, during this time period. Leading up to this assault, Petitioner believed V.D. was a virgin and told her he wanted to "take her virginity" and made her pick a date for it to occur. On August 24, 2007, Petitioner, T.D., and V.D. sat in Petitioner's car outside his mother's house, where he taunted V.D., saying he would be taking her virginity later. Petitioner drove around town with V.D. and T.D. in the car during the day, picking up alcohol which all three consumed. That night, Petitioner drove the three of them up to the top of a hill where he parked the car. Initially, Petitioner and T.D. sat in the front seat, while V.D. sat in the back. Petitioner moved to the back seat where he began to rub V.D.'s breasts while her mother watched. T.D. seemed amused as Petitioner removed her daughter's pants. He raped V.D. in the backseat of the car by forcing his penis into her vagina and told her he would do the same to her again. Afterwards, Petitioner drove back to his mother's house where he dropped off V.D. and T.D.

In the next few months, T.D. and V.D. moved out of Petitioner's mother's house and into a long-term motel efficiency apartment. T.D.'s four youngest children continued to live with Petitioner and Miss Ann on Blankenship Drive. While T.D. and V.D. lived in the efficiency, Petitioner pressured T.D. to engage in sex work and give the money she earned to him, in addition to the wages she earned through her job at Bally's housekeeping. Petitioner and T.D. engaged in a consensual sexual relationship during this time. Petitioner also continued to sexually assault V.D., who was then 15, while she and T.D. lived in the efficiency. At times, Petitioner would come to the apartment while T.D. was at work, drink beer, and force V.D. to have sex with him. Other times he would rape V.D. while T.D. was home. On at least two occasions, T.D. engaged in sexual activities with V.D. at Petitioner's behest. Specifically, Petitioner insisted that T.D. insert one end of a sex toy into her vagina while the other end was inserted into V.D.'s vagina. He also forced T.D. to perform oral sex on V.D. without V.D.'s consent and forced T.D. to hold a vibrator to V.D.'s genitals. On another occasion, Petitioner became enraged with T.D. who had not surrendered enough money to him, and in response he raped her by forcing his penis into her anus.

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After about six months, T.D. and V.D. moved from the efficiency apartment to an apartment on Walnut Street, where they lived for about six months. Petitioner continued to rape V.D., who was 15 years old, at the apartment on Walnut Street. In July of 2008, T.D. and V.D. moved into the Blankenship house. Petitioner, Miss Ann, Miss Ann's daughter, T.D., and all five of T.D.'s children were living in the house on Blankenship at that point. Petitioner raped V.D., aged 16, once while she lived at the Blankenship house, in the bathroom connected to his bedroom.

Petitioner was also physically abusive to T.D. and her children. Among other incidents, Petitioner struck the children with a belt, punched S.D. in the face and stomach, and strangled M.D. Petitioner similarly struck T.D. with a belt on at least one occasion. V.D. lived there for about two years before she and T.D. moved to Henderson with two of V.D.'s siblings. That left T.D.'s youngest two children (Tah. D. and Taq. D.) with Petitioner and Miss Ann at the Blankenship house, while T.D., V.D., M.D., and S.D. lived in an apartment called "St. Andrews."

Petitioner also raped V.D. once while she was living at the St. Andrew's apartment, and approximately 17 years old. In 2010, when V.D., her mom, and siblings were moving into the St. Andrew's apartment, V.D. met Rose Smith, who she came to call Miss Rose. Over the course of several months, V.D. spent time at Miss Rose's house, where she eventually lived for a period of time. Before V.D. moved in with Miss Rose, while she was visiting in December of 2011, V.D. told Miss Rose about the sexual abuse she had experienced. Miss Rose took V.D. to a police station in Henderson, where the desk officer called the special victims unit and Detective Aguiar was dispatched to the station to interview Miss Rose and V.D. After interviewing V.D. at the station, Detective Aguiar went to V.D.'s home on Center Street where T.D. and two of V.D.'s siblings lived. Over the course of his interviews, Detective Aguiar learned that V.D. had been physically and sexually assaulted by Petitioner on multiple occasions and that V.D.'s younger sisters were currently living with Petitioner. Detective Aguiar then proceeded to Petitioner's home on Blankenship. After interviewing everyone in the home, the officers concluded that probable cause did not exist to make an arrest. The

officers from Henderson Police Department made contact with CPS who began an investigation as well.

In the summer of 2012, two years after T.D., V.D., S.D., and M.D. moved out of the Blankenship house, and a few months after the police first questioned him, Petitioner began sexually assaulting Tah. D., who was twelve years old. On more than one occasion, Petitioner sexually assaulted Tah. D. in the bathroom attached to his bedroom by rubbing her breasts and the outside of her vagina with his hand, and putting his penis inside her vagina. At other times, he forced Tah. D. to put her hand on his penis, and put his penis in her mouth and vagina in her bedroom. He also sexually assaulted Tah. D. in the same manner in the garage. On one particular occasion, he woke Tah. D. and took her from her bedroom to the laundry room where he unbuckled his pants and forced his fingers in her vagina. When Taq. D. began to approach the laundry room, he stopped and told Tah. D. not to tell anyone what he had done. Taq. D. saw Petitioner through a crack in the laundry room door touching Tah. D.'s leg and asked Tah. D. what happened. Tah. D. subsequently told Taq. D. that Petitioner had molested her. Together, the two girls told Miss Ann. At that time, Miss Ann took both Tah. D. and Taq. D. to a gynecologist for pelvic exams. Miss Ann did not report the disclosure to the police and, although Tah. D. and Taq. D. briefly lived with their mother and siblings in Henderson during the summer of 2012, they returned to the Blankenship house in September.

In September of 2012, approximately nine months after the police first reported to the Blankenship house and two or three months after Tah. D. was sexually assaulted, Taq. D. called the CPS hotline to report Petitioner sexually assaulting Tah. D. CPS and the Las Vegas Metropolitan Police Department were assigned to the case and arranged for Tah. D. and Taq. D. to be interviewed and undergo medical exams at the Children's Assessment Center. Miss Ann was also interviewed at that time. T.D. and her other children were subsequently interviewed. Petitioner was arrested early in 2013 and by the start of trial in 2014, Tah. D. and Taq. D. had been reunited with their mother and lived in Henderson.

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ARGUMENT

Petitioner brings eight (8) grounds in his Petition. The first seven (7) grounds allege ineffective assistance of counsel. Pet. at 2. Ground eight (8) alleges that cumulative error by defense counsel requires reversal of this conviction. Pet. at 2.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

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

I. COUNSEL'S PRETRIAL INVESTIGATION WAS NOT INEFFECTIVE

In Ground One (1), Petitioner alleges that his trial counsel was ineffective in pretrial investigation. Specifically, Petitioner seems to allege that counsel was ineffective for not fully investigating how to attack the credibility of the State's main witness. Pet. at 5-6. Petitioner also alleges that counsel was ineffective for not seeking the services of a credible expert witness to do a pretrial psychiatric examination of the victims and challenge the State's expert witnesses. Pet. at 7.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." Harrington v. Richter, 562 U.S. 86, 111, 131 S.Ct. a770, 791 (2011).

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

Second, Petitioner is incorrect in alleging that counsel was ineffective for failing to secure an expert witness to challenge the State's expert witnesses. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." Harrington, 562 U.S. at 111, 131 S. Ct. at 791. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. Once again, Petitioner has made no claims regarding why such an expert witness needed to be called. Petitioner merely alleges that an expert witness could have challenged the State's child medical experts. Pet. at 7. However, Petitioner does not identify what grounds an expert would or even could have challenged the State's expert witnesses on.

Third, assuming that Petitioner means V.D. when he refers to the "main witness" (as V.D. was the victim of the majority of Petitioner's sexual assaults), the record shows that counsel's cross-examination evidenced a thorough understanding both of the case and the witness's history. Counsel began by reviewing previous statements and testimony V.D. had given in the case. Trial Transcript, Day 6, at 37. Counsel went on to demonstrate a thorough understanding of the factual allegations surrounds the case. See *inter alia*, Id. at 38-53. Counsel further attempted to impeach V.D. with her preliminary hearing transcripts. Id. at 58-72. None of these things would have been possible without a thorough investigation into the case. As such, it is clear that Petitioner's counsel conducted a reasonable pre-trial

investigation.

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

II. TRIAL COUNSEL WAS NOT INEFFECTIVE DURING JURY SELECTION

A. Counsel Was Not Ineffective For Not Requesting Sequestered Individual Voir Dire

Petitioner first alleges that counsel was ineffective for failing to secure sequestered individual voir dire. Pet. at 8. According to Petitioner, such a failure resulted in a impartial jury because (1) jurors may have been unwilling to reveal that they had previously been victims of sexual assault, and (2) those jurors who had been victims of sexual assault may have been seen as more credible by other jurors, and therefore have been able to sway their minds during jury deliberation.

First, such a decision was not unreasonable. Petitioner has cited to no authority suggesting that not requesting sequestered individual voir dire constitutes ineffective assistance of counsel. Petitioner's entire premise underlying this claim is that jurors who had been victims of sexual assault may not come forward if the voir dire was not sequestered. This claim is belied not only by the record, but Petitioner's own pleadings. Petitioner readily admits the numerous jurors admitted they had been the victims of sexual assault during voir dire. Pet. at 8. The record reflects that the court asked the jurors whether they or anyone close to them had been the victim of sexual crimes. (Trial Transcript, Day 1, at 111). It was further made clear to the jurors that they were free to approach the bench to discuss any sensitive answers they did not wish to vocalize to the public when the district court had one potential juror do just that when the juror became emotional while discussing her past. (Trial Transcript, Day 1, at 123). The jury was therefore aware that they could disclose any sensitive information out of the presence of the rest of the panel. Given that this option was available and made known to the jury, it is disingenuous to suggest that jurors would have responded differently to a sequestered voir dire.

The State would further note that Petitioner does not actually allege in this section that a juror concealed their relevant history and subsequently had a disproportionate effect during deliberations. Petitioner merely asserts that this *could* have occurred. Pet. at 9.[1] Given that Petitioner has not identified any jurors that concealed bias, his entire argument is based on hypotheticals. As such, Petitioner has failed to establish that he was prejudiced as a result of his trial counsel's decision to not request sequestered individual voir dire.

Given that the voir dire strategy pursued by counsel was not unreasonable, and that Petitioner has failed to demonstrate he was prejudiced by failing to even allege that an impartial jury was empaneled as a result, counsel was not ineffective. This claim should be denied.

B. Trial Counsel Was Not Ineffective For Failing to Hire a Jury Selection Expert

Appellant next argues that his trial counsel was ineffective for failing to hire a jury selection expert. Pet at 10. As an initial point, the State notes that once again, Petitioner does not even allege that an impartial jury was empaneled as a result of this trial decision. As such, Petitioner has failed to reach his burden of even arguing that this decision prejudiced the outcome of his trial under Strickland's second prong.

In addition, Petitioner has failed to show that the decision not to hire a jury selection expert was an unreasonable one. First, Petitioner does not allege what a jury selection expert would have contributed to his case. Instead, Petitioner merely states that "[a] jury consultant, would have seen many things that counsel missed because they would have been trained to look for certain things." Pet. at 14. Petitioner does not state what "things" his trial counsel missed, and instead relies on the circular argument that trial counsel must have missed "things" because he did not hire a jury selection expert. Such bare and naked allegations cannot support a successful ineffective assistance of counsel claim. Hargrove v. State, 100 Nev. 498, 502, 686

[1] The State notes however, that Petitioner claims under Ground Six that Yvonne Lewis (one of the jurors in the underlying case), discussed being sexually abused as a child during the jury deliberations. Pet. at 22. However, the record shows that Yvonne Lewis raised her hand during voir dire, indicating that she or someone close to her had been the victim of sexual crimes. Trial Transcript, Day 1, at 121-22. Specifically, Ms. Lewis indicated that her family had a history of domestic abuse that occurred while she young. However, she did not allege any sexual assault, and stood by that assertion at a later evidentiary hearing. Id.; Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 31-32, November 24, 2014. When questioned, Ms. Lewis indicated that despite these circumstances, she could be fair and impartial during the trial. Id. Given that Ms. Lewis indicated both at voir dire and at an evidentiary hearing that she had not been sexually assaulted, her selection as a juror in this case does not support Petitioner's argument.

P.2d 222, 225 (1984).

Second, Petitioner only points to the partial voir dire of two potential jurors as proof that a jury selection expert was needed. However, neither of these two jurors was ultimately selected to be on the jury, showing that no jury selection expert was necessary to distinguish which of the jurors displayed bias. Trial Transcript, Day 1, at 111,123; Trial Transcript, Day 2, at 239. Given that neither of these jurors were selected, Petitioner has brought no actual evidence forward indicating that a biased jury was empaneled as a result of his counsel's decisions. As such, Petitioner has not demonstrated that he was prejudiced by counsel's decision not to hire a jury expert. Therefore, counsel cannot be deemed ineffective, and this claim should be denied.

III. COUNSEL'S DECISIONS REGARDING WHICH PRE-TRIAL MOTIONS TO FILE WERE NOT INEFFECTIVE

In Ground Three, petitioner alleges that counsel was ineffective for failing to file various motions. Pet. at 2. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

A. Counsel Had No Obligation to File a Motion For a Defense Psychiatric Examination

Petitioner first alleges in this section that his counsel was ineffective for failing to file a Motion for Defense Psychiatric Examination. Pet. at 14. Petitioner alleges that there were indications that Tah. D. and M.D. may have had psychological problems that would have rendered their testimony inherently suspect or unreliable. Pet. at 15. Petitioner bases his argument off Tah.D. being diagnosed with "cognitive delay" and M.D. being diagnosed with "anxiety disorder."

In Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), the Nevada Supreme Court departed from a two year old precedent by overruling State v. District Court (Romano), 120 Nev. 613, 97 P.3d 594 (2004). In doing so, the Court returned to the requirements it previously set forth in Koerschner v. State, 116 Nev. 111, 13 P.3d 451 (2000), reasserting that a trial judge should order an independent psychological or psychiatric examination of a child victim in a sexual assault case only if the defendant presents a compelling reason for such an examination. "Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity." Koerschner, 116 Nev. at116-117, 13 P.3d at 455.

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

Second, the factors articulated in Koerschner would not have weighed towards a finding that an independent psychological or psychiatric examination was required. First, there was significant corroborating evidence to these two victims' testimony. The State called all large number of witnesses, who testified to Petitioner's violent and sexually criminal behavior towards multiple members of the Duke family. See *inter alia*, Trial Transcript, Day 1, at 73, 105-117 (testimony of T.D.); Trial Transcript, Day 5, at 112, 120-124 (testimony of V.D.); Trial Transcript, Day 8, at 85, 103-115, 118-120, 137-145 (testimony of Taq. D.); Trial Transcript, Day 9, at 96, 104-107 (testimony of CPS employee Sholeh Nourbakhsh). Second, neither disorder suffered by either victim bears on their credibility. M.D. has a general anxiety disorder (Trial Transcript, Day 7, at 66-71), while Tah.D. has a learning disability (Trial Transcript, Day 9, at 92-94). Neither of these diagnoses affect one's ability to discern reality. Neither do these diagnoses make one inherently unreliable or likely to fabricate. In fact, both

witnesses were able to respond articulately and clearly at trial. As such, the factors articulated in Koerschner would not have weighed towards finding that an independent psychological examination was required.

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

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

B. Defense Counsel Was not Ineffective For Not Filing a Motion in Limine

Petitioner next argues that his counsel was ineffective for failing to oppose the State's Motion in Limine "to restrict cross-examination for bias." This pleading is so bare of facts and citations the State is unable to adequately respond. Odyssey does not reflect any written Motion in Limine on file. If the alleged Motion was an oral motion, Petitioner has provided no citation to the record regarding where it occurred. Neither has Petitioner said what witness this Motion was in regards to, or on what day of this 14-day trial it occurred. Given that this claim is the epitome of a bare and naked allegation, it is suitable only for summary denial

pursuant to Hargrove.[2]

To the extent Petitioner supplements this claim in his Reply sufficient to merit a response, the State would respectively request an opportunity to respond to the claim on the merits.

IV. COUNSEL WAS NOT INEFFECTIVE DURING TRIAL

A. Trial Counsel's Impeachment Was Effective

Petitioner next alleges that counsel was ineffective in their cross-examination of Tah.D. Pet. at 17. Specifically, Petitioner claims that the State's objections kept any useful information from being elicited. Such a claim is belied by the record.

Petitioner's complaint regarding counsel's performance after the State objected to a line of questioning for "lack of foundation" is mystifying. The objection was posed merely because the question was asked in a confusing manner. Trial Transcript, Day 9, at 161. Counsel clarified her question, and was able to proceed with the line of questioning. Id. The State further objected to a hearsay statement which was sustained. Id. at 167. However, the failure to get a hearsay statement admitted into evidence is not a byproduct of counsel's effectiveness, it is a byproduct of the fact that the statement was hearsay and not permitted under the rules of evidence.

Further, the record shows that Petitioner's counsel was effective on cross-examination. Counsel elicited that Petitioner was the one who drove the children to well in school. Trial Transcript, Day 9, at 140-141. Counsel elicited that the witness had reported feeling "protected" while staying with Petitioner. Id. at 151. Counsel elicited that the witness had told detectives she had no problems with anybody in the house. Id. at 153. Counsel outlined the potential contradiction between witness saying she was raped for the first time at age 11, but saying during that same year she was not uncomfortable around Petitioner. Pet. at 153-54. Counsel elicited as much information that was helpful to Petitioner's case as was possible under the circumstances. Further, the scope of cross-examination is a strategic decision that is

[2] Further, the State objects to the categorization of any such Motion as "an attempt to block" Petitioner's rights. The right to cross-examination is not unlimited, and is restricted through a number of procedural rules.

virtually unchallengeable. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002); Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Here, the record demonstrates that counsel effectively elicited varying pieces of helpful information on cross-examination. Further, the record belies Petitioner's claim that his counsel was ineffective at dealing with the State's objections. Finally, Petitioner has failed to demonstrate how a different cross-examination would have made a more favorable outcome at trial probable. Therefore, counsel cannot be deemed ineffective and this claim should be denied.

B. There Was No Prosecutorial Misconduct For Petitioner's Counsel to Object To

Petitioner next claims his counsel was ineffective for failing to object when the State committed prosecutorial misconduct by allegedly vouching for witnesses during closing argument. Pet. at 18. Specifically, Petitioner raises issue with the following excerpt from the States closing:

> You heard from the Dukes. Do you really think that they could have concocted all of this, those people you heard on the stand? There is no way. Ladies and gentlemen, the State of Nevada cannot hold the Defendant accountable for his actions. Even the Court cannot hold the Defendant accountable for his actions. Only you can. The evidence shows that the Defendant is guilty of these charges, so please find him guilty. Thank you.

Pet. at 18.

Vouching occurs when the State "places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (citing U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). This Court has held that it is not vouching where the State claims that a witness' identification was "as good as you could ask for" during closing argument. Id. Further, "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). However, the State may not go

so far as to argue that a witness is a person of "integrity" or "honor." Id. Finally, it is the province of counsel to determine what objections, if any, to make during a closing argument. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating that it is trial counsel that has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

Given that the statement did not amount to "vouching," the State did not commit prosecutorial misconduct. It therefore would have been futile for counsel to object. Counsel has no obligation to raise futile arguments pursuant to Ennis. In the alternative, if the Court finds that statements to be vouching, the statements were not such that the failure to object would have rendered a more favorable outcome at trial probable. See Rowland, 118 Nev. at 31, 39 P.3d at 167 (stating: "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt"). In the instant case, the evidence of guilt was strong. The State presented multiple witnesses, including the entire Duke Family,

individuals close with the family, and investigating officers. Given the overwhelming evidence presented against Petitioner, even if the statements were considered vouching, Petitioner was not prejudiced by his counsel not objecting.

Therefore, Counsel cannot be held ineffective on this ground, and this claim should be denied.

C. Counsel's Closing Argument Was Adequate

Petitioner next argues that his counsel was ineffective during closing argument. Pet. at 19. Petitioner does not articulate why, or what portions of the closing argument were ineffective. Petitioner does not allege what counsel should or even could have done differently in order to present a more compelling closing argument. As such, this claim is nothing more than a bare and naked allegation suitable only for summary dismissal pursuant to Hargrove.

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

Given that Petitioner has not alleged any issue pursuant to Jones or other rule of law that confines the scope of counsel's arguments, the only question is whether counsel performed reasonably at closing. The record reveals this to be the case. Counsel began by challenging the veracity of the State's witness V.D. Trial Transcript, Day 12, at 70. Counsel went on to point out the V.D.'s mother T.D. had potential issues with Child Protective Services when living in Louisiana. Id. at 72. Counsel highlighted that it would have been odd for T.D. to bring her children back to the Petitioner after they suffered such abuse at his hands. Id. at 74. Counsel further went on to point out the timing of the reports versus the timing of the incidents. Id. at 74-75. Counsel went on to reiterate that the children's grades were the best they had ever been during this time. Id. at 77. The record clearly shows that counsel's closing

argument was designed to discredit the witnesses and attempt to show that Petitioner had been a positive influence on the family. While this strategy was ultimately not successful, it was clearly not unreasonable. Therefore, counsel was not ineffective during closing argument and this claim should be denied.

V. COUNSEL WAS EFFECTIVE AT SENTENCING

While Petitioner makes to claims under Section five of his Petition, the State breaks them up here as they are two distinct issues.[3] Petitioner alleges that counsel performed ineffectively at sentencing. Specifically, Petitioner claims that it was ineffective for counsel to not file a sentencing memorandum, as well as to not present any witnesses to provide mitigation testimony. Pet. at 20.

As an initial point, Petitioner has not alleged what information should or could have been presented in a sentencing memorandum. Petitioner further has not alleged what witnesses could have been called to present mitigation testimony, or what these alleged witnesses would have even testified to. As such, Petitioner's claims are bare and naked assertions suitable only for summary dismissal pursuant to Hargrove.

Further, the record demonstrates that Petitioner's counsel performed effectively at sentencing. Counsel began by noting the number of people who had been called as witnesses who testified that none of the State's witnesses had spoken up regarding the abuse. Recorders Transcript RE: Sentencing, at 7, October 27, 2015. To the extent Petitioner believes these are the witnesses who should have been called, such a decision was unnecessary. The sentencing judge was the same judge who had presided over the trial, and as such, had already heard this testimony. Id. at 5. Counsel further noted Petitioner's relatively old age. Id. at 7. That counsel could not present a more sympathetic argument was due not to counsel's alleged ineffectiveness, but the reprehensible nature of Appellant's actions. Therefore, this claim should be denied.

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[3] For analysis on why Petitioner's sentence was neither cruel nor unusual see section VI.

VI. PETITIONER'S SENTENCE WAS NOT CRUEL AND UNUSUAL

Petitioner also argues that his sentence was cruel and unusual. Pet. at 20-21.

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

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Petitioner concedes that his sentence was within the statutory limits. Pet. at 20-21. Further, Petitioner does not even allege that the Court relied on impalpable or highly suspect evidence. Instead Petitioner makes a proportionality argument, alleging that his sentence is simply too long given his crimes. The State disagrees. Appellant was convicted for sexually assaulting multiple minors over many years. Appellant was further convicted of beating minors. Appellant was also convicted of sexually assaulting their mother and forcing her to work as a prostitute. See generally, Trial Transcript, Day 14. It is the reprehensible nature of these crimes, not the sentence, which shocks the conscience. Therefore, Petitioner's sentence

is neither cruel nor unusual, and this claim should be denied.

VII. COUNSEL WAS NOT INEFFECTIVE IN ARGUING THE MOTION FOR A NEW TRIAL

Petitioner next argues that his counsel was ineffective in their preparation and arguments regarding Petitioner's Motion for a New Trial. Pet. at 21-22. While Petitioner dedicates multiple pages to trying to relitigate the issue of whether he should have been granted a new trial due to juror misconduct, his only real claim that counsel was ineffective is that counsel failed to secure Kathleen Smith's ("Smith") signature on her affidavit once it had been revised. Pet. a 22-25.

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

However, Petitioner is incorrect that counsel's failure to get Smith to sign the affidavit constituted ineffective assistance of counsel. Counsel prepared the affidavit after her investigator spoke to Smith. However, Smith requested that changes be made to the affidavit and refused to sign it, claiming "she did not want to get involved." Reply to State's Response to Motion for a New Trial and Supplement to Defendant's Motion for a New Trial, at 9-10, Jul 9, 2014; Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 22, November 24, 2014. Petitioner's counsel cannot force someone to sign a document, and any assertion that her failure to do so constitutes ineffective assistance of counsel is absurd.

Further, counsel's conduct following Smith's refusal to sign the affidavit was reasonable. Counsel requested and received an evidentiary hearing on the issue. Id.; Reply to State's Response to Motion for a New Trial and Supplement to Defendant's Motion for a New Trial, at 7, Jul 9, 2014. At the hearing, counsel called Smith as a witness, and asked her to explain her experience during deliberation. Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 4, 9-17, November 24, 2014.

Counsel further received a hand written statement from Smith detailing what happened during the deliberation. Id. This statement was attached as Exhibit B to Petitioner's Reply.

The simple fact is that Petitioner's Motion being denied has nothing to do with counsel's alleged ineffectiveness. It has everything to do with the fact that multiple jurors (including Yvonne Lewis) testified that Lewis did not claim during deliberations that she had been sexually assaulted. Id. at 31-32, 55. These jurors also indicated that Ms. Smith had claimed she could not vote guilty based upon Petitioner's race. Id. at 33, 41. As such, it is clear that counsel did everything she could have possibly done in investigating this claim. Counsel was not ineffective on this Ground, and this claim should be denied.

Further, to the extent Petitioner is seeking to relitigate the fact that he should have been granted a new trial due to juror misconduct, such a claim is barred by law of the case doctrine. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

On November 28, 2017, the Supreme Court of Nevada issued an Order of Affirmance finding that stated "the district court did not abuse its discretion in denying the motion for a new trial for juror misconduct, as any misconduct did not prejudice Petitioner." Order of Affirmance, at 2, November 28. 2017. As such, any attempt Petitioner now makes to relitigate this issue is barred by law of the case and must be denied.

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VIII. APPELLATE COUNSEL WAS NOT INEFFECTIVE

Petitioner next argues that his appellate counsel was ineffective for not raising the following issues on appeal: (1) that Petitioner's sentence was a cruel and unusual punishment in violation of the eighth amendment; (2) that the court erred by limiting cross-examination; and (3) that the court erred by not restraining excessive prosecutorial misconduct. Pet. at 27.

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

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

Appellate counsel was not ineffective for not bringing the claims Petitioner now urges they should have. The claims Petitioner advocates for are either without merit, or so bare of factual underpinnings in this Petition that their merit is impossible to address. First, as the State argued in Section VI, Petitioner's punishment was not cruel and unusual. Second, it is unclear what witnesses Petitioner was not entitled to fully cross-examine. The State notes that appellate counsel did raise the issue on appeal of whether the district court erred in limiting his cross-examination regarding a book written by T.D. To the extent this is the issue Petitioner is alleging, his claim is belied by the record. Otherwise, the underlying claim Petitioner alleges

counsel should have brought is nothing more than a bare and naked allegation. Finally, as the State argued in Section IV(B), the State did not engage in vouching, so any prosecutorial misconduct claim on these grounds would have been frivolous.

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

IX. THERE WAS NO CUMULATIVE ERROR

Finally, Petitioner argues that cumulative error requires reversal in the instant case.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot.[4] However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Defendant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the

[4] However, while addressing the issue in dicta, the Nevada Supreme Court has noted other courts' holdings that "multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong." McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992).

crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

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

CONCLUSION

For the reasons set forth above, the court should deny Petitioner's Petition for Writ of Habeas Corpus.

DATED this 6th day of April, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 6th day of APRIL, 2020, to:

TERRANCE JACKSON, ESQ.
terry.jackson.esq@gmail.com

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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Counsel for *Frederick H. Harris, Jr.*

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA Plaintiff, v. FREDERICK H. HARRIS, #1149356, Defendant.	District Case No.: **A-18-784704-W** District Case No.: **C-13-291374-1** Dept. **XII** Date of Hearing: **April 23, 2020** Time of Hearing: **8:30 a.m.**

REPLY TO STATE'S RESPONSE TO PETITIONERS'S SUPPLEMENTAL POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Defendant, FREDERICK HAROLD HARRIS, JR., by and through his attorney, TERRENCE M. JACKSON, ESQ., and hereby submits this Reply Brief with Points and Authorities incorporated herein.

This Reply is based upon all prior pleadings previously filed in this case, the attached Points and Authorities in support and all oral argument at a hearing of this Petition.

DATED this 10th day of April, 2020.

Respectfully submitted,

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POINTS AND AUTHORITIES

I. TRIAL COUNSEL DID NOT PROVIDE EFFECTIVE ASSISTANCE DURING THE PRETRIAL INVESTIGATION AND PREPARATION STAGE.

Using the long standing United State's Supreme Court standard for ineffective assistance of counsel enunciated in *Strickland v. Washington,* 466 U.S. 668 of "reasonably effective assistance" Defendant has shown he met each part of *Strickland's* test of ineffective assistance.

His counsel was not reasonable effective under an objective standard because the errors made by Defendant's counsel were fundamental errors that would not have been made by competent counsel in this type of case. This was a case involving multiple counts of sexual assault and first degree kidnapping. It is the kind of case that required zealous and competent advocacy as the Defendant was facing multiple life sentences.

Furthermore, it can be clearly established that the errors of counsel created at least a reasonable probability there would likely have been a different result if counsel had acted competently and avoided the errors of omission of defendant's counsel.

This was not a case where there were only minor or insignificant errors or omissions, but the errors were game changing errors that resulted in multiple convictions that must be reversed.

The State argued counsel's failure to seek a psychiatric examination of the victim or to even hire his own expert witnesses to assist him was not error. (State's Response, hereinafter, S.R., p. 18) The State overlooks *Strickland's* clear injunction that a defense counsel must do at least a minimal investigation so he can be aware of possible defenses to ascertain the best defense. *Strickland, Id.* 691. It is respectfully submitted the defense counsel in this case did not meet that minimal standard required by *Strickland.*

II. DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE IN JURY SELECTION.

A. Defense Counsel was Ineffective Because He Failed to Seek Individual Sequestered Voir Dire and Defendant was Prejudiced Thereby.

The State in their Response Brief argues that the Defendant was not prejudiced because his counsel failed to file a Motion for Individual Voir Dire, saying that at least one juror approached the bench and became "emotional" discussing "sensitive" answers about her past. (S.R., p. 16) (See T.T. Day 1, p. 111)

Defendant respectfully submits this supports his claim that a Motion for Individual Voir Dire was necessary in this type of case and counsel was grossly ineffective for not seeking such a motion.

B. Defendant was Entitled to a Searching Voir Dire with the Help of a Jury Selection Expert.

Defendant did not have a jury selection expert. It was even more critical in this type of case than in other cases that every single juror was subjected to a lengthy and thorough voir dire designed to discover any possible biases. The State seems to suggest that each juror should be presumed to have no biases, conscious or unconscious, against the Defendant. Why should there be any voir dire if it is not designed to carefully and systematically search for hidden biases?

In the Response Brief, the State argues that merely because the Defendant did not articulate a case specific reason for a jury consultant, it therefore would not have resulted in a different outcome in this case if a jury consultant had been granted. (S. R., p. 9) Defendant respectfully submits this logic is flawed and having a expert jury consultant, who was able to assist in discovering even one jury member who was not fair and impartial, because of hidden biases, would likely have changed the result.

III. IT WAS NOT A REASONED CHOICE OR REASONABLE TRIAL TACTIC FOR DEFENSE COUNSEL'S FAILURE TO FILE MERITORIOUS MOTIONS.

The State cites *Doleman v. State,* 112 Nev. 843, 846, 921 P.2d 278, 280 (1996), for the proposition that counsel's "strategy" decisions or "tactical" decisions are "virtually unchallengeable absent extraordinary circumstances."

It is not clear how choosing not to file meritorious motions pre-trial is an actual "strategy"

or "tactical' decision rather than mere laziness of counsel. In any event, in this case the failure to file possibly winning motions was inexcusable under *Strickland*. Particularly inexcusable was the failure of defense counsel to file a Motion for an Independent Psychiatric Examination or Evaluation of the State's alleged victims.

The State actually suggests an *ex post facto* change in law, NRS 50.700, orchestrated by the District Attorney's Office, one year after the Defendant's trial, would have made such a motion frivolous. (S.R., p. 20) Defendant respectfully disagrees.

Before the revision of NRS 50.700, one year after Defendant's trial, numerous Nevada cases had upheld the granting of a defendant's motion for the opportunity to present expert psychological testimony concerning the alleged victims in sexual assault cases. The Nevada Supreme Court held that this evidence is admitted . . . "to explain to the jury such factors as "whether the child victim shows signs of being coached in testimony, whether the child suffers post-traumatic stress, whether the observed condition of the child is consistent with the assault and whether the victim has been forthcoming or evasive." *Kuerschner v. State,* 116 Nev. 1111, 1121 (2000), citing *Lickey v. State,* 108 Nev. 191, 827 P.2d 824 (1992), *Manuelle v. State,* 114 Nev. 921, 966 P.2d 151 (1998). (Emphasis added)

IV. AN EVIDENTIARY HEARING WILL RESOLVE DISPUTED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

The State claims Defendant has made many unsupported or "bare naked allegations." (S. R., p. 14, 16) Defendant believes an evidentiary hearing will establish in more concrete detail the ineffectiveness of defense counsel in many areas. The evidentiary hearing will show that in each issue Defendant has raised he was prejudiced by his counsel's omissions and ineffectiveness.

Defendant's petition has alleged facts that if true would entitle the Defendant to an evidentiary hearing. *See, Hatley v. State,* 100 Nev. 274, 678 P.2d 1160 (1984). *See also, Bolden v. State,* 99 Nev. 181, 183, 659 P.2d 886, 887 (1983).

. . .

V. DEFENSE COUNSEL'S INEFFECTIVENESS AT SENTENCING REQUIRES REVERSAL UNDER *STRICKLAND* OF THE DISPROPORTIONATE SENTENCE.

The Defendant was facing an extraordinarily lengthy sentence after being convicted of multiple A felonies. Defense counsel however expanded minimal effort in trying to mitigate the Defendant's sentence. The State submits it was unnecessary for defense counsel to call any witnesses on his behalf at sentencing. The State argued that merely because the defense counsel noted the testimony of some of the State's witnesses, that fact demonstrated counsel rendered effective assistance so as to satisfy his role as an advocate under *Strickland.*

The resulting aggregate sentence of Life with a minimum of Seven Hundred Twenty (720) months or Sixty (60) years was the result. This was a sentence that was shockingly long and disproportionate. *Weems v. United States,* 217 U.S. 349 (1910). In many cases where the evidence is very strong against a defendant, the most important task a defense attorney has is to attempt to mitigate the punishment at sentencing. Defense counsel failed to make reasonable efforts to mitigate Defendant Harris' punishment.

CONCLUSION

It is respectfully submitted an evidentiary hearing will show the Defendant, *Frederick H. Harris,* received ineffective assistance of counsel under *Strickland* and he was prejudiced thereby.

DATED this 10th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esquire, am a person competent to serve papers and not a party to the above-entitled action and on the 10th day of April, 2020, I served copy of the foregoing: Petitioner/Appellant's, FREDERICK H. HARRIS JR'S., REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Petitioner/Appellant as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FREDERICK HAROLD HARRIS JR., #0972945

Defendant.

CASE NO: **A-18-784704-W**
C-13-291374-1

DEPT NO: **XII**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **APRIL 23, 2020**
TIME OF HEARING: **12:00 PM**

THIS CAUSE having presented before the Honorable MICHELLE LEAVITT, District Judge, on the 23rd day of April, 2020; Defendant not present, represented by TERRENCE MICHAEL JACKSON, ESQ.; Plaintiff represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JAMES SWEETIN, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On July 23, 2013, Defendant Frederick Harris ("Petitioner") was charged by way of Information with the following: Counts 1, 15-18: Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508); Counts 2-3, 6, 8-11, 13-14, 21- 22: Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 4-5, 7, 12, 20: Lewdness with a Child Under the Age of 14 (Category A Felony - NRS 201.230); Counts 19, 25, 28, 37: First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320); Count 23: Coercion (Sexually Motivated) (Category B Felony - NRS 207.190); Counts 24 and 27: Administration of a Drug to Aid in the Commission of a Crime (Category B Felony - NRS 200.405); Counts 26, 29-35: Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 36, 39-41: Sexual Assault (Category A Felony - NRS 200.364, 200.366); Count 38: Battery with Intent to Commit Sexual Assault (Category A Felony - NRS 200.400); Count 42: Pandering (Category C Felony - NRS 201.300); Count 44: Living from the Earnings of a Prostitute (Category D Felony - NRS 201.320); and Count 45: Battery by Strangulation (Category C Felony - NRS 200.481).

A jury trial commenced on March 25, 2014. 9 AA 999. On April 15, 2014, after hearing 12 days of evidence and after approximately two days of deliberation, the jury found Petitioner guilty of the following: eleven counts of Sexual Assault With a Minor Under Fourteen Years of Age; five counts of Lewdness With a Child Under the Age of 14; six counts of Sexual Assault With a Minor Under Sixteen Years of Age; four counts of Sexual Assault; four counts of First Degree Kidnapping; one count of Administration of a Drug to Aid in the Commission of a Crime; one count of Coercion (Sexually Motivated); one count of Battery With Intent to Commit Sexual Assault; one count of Child Abuse, Neglect or Endangerment; one count of Pandering; and one count of Living From the Earnings of a Prostitute. The jury found Defendant not guilty of the following: two counts of Sexual

Assault With a Minor Under Sixteen Years of Age; one count of Sexual Assault; one count of Administration of a Drug to Aid in the Commission of a Crime; four counts of Child Abuse, Neglect or Endangerment; and one count of Battery by Strangulation.

Petitioner filed a Motion for New Trial on April 28, 2014. The State filed an Opposition on June 13, 2014. Petitioner's Motion was denied on June 30, 2015.

On November 2, 2014, Petitioner was adjudged guilty of the following: OF COUNT 2 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT3-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 5 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT6-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 8 -SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 9 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 10 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 11 - SEXUAL ASSAULT WTIH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 12- LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 13- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 14 -SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 16 - CHILD ABUSE, NEGLECT OR ENDANGERMENT (F); COUNT 19 - FIRST DEGREE KIDNAPPING (F); COUNT 20 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (F); COUNT 21- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 22- SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (F); COUNT 23 -COEROON (SEXUALLY MOTIVATED) (F); COUNT 24- ADMINISTRATION OF A DRUG TO AID IN THE COMMISSION OF A CRIME (F); COUNT 25 - FIRST DEGREE KIDNAPPING (F); COUNT 26 -SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 28 - FIRST DEGREE KIDNAPPING (F); COUNT 29 - SEXUAL

ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 31 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 33 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 34- SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 35 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (F); COUNT 36 – SEXUAL ASSAULT (F); COUNT 37 - FIRST DEGREE KIDNAPPING (F); COUNT 38- BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (F); COUNT 39- SEXUAL ASSAULT (F); COUNT 40- SEXUAL ASSAULT (F); COUNT 41 SEXUAL ASSAULT (F); COUNT 42 - PANDERING (F); AND, COUNT 44 – LIVING FROM THE EARNINGS OF A PROSTITUTE (F); COUNTS 1 , 15, 17, 18, 27, 30, 32, 43, and 45 were dismissed.

Petitioner was sentenced as follows: COUNT 2 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 3 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 4 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 5 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 6 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 7 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 8 – LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 9 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 10 - LIFE with a MINIMUM Parole Eligibility of THIRTY FNE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 11 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 12- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 13 - LIFE with a

MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 14 - LIFE with a MINIMUM Parole Eligibility of THIRTY FIVE (35) YEARS in the Nevada Department of Corrections (NDC); COUNT 16 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 19 – LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 20- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 21 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 22- LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 23 - to a MINIMUM of TWENTY EIGHT (28) MONTHS and a MAXIMUM of SEVENTY TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 24 - to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); COUNT 25 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 26 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 28 - LIFE with a MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 29 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 31 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 33 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 34 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 35 - LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC); COUNT 36 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 37 - LIFE with a

MINIMUM Parole Eligibility of FIVE (5) YEARS in the Nevada Department of Corrections (NDC); COUNT 38 - LIFE with a MINIMUM Parole Eligibility of TWO (2) YEARS in the Nevada Department of Corrections (NDC); COUNT 39- LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 40 - LIFE with a MIN MUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 41 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); COUNT 42- to a MINIMUM of TWENTY FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC); and COUNT 44 - to a MINIMUM of EIGHTEEN (18) MONTHS and a MAXIMUM of FORTY EIGHT (48) MONTHS in the Nevada Department of Corrections (NDC); COUNTS 2, 3, 6, 8, 9, 10, 11,13, and 14 are to run CONCURRENT with each other; COUNT 21 to run CONSECUTIVE to COUNT 22; COUNTS 4, 5, 7, 12, and 20 are to run CONCURRENT with each other and to the other Counts; COUNT 16 to run CONCURRENT to the other Counts; COUNTS 19, 25, 28, and 37 are to run CONCURRENT with each other and to the other Counts; COUNT 23 to run CONCURRENT to the other Counts; COUNT 24 to run CONCURRENT to the other Counts; COUNTS 26, 29, 31, 33, 34, and 35 are to run CONCURRENT with each other and CONSECUTIVE to the other Counts; COUNTS 36, 39, 40, and 41 are to run CONCURRENT with each other; COUNT 38 to run CONCURRENT to the other Counts; and, COUNT 42 to run CONSECUTIVE to COUNT 44, with NINE HUNDRED SEVENTY NINE (979) DAYS CREDIT FOR TIME SERVED. Petitioner's AGGREGATE TOTAL SENTENCE is LIFE with a MINIMUM sentence of SEVEN HUNDRED TWENTY (720) MONTHS.

On October 27, 2015, Petitioner filed a Notice of Appeal.

On November 2, 2015, the Court filed the Judgment of Conviction.

On November 14, 2016, the Court filed an Amended Judgment of Conviction.

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

On November 16, 2018, Petitioner filed a Petition for Writ of Habeas Corpus. On June 6, 2019, the Court appointed petitioner post-conviction counsel. On June 20, 2019, Mr. Jackson confirmed as counsel. On November 1, 2019, Petitioner filed his Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). On April 6, 2020, the State filed its Response. On April 10, 2020, Petitioner filed his Reply. On April 23, 2020, this Court denied Petitioner's Petition.

STATEMENT OF THE FACTS

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

At some point in 2005, T.D. and her children moved to Utah where they stayed for about two years. When they returned to Las Vegas in July of 2007, T.D. and her eldest child, V.D., moved into Petitioner's mother's house. The other four children went to live with Petitioner and Miss Ann on Blankenship Street. T.D. and V.D. moved several times over the next year before moving into the Blankenship house. From 2008 to 2010, Petitioner, Miss Ann, T.D. and T.D.'s five children lived at Blankenship. In 2010, T.D., V.D., M.D., and S.D., moved out of the Blankenship house and into an apartment in Henderson, while Tah. D. and Taq. D. remained at Blankenship with Petitioner and Miss Ann. Tah. D. and Taq. D. joined their mom and siblings in Henderson for the summer of 2012, before returning to the house on Blankenship. Taq. D. and Tah. D. were removed from Petitioner and Miss Ann's home in the Fall of 2012 and lived with a foster family for about a year before being reunited with T.D., who they resided with at the time of trial.

T.D. was working as a cocktail waitress in Louisiana where she lived with her five children when she met Petitioner in 2004. T.D.'s children, who ranged in age from toddlers to twelve years old, were enrolled in school for the first time in 2004. Petitioner, a Las Vegas resident, was visiting Louisiana and met T.D. at the bar where she worked. Shortly

thereafter, T.D. left Louisiana for Las Vegas, while her children stayed behind. While neighbors periodically checked on the children, twelve-year-old V.D. was primarily responsible for the care of her younger siblings. A few days after T.D.'s arrival in Las Vegas, Petitioner's brother picked up T.D.'s children and moved them from Louisiana to Las Vegas.

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

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

About a week after this assault, V.D. told Miss Ann what Petitioner had done to her. Miss Ann informed Petitioner's mother, as well as T.D. Miss Ann, Petitioner, and Petitioner's mother confronted V.D., who they berated for reporting this assault and told her they did not believe her. At that time, no one reported the abuse or sexual assault to authorities. Subsequently, T.D. and her five children left Las Vegas and moved to Utah. They lived in Utah for approximately one-and-a half years, before T.D. returned to Las Vegas alone. While T.D. was in Las Vegas, her children were taken into state custody in Utah. T.D. returned to Utah and over the course of six months participated in parenting classes and was reunited with her children. Shortly after, she abruptly moved back to Las Vegas, this time taking her children with her.

When T.D. and her children moved back to Las Vegas in the summer of 2007, Miss Ann and Petitioner were living together in a house on Blankenship Street. T.D.'s four youngest children moved into that house, while T.D. and V.D. moved into the house of Petitioner's mother. 11 AA 1544-47. Petitioner committed another sexual assault on V.D., who was 15 years old, during this time period. Leading up to this assault, Petitioner believed V.D. was a virgin and told her he wanted to "take her virginity" and made her pick a date for it to occur. On August 24, 2007, Petitioner, T.D., and V.D. sat in Petitioner's car outside his mother's house, where he taunted V.D., saying he would be taking her virginity later. Petitioner drove around town with V.D. and T.D. in the car during the day, picking up alcohol which all three consumed. That night, Petitioner drove the three of them up to the top of a hill where he parked the car. Initially, Petitioner and T.D. sat in the front seat, while V.D. sat in the back. Petitioner moved to the back seat where he began to rub V.D.'s breasts while her mother watched. T.D. seemed amused as Petitioner removed her daughter's pants. He raped V.D. in the backseat of the car by forcing his penis into her vagina and told her he would do the same to her again. Afterwards, Petitioner drove back to his mother's house where he dropped off V.D. and T.D.

In the next few months, T.D. and V.D. moved out of Petitioner's mother's house and into a long-term motel efficiency apartment. T.D.'s four youngest children continued to live with Petitioner and Miss Ann on Blankenship Drive. While T.D. and V.D. lived in the efficiency, Petitioner pressured T.D. to engage in sex work and give the money she earned to him, in addition to the wages she earned through her job at Bally's housekeeping. Petitioner and T.D. engaged in a consensual sexual relationship during this time. Petitioner also continued to sexually assault V.D., who was then 15, while she and T.D. lived in the efficiency. At times, Petitioner would come to the apartment while T.D. was at work, drink beer, and force V.D. to have sex with him. Other times he would rape V.D. while T.D. was home. On at least two occasions, T.D. engaged in sexual activities with V.D. at Petitioner's behest. Specifically, Petitioner insisted that T.D. insert one end of a sex toy into her vagina while the other end was inserted into V.D.'s vagina. He also forced T.D. to perform oral sex

on V.D. without V.D.'s consent and forced T.D. to hold a vibrator to V.D.'s genitals. On another occasion, Petitioner became enraged with T.D. who had not surrendered enough money to him, and in response he raped her by forcing his penis into her anus.

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After about six months, T.D. and V.D. moved from the efficiency apartment to an apartment on Walnut Street, where they lived for about six months. Petitioner continued to rape V.D., who was 15 years old, at the apartment on Walnut Street. In July of 2008, T.D. and V.D. moved into the Blankenship house. Petitioner, Miss Ann, Miss Ann's daughter, T.D., and all five of T.D.'s children were living in the house on Blankenship at that point. Petitioner raped V.D., aged 16, once while she lived at the Blankenship house, in the bathroom connected to his bedroom.

Petitioner was also physically abusive to T.D. and her children. Among other incidents, Petitioner struck the children with a belt, punched S.D. in the face and stomach, and strangled M.D. Petitioner similarly struck T.D. with a belt on at least one occasion. V.D. lived there for about two years before she and T.D. moved to Henderson with two of V.D.'s siblings. That left T.D.'s youngest two children (Tah. D. and Taq. D.) with Petitioner and Miss Ann at the Blankenship house, while T.D., V.D., M.D., and S.D. lived in an apartment called "St. Andrews."

Petitioner also raped V.D. once while she was living at the St. Andrew's apartment, and approximately 17 years old. In 2010, when V.D., her mom, and siblings were moving into the St. Andrew's apartment, V.D. met Rose Smith, who she came to call Miss Rose. Over the course of several months, V.D. spent time at Miss Rose's house, where she eventually lived for a period of time. Before V.D. moved in with Miss Rose, while she was visiting in December of 2011, V.D. told Miss Rose about the sexual abuse she had experienced. Miss Rose took V.D. to a police station in Henderson, where the desk officer called the special victims unit and Detective Aguiar was dispatched to the station to interview Miss Rose and V.D. After interviewing V.D. at the station, Detective Aguiar went

to V.D.'s home on Center Street where T.D. and two of V.D.'s siblings lived. Over the course of his interviews, Detective Aguiar learned that V.D. had been physically and sexually assaulted by Petitioner on multiple occasions and that V.D.'s younger sisters were currently living with Petitioner. Detective Aguiar then proceeded to Petitioner's home on Blankenship. After interviewing everyone in the home, the officers concluded that probable cause did not exist to make an arrest. The officers from Henderson Police Department made contact with CPS who began an investigation as well.

In the summer of 2012, two years after T.D., V.D., S.D., and M.D. moved out of the Blankenship house, and a few months after the police first questioned him, Petitioner began sexually assaulting Tah. D., who was twelve years old. On more than one occasion, Petitioner sexually assaulted Tah. D. in the bathroom attached to his bedroom by rubbing her breasts and the outside of her vagina with his hand, and putting his penis inside her vagina. At other times, he forced Tah. D. to put her hand on his penis, and put his penis in her mouth and vagina in her bedroom. He also sexually assaulted Tah. D. in the same manner in the garage. On one particular occasion, he woke Tah. D. and took her from her bedroom to the laundry room where he unbuckled his pants and forced his fingers in her vagina. When Taq. D. began to approach the laundry room, he stopped and told Tah. D. not to tell anyone what he had done. Taq. D. saw Petitioner through a crack in the laundry room door touching Tah. D.'s leg and asked Tah. D. what happened. Tah. D. subsequently told Taq. D. that Petitioner had molested her. Together, the two girls told Miss Ann. At that time, Miss Ann took both Tah. D. and Taq. D. to a gynecologist for pelvic exams. Miss Ann did not report the disclosure to the police and, although Tah. D. and Taq. D. briefly lived with their mother and siblings in Henderson during the summer of 2012, they returned to the Blankenship house in September.

In September of 2012, approximately nine months after the police first reported to the Blankenship house and two or three months after Tah. D. was sexually assaulted, Taq. D. called the CPS hotline to report Petitioner sexually assaulting Tah. D. CPS and the Las Vegas Metropolitan Police Department were assigned to the case and arranged for Tah. D.

and Taq. D. to be interviewed and undergo medical exams at the Children's Assessment Center. Miss Ann was also interviewed at that time. T.D. and her other children were subsequently interviewed. Petitioner was arrested early in 2013 and by the start of trial in 2014, Tah. D. and Taq. D. had been reunited with their mother and lived in Henderson.

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ANALYSIS

Petitioner brings eight (8) grounds in his Petition. The first seven (7) grounds allege ineffective assistance of counsel. Pet. at 2. Ground eight (8) alleges that cumulative error by defense counsel requires reversal of this conviction. Pet. at 2.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,

108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

I. COUNSEL'S PRETRIAL INVESTIGATION WAS NOT INEFFECTIVE

In Ground One (1), Petitioner alleges that his trial counsel was ineffective in pretrial investigation. Specifically, Petitioner seems to allege that counsel was ineffective for not fully investigating how to attack the credibility of the State's main witness. Pet. at 5-6. Petitioner also alleges that counsel was ineffective for not seeking the services of a credible expert witness to do a pretrial psychiatric examination of the victims and challenge the State's expert witnesses. Pet. at 7.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." Harrington v. Richter, 562 U.S. 86, 111, 131 S.Ct. a770, 791 (2011).

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First, the Court notes that Petitioner has not even alleged what a different investigation would have revealed. Petitioner merely asserts that the main witness's credibility could potentially have been attacked and that a psychiatric examination could have been run. Petitioner does not allege what impeachment evidence a better investigation would have turned up. In fact, he does not even mention the name (or in the instant case identifying initials) of the "main witness" who trial counsel was allegedly obligated to investigate. Further, Petitioner does not allege what a psychiatric examination would have contributed to Petitioner's defense at trial. As such, the Court finds that Petitioner's claims must fail. Further, the Court finds that these claims are bare and naked assertions pursuant to Hargrove, and thereby suitable only for summary dismissal.

Second, the Court finds that Petitioner is incorrect in alleging that counsel was ineffective for failing to secure an expert witness to challenge the State's expert witnesses. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense." Harrington, 562 U.S. at 111, 131 S. Ct. at 791. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167. Once again, Petitioner has made no claims regarding why such an expert witness needed to be called. Petitioner merely alleges that an expert witness could have challenged the State's child medical experts. Pet. at 7. However,

Petitioner does not identify what grounds an expert would or even could have challenged the State's expert witnesses on.

Third, assuming that Petitioner means V.D. when he refers to the "main witness" (as V.D. was the victim of the majority of Petitioner's sexual assaults), the Court finds that the record shows that counsel's cross-examination evidenced a thorough understanding both of the case and the witness's history. Counsel began by reviewing previous statements and testimony V.D. had given in the case. Trial Transcript, Day 6, at 37. Counsel went on to demonstrate a thorough understanding of the factual allegations surrounds the case. See *inter alia*, Id. at 38-53. Counsel further attempted to impeach V.D. with her preliminary hearing transcripts. Id. at 58-72. None of these things would have been possible without a thorough investigation into the case. As such, it is clear that Petitioner's counsel conducted a reasonable pre-trial investigation.

As such, Petitioner has brought only bare and naked allegations that it was unreasonable for counsel not to undertake these actions in her investigation. Pursuant to Hargrove, these claims are denied.

II. TRIAL COUNSEL WAS NOT INEFFECTIVE DURING JURY SELECTION

A. Counsel Was Not Ineffective For Not Requesting Sequestered Individual Voir Dire

Petitioner first alleges that counsel was ineffective for failing to secure sequestered individual voir dire. Pet. at 8. According to Petitioner, such a failure resulted in an impartial jury because (1) jurors may have been unwilling to reveal that they had previously been victims of sexual assault, and (2) those jurors who had been victims of sexual assault may have been seen as more credible by other jurors, and therefore have been able to sway their minds during jury deliberation.

First, the Court finds that such a decision was not unreasonable. Petitioner has cited to no authority suggesting that not requesting sequestered individual voir dire constitutes ineffective assistance of counsel. Petitioner's entire premise underlying this claim is that

jurors who had been victims of sexual assault may not come forward if the voir dire was not sequestered. This claim is belied not only by the record, but Petitioner's own pleadings. The Court notes that Petitioner readily admits the numerous jurors admitted they had been the victims of sexual assault during voir dire. Pet. at 8. The record reflects that the court asked the jurors whether they or anyone close to them had been the victim of sexual crimes. (Trial Transcript, Day 1, at 111). It was further made clear to the jurors that they were free to approach the bench to discuss any sensitive answers they did not wish to vocalize to the public when the district court had one potential juror do just that when the juror became emotional while discussing her past. (Trial Transcript, Day 1, at 123). The jury was therefore aware that they could disclose any sensitive information out of the presence of the rest of the panel. Given that this option was available and made known to the jury, it is disingenuous to suggest that jurors would have responded differently to a sequestered voir dire.

The Court would further note that Petitioner does not actually allege in this section that a juror concealed their relevant history and subsequently had a disproportionate effect during deliberations. Petitioner merely asserts that this *could* have occurred. Pet. at 9.[1] Given that Petitioner has not identified any jurors that concealed bias, his entire argument is based on hypotheticals. As such, the Court finds that Petitioner has failed to establish that he was prejudiced as a result of his trial counsel's decision to not request sequestered individual voir dire.

Given that the voir dire strategy pursued by counsel was not unreasonable, and that Petitioner has failed to demonstrate he was prejudiced by failing to even allege that an impartial jury was empaneled as a result, counsel was not ineffective. This claim is denied.

B. Trial Counsel Was Not Ineffective For Failing to Hire a Jury Selection Expert

[1] The Court does note however, that Petitioner claims under Ground Six that Yvonne Lewis (one of the jurors in the underlying case), discussed being sexually abused as a child during the jury deliberations. Pet. at 22. However, the record shows that Yvonne Lewis raised her hand during voir dire, indicating that she or someone close to her had been the victim of sexual crimes. Trial Transcript, Day 1, at 121-22. Specifically, Ms. Lewis indicated that her family had a history of domestic abuse that occurred while she young. However, she did not allege any sexual assault, and stood by that assertion at a later evidentiary hearing. Id.; Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 31-32, November 24, 2014. When questioned, Ms. Lewis indicated that despite these circumstances, she could be fair and impartial during the trial. Id. Given that Ms. Lewis indicated both at voir dire and at an evidentiary hearing that she had not been sexually assaulted, her selection as a juror in this case does not support Petitioner's argument.

Appellant next argues that his trial counsel was ineffective for failing to hire a jury selection expert. Pet at 10. As an initial point, the Court notes that once again, Petitioner does not even allege that an impartial jury was empaneled as a result of this trial decision. As such, the Court finds that Petitioner has failed to reach his burden of even arguing that this decision prejudiced the outcome of his trial under Strickland's second prong.

In addition, the Court finds that Petitioner has failed to show that the decision not to hire a jury selection expert was an unreasonable one. First, Petitioner does not allege what a jury selection expert would have contributed to his case. Instead, Petitioner merely states that "[a] jury consultant, would have seen many things that counsel missed because they would have been trained to look for certain things." Pet. at 14. Petitioner does not state what "things" his trial counsel missed, and instead relies on the circular argument that trial counsel must have missed "things" because he did not hire a jury selection expert. Such bare and naked allegations cannot support a successful ineffective assistance of counsel claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Second, Petitioner only points to the partial voir dire of two potential jurors as proof that a jury selection expert was needed. However, the Court notes that neither of these two jurors was ultimately selected to be on the jury, showing that no jury selection expert was necessary to distinguish which of the jurors displayed bias. Trial Transcript, Day 1, at 111,123; Trial Transcript, Day 2, at 239. Given that neither of these jurors were selected, Petitioner has brought no actual evidence forward indicating that a biased jury was empaneled as a result of his counsel's decisions. As such, Petitioner has not demonstrated that he was prejudiced by counsel's decision not to hire a jury expert. Therefore, counsel cannot be deemed ineffective, and this claim is denied.

III. COUNSEL'S DECISIONS REGARDING WHICH PRE-TRIAL MOTIONS TO FILE WERE NOT INEFFECTIVE

In Ground Three, Petitioner alleges that counsel was ineffective for failing to file various motions. Pet. at 2. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825

P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

A. Counsel Had No Obligation to File a Motion For a Defense Psychiatric Examination

Petitioner first alleges in this section that his counsel was ineffective for failing to file a Motion for Defense Psychiatric Examination. Pet. at 14. Petitioner alleges that there were indications that Tah. D. and M.D. may have had psychological problems that would have rendered their testimony inherently suspect or unreliable. Pet. at 15. Petitioner bases his argument off Tah.D. being diagnosed with "cognitive delay" and M.D. being diagnosed with "anxiety disorder."

In Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), the Nevada Supreme Court departed from a two year old precedent by overruling State v. District Court (Romano), 120 Nev. 613, 97 P.3d 594 (2004). In doing so, the Court returned to the requirements it previously set forth in Koerschner v. State, 116 Nev. 111, 13 P.3d 451 (2000), reasserting that a trial judge should order an independent psychological or psychiatric examination of a child victim in a sexual assault case only if the defendant presents a compelling reason for such an examination. "Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity." Koerschner, 116 Nev. at116-117, 13 P.3d at 455.

First, the Court notes that Petitioner does not even address that these factors exist, much less show that they would have weighed in favor of granting the Motion. As such,

Petitioner's claim that this Motion would have been meritorious is a bare and naked allegation suitable only for summary dismissal.

Second, the Court finds that the factors articulated in Koerschner would not have weighed towards a finding that an independent psychological or psychiatric examination was required. First, there was significant corroborating evidence to these two victims' testimony. The State called a large number of witnesses, who testified to Petitioner's violent and sexually criminal behavior towards multiple members of the Duke family. See *inter alia*, Trial Transcript, Day 1, at 73, 105-117 (testimony of T.D.); Trial Transcript, Day 5, at 112, 120-124 (testimony of V.D.); Trial Transcript, Day 8, at 85, 103-115, 118-120, 137-145 (testimony of Taq. D.); Trial Transcript, Day 9, at 96, 104-107 (testimony of CPS employee Sholeh Nourbakhsh). Second, neither disorder suffered by either victim bears on their credibility. M.D. has a general anxiety disorder (Trial Transcript, Day 7, at 66-71), while Tah.D. has a learning disability (Trial Transcript, Day 9, at 92-94). Neither of these diagnoses affect one's ability to discern reality. Neither do these diagnoses make one inherently unreliable or likely to fabricate. In fact, both witnesses were able to respond articulately and clearly at trial. As such, the factors articulated in Koerschner would not have weighed towards finding that an independent psychological examination was required.

Finally, the Court notes that approximately one (1) year after the trial in the underlying case took place, the Nevada legislature codified NRS 50.700. NRS 50.700(1) forbids the Court from ordering a victim or witness to a sexual assault to undergo a psychological or psychiatric examination. NRS 50.700. While the date the statute become operable means that NRS 50.700 would not have been applicable at the time of the underlying trial, it's subsequent inclusion in this jurisdiction's statutory framework indicates that the Motion would have been disfavored (as the underlying offenses of this Petition include many charges of Sexual Assault). As such, any Motion filed to this effect would likely have been denied.

Since the Motion was not likely to succeed, filing it likely would have been a frivolous exercise. Counsel has no obligation to file frivolous motions. See Ennis v. State,

122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). However even if the motion would not have been frivolous, its dubious chances for success would make whether to file such a motion a strategic decision. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). As such, the Court finds that counsel was not ineffective for not filing this motion, and this claim is denied.

B. Defense Counsel Was not Ineffective For Not Filing a Motion in Limine

Petitioner next argues that his counsel was ineffective for failing to oppose the State's Motion in Limine "to restrict cross-examination for bias." This pleading bare of facts and citations. Odyssey does not reflect any written Motion in Limine on file. If the alleged Motion was an oral motion, Petitioner has provided no citation to the record regarding where it occurred. Neither has Petitioner said what witness this Motion was in regards to, or on what day of this 14-day trial it occurred. Given that this claim is the epitome of a bare and naked allegation, it is denied pursuant to Hargrove.

IV. COUNSEL WAS NOT INEFFECTIVE DURING TRIAL

A. Trial Counsel's Impeachment Was Effective

Petitioner next alleges that counsel was ineffective in their cross-examination of Tah.D. Pet. at 17. Specifically, Petitioner claims that the State's objections kept any useful information from being elicited. Such a claim is belied by the record.

Petitioner's complaint regarding counsel's performance after the State objected to a line of questioning for "lack of foundation" is confusing. The Court notes that the objection was posed merely because the question was asked in a confusing manner. Trial Transcript, Day 9, at 161. Counsel clarified her question, and was able to proceed with the line of questioning. Id. The State further objected to a hearsay statement which was sustained. Id. at 167. However, the failure to get a hearsay statement admitted into evidence is not a byproduct of counsel's effectiveness, it is a byproduct of the fact that the statement was hearsay and not permitted under the rules of evidence.

Further, the Court finds that Petitioner's counsel was effective on cross-examination. Counsel elicited that Petitioner was the one who drove the children to well in school. Trial Transcript, Day 9, at 140-141. Counsel elicited that the witness had reported feeling "protected" while staying with Petitioner. Id. at 151. Counsel elicited that the witness had told detectives she had no problems with anybody in the house. Id. at 153. Counsel outlined the potential contradiction between witness saying she was raped for the first time at age 11, but saying during that same year she was not uncomfortable around Petitioner. Pet. at 153-54. Counsel elicited as much information that was helpful to Petitioner's case as was possible under the circumstances. Further, the scope of cross-examination is a strategic decision that is virtually unchallengeable. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002); Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Here, the record demonstrates that counsel effectively elicited varying pieces of helpful information on cross-examination. Further, the record belies Petitioner's claim that his counsel was ineffective at dealing with the State's objections. Finally, Petitioner has failed to demonstrate how a different cross-examination would have made a more favorable outcome at trial probable. Therefore, the Court finds that counsel cannot be deemed ineffective and this claim is denied.

B. There Was No Prosecutorial Misconduct For Petitioner's Counsel to Object To

Petitioner next claims his counsel was ineffective for failing to object when the State committed prosecutorial misconduct by allegedly vouching for witnesses during closing argument. Pet. at 18. Specifically, Petitioner raises issue with the following excerpt from the States closing:

> You heard from the Dukes. Do you really think that they could have concocted all of this, those people you heard on the stand? There is no way. Ladies and gentlemen, the State of Nevada cannot hold the Defendant accountable for his actions. Even the Court cannot hold the Defendant accountable for his actions. Only you can. The evidence shows that the Defendant is guilty of these charges, so please find him guilty. Thank you.

Pet. at 18.

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

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

(stating: "extrajudicial confession does not warrant a conviction unless it is corroborated by independent evidence").

Given that the statement did not amount to "vouching," the State did not commit prosecutorial misconduct. It therefore would have been futile for counsel to object. Counsel has no obligation to raise futile arguments pursuant to Ennis. Further, even if statements were to be considered vouching, the statements were not such that the failure to object would have rendered a more favorable outcome at trial probable. See Rowland, 118 Nev. at 31, 39 P.3d at 167 (stating: "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt"). In the instant case, the evidence of guilt was strong. The State presented multiple witnesses, including the entire Duke Family, individuals close with the family, and investigating officers. Given the overwhelming evidence presented against Petitioner, even if the statements were considered vouching, Petitioner was not prejudiced by his counsel not objecting.

Therefore, Counsel cannot be held ineffective on this ground, and this claim is denied.

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C. Counsel's Closing Argument Was Adequate

Petitioner next argues that his counsel was ineffective during closing argument. Pet. at 19. Petitioner does not articulate why, or what portions of the closing argument were ineffective. Petitioner does not allege what counsel should or even could have done differently in order to present a more compelling closing argument. As such, the Court finds that this claim is nothing more than a bare and naked allegation suitable only for summary dismissal pursuant to Hargrove.

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

(holding that it is reversible error for an attorney to concede guilt during closing argument over his client's testimonial disavowal).

Given that Petitioner has not alleged any issue pursuant to Jones or other rule of law that confines the scope of counsel's arguments, the only question is whether counsel performed reasonably at closing. The record reveals this to be the case. Counsel began by challenging the veracity of the State's witness V.D. Trial Transcript, Day 12, at 70. Counsel went on to point out the V.D.'s mother T.D. had potential issues with Child Protective Services when living in Louisiana. Id. at 72. Counsel highlighted that it would have been odd for T.D. to bring her children back to the Petitioner after they suffered such abuse at his hands. Id. at 74. Counsel further went on to point out the timing of the reports versus the timing of the incidents. Id. at 74-75. Counsel went on to reiterate that the children's grades were the best they had ever been during this time. Id. at 77. The record clearly shows that counsel's closing argument was designed to discredit the witnesses and attempt to show that Petitioner had been a positive influence on the family. The Court finds that while this strategy was ultimately not successful, it was clearly not unreasonable. Therefore, counsel was not ineffective during closing argument and this claim is denied.

V. COUNSEL WAS EFFECTIVE AT SENTENCING

While Petitioner makes to claims under Section five of his Petition, the Court breaks up its analysis here as they are two distinct issues.[2] Petitioner alleges that counsel performed ineffectively at sentencing. Specifically, Petitioner claims that it was ineffective for counsel to not file a sentencing memorandum, as well as to not present any witnesses to provide mitigation testimony. Pet. at 20.

As an initial point, the Court notes that Petitioner has not alleged what information should or could have been presented in a sentencing memorandum. Petitioner further has not alleged what witnesses could have been called to present mitigation testimony, or what these alleged witnesses would have even testified to. As such, the Court finds that Petitioner's

[2] For analysis on why Petitioner's sentence was neither cruel nor unusual see section VI.

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claims are bare and naked assertions suitable only for summary dismissal pursuant to Hargrove.

Further, the record demonstrates that Petitioner's counsel performed effectively at sentencing. Counsel began by noting the number of people who had been called as witnesses who testified that none of the State's witnesses had spoken up regarding the abuse. Recorders Transcript RE: Sentencing, at 7, October 27, 2015. To the extent Petitioner believes these are the witnesses who should have been called, such a decision was unnecessary. The sentencing judge was the same judge who had presided over the trial, and as such, had already heard this testimony. Id. at 5. Counsel further noted Petitioner's relatively old age. Id. at 7. The Court finds that counsel's inability to present a more sympathetic argument was due not to counsel's alleged ineffectiveness, but the nature of Appellant's actions. Therefore, this claim is denied.

VI. PETITIONER'S SENTENCE WAS NOT CRUEL AND UNUSUAL

Petitioner also argues that his sentence was cruel and unusual. Pet. at 20-21.

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

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

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

The Court first notes that Petitioner concedes that his sentence was within the statutory limits. Pet. at 20-21. Further, Petitioner does not even allege that the Court relied on impalpable or highly suspect evidence. Instead Petitioner makes a proportionality argument, alleging that his sentence is simply too long given his crimes. The Court disagrees. Appellant was convicted for sexually assaulting multiple minors over many years. Appellant was further convicted of beating minors. Appellant was also convicted of sexually assaulting their mother and forcing her to work as a prostitute. See generally, Trial Transcript, Day 14. The sentence is therefore proportional to the crimes committed. As such, Petitioner's sentence is neither cruel nor unusual, and this claim is denied.

VII. COUNSEL WAS NOT INEFFECTIVE IN ARGUING THE MOTION FOR A NEW TRIAL

Petitioner next argues that his counsel was ineffective in their preparation and arguments regarding Petitioner's Motion for a New Trial. Pet. at 21-22. While Petitioner dedicates multiple pages to trying to relitigate the issue of whether he should have been granted a new trial due to juror misconduct, his only real claim that counsel was ineffective is that counsel failed to secure Kathleen Smith's ("Smith") signature on her affidavit once it had been revised. Pet. a 22-25.

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

However, the Court finds that counsel's failure to get Smith to sign the affidavit does not constitute ineffective assistance of counsel. Counsel prepared the affidavit after her

investigator spoke to Smith. However, Smith requested that changes be made to the affidavit and refused to sign it, claiming "she did not want to get involved." Reply to State's Response to Motion for a New Trial and Supplement to Defendant's Motion for a New Trial, at 9-10, Jul 9, 2014; Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 22, November 24, 2014. Petitioner's counsel cannot force someone to sign a document, and any assertion that her failure to do so constitutes ineffective assistance of counsel is absurd.

Further, the Court finds that counsel's conduct following Smith's refusal to sign the affidavit was reasonable. Counsel requested and received an evidentiary hearing on the issue. Id.; Reply to State's Response to Motion for a New Trial and Supplement to Defendant's Motion for a New Trial, at 7, Jul 9, 2014. At the hearing, counsel called Smith as a witness, and asked her to explain her experience during deliberation. Recorders Transcript of Proceedings RE: Evidentiary Hearing on Defendant's Motion for New Trial, at 4, 9-17, November 24, 2014. Counsel further received a hand written statement from Smith detailing what happened during the deliberation. Id. This statement was attached as Exhibit B to Petitioner's Reply.

The Court finds that Petitioner's Motion being denied has nothing to do with counsel's alleged ineffectiveness. It has everything to do with the fact that multiple jurors (including Yvonne Lewis) testified that Lewis did not claim during deliberations that she had been sexually assaulted. Id. at 31-32, 55. These jurors also indicated that Ms. Smith had claimed she could not vote guilty based upon Petitioner's race. Id. at 33, 41. As such, it is clear that counsel did everything she could have possibly done in investigating this claim. Counsel was not ineffective on this Ground, and this claim is denied.

Further, to the extent Petitioner is seeking to relitigate the fact that he should have been granted a new trial due to juror misconduct, the Court finds that such a claim is barred by law of the case doctrine. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)).

"The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

On November 28, 2017, the Supreme Court of Nevada issued an Order of Affirmance finding that stated "the district court did not abuse its discretion in denying the motion for a new trial for juror misconduct, as any misconduct did not prejudice Petitioner." Order of Affirmance, at 2, November 28. 2017. As such, the Court finds that any attempt Petitioner now makes to relitigate this issue is barred by law of the case and is denied.

VIII. APPELLATE COUNSEL WAS NOT INEFFECTIVE

Petitioner next argues that his appellate counsel was ineffective for not raising the following issues on appeal: (1) that Petitioner's sentence was a cruel and unusual punishment in violation of the eighth amendment; (2) that the court erred by limiting cross-examination; and (3) that the court erred by not restraining excessive prosecutorial misconduct. Pet. at 27.

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

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments .

. . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

The Court finds that Appellate counsel was not ineffective for not bringing the claims Petitioner now urges they should have. The claims Petitioner advocates for are either without merit, or so bare of factual underpinnings in this Petition that their merit is impossible to address. First, as the Court articulated in Section VI, Petitioner's punishment was not cruel and unusual. Second, it is unclear what witnesses Petitioner was not entitled to fully cross-examine. The Court notes that appellate counsel did raise the issue on appeal of whether the district court erred in limiting his cross-examination regarding a book written by T.D. To the extent this is the issue Petitioner is alleging, his claim is belied by the record. Otherwise, the underlying claim Petitioner alleges counsel should have brought is nothing more than a bare and naked allegation. Finally, as the Court articulated in Section IV(B), the State did not engage in vouching, so any prosecutorial misconduct claim on these grounds would have been frivolous.

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

IX. THERE WAS NO CUMULATIVE ERROR

Finally, Petitioner argues that cumulative error requires reversal in the instant case.

The Court notes that the Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated.[3] However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Defendant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

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

ORDER

[3] While addressing the issue in dicta, the Nevada Supreme Court has noted other courts' holdings that "multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong." McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992).

THEREFORE, **IT IS HEREBY ORDERED** that the Post-Conviction Petition for Writ of Habeas Corpus shall be and is DENIED.

DATED this 21 day of May, 2020.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

hjc/SVU

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NOASC
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Counsel for Frederick H. Harris

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. FREDERICK H. HARRIS JR., #1149356, Defendant.	District Case No.: **A-18-784704-W** **C-13-291374-1** Dept.: **XII** **NOTICE OF APPEAL**

NOTICE is hereby given that the Defendant, FREDERICK H. HARRIS JR., by and through his attorney, TERRENCE M. JACKSON, ESQ., hereby appeals to the Nevada Supreme Court, from the Findings of Fact, Conclusions of Law and Order, file-stamped May 21, 2020, denying his Post-Conviction Petition for Writ of Habeas Corpus.

Defendant, FREDERICK H. HARRIS JR., further states he is indigent and requests that the filing fees be waived.

Respectfully submitted this 27th day of May, 2020.

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com

Counsel for Defendant, Frederick H. Harris, Jr.

CERTIFICATE OF SERVICE

I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and on the 27th day of May, 2020, I served a true, correct and e-filed stamped copy of the foregoing: Defendant, Frederick Harold Harris, Jr's, NOTICE OF APPEAL as follows:

[X] Via Odyssey eFile and Serve to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals, or U.S. mail to NSC, located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

JAMES R. SWEETIN
Chief Deputy District Attorney
james.sweetin@clarkcountyda.com

FREDERICK H. HARRIS, JR.
ID# 1149356
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

AARON D. FORD, ESQUIRE
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

Electronically Filed
5/28/2020 9:27 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Petitioner,

vs.

FREDERICK HARRIS,

Respondent,

Case No: A-18-784704-W

Dept No: XII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on May 21, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on May 28, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 28 day of May 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Frederick Harris # 1149356
1200 Prison Rd.
Lovelock, NV 89419

Terremce M. Jackson, Esq.
624 S. Ninth St.
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR.,)

#1149356,) Supreme Court No: **81255**

Appellant,) **E-filed**

)

v.)

STATE OF NEVADA,)

)

Respondent.)

_____)

MOTION to CONSOLIDATE SUPREME COURT CASE 81255 with 81257

Comes now the Appellant/Defendant, Frederick Harold Harris, Jr., by and through counsel, Terrence M. Jackson, Esquire, and moves this Honorable Court to consolidate Supreme Court case **81255** with Supreme Court case **81257**, pursuant to

Supreme Court Rule 27A. As grounds for this Motion, counsel states that it is his belief each case involves the identical issues of ineffective assistance of counsel in case no.: C-13-291374-1 (the Trial) and case no.: A-18-784704-W (the Writ) and should therefore be consolidated for Appeal.

Dated this 13th day of July, 2020.

/s/ Terrence M. Jackson

Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Terry.jackson.esq@gmail.com
Counsel for Frederick H. Harris, Jr.

CERTIFICATE OF SERVICE

I certify that on the 13th day of July, 2020, I served a copy of this Motion to Consolidate Supreme Court Case 81255 with 81257 upon all counsel of record:

[X] Via Electronic Service (eFlex) to the Nevada Supreme Court;

[X] and by United States first class mail with postage affixed to the Nevada Attorney General and to the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

JAMES R. SWEETIN
Chief Deputy D.A. - Criminal
james.sweetin@clarkcountyda.com

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AARON D. FORD, ESQUIRE
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

SUPREME COURT OF THE STATE OF NEVADA

FREDERICK H. HARRIS, JR.,	)	
#1149356,	)	Supreme Court No: 81257
Appellant,	)	**E-filed**
	)	
v.	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

MOTION to CONSOLIDATE SUPREME COURT CASE 81257 with 81255

Comes now the Appellant/Defendant, Frederick Harold Harris, Jr., by and through counsel, Terrence M. Jackson, Esquire, and moves this Honorable Court to consolidate Supreme Court case **81257** with Supreme Court case **81255**, pursuant to Supreme Court Rule 27A. As grounds for this Motion, counsel states that it is his belief each case involves the identical issues of ineffective assistance of counsel in case no.: C-13-291374-1 (the Trial) and case no.: A-18-784704-W (the Writ) and should therefore be consolidated for Appeal.

Dated this 13th day of July, 2020.

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Terry.jackson.esq@gmail.com
Counsel for Frederick H. Harris, Jr.

CERTIFICATE OF SERVICE

I certify that on the 13th day of July, 2020, I served a copy of this Motion to Consolidate Supreme Court Case 81255 with 81257 upon all counsel of record:

[X] Via Electronic Service (eFlex) to the Nevada Supreme Court;

[X] and by United States first class mail with postage affixed to the Nevada Attorney General and to the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

JAMES R. SWEETIN
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AARON D. FORD, ESQUIRE
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

FREDERICK HARRIS

Defendant.

CASE NO. A-18-7847804-W

DEPT. NO. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE
(present via teleconference)

THURSDAY, APRIL 23, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
HEARING

APPEARANCES:

For the State: JAMES SWEETIN
Chief Deputy District Attorney
(via teleconference)

For the Defendant: TERRENCE M. JACKSON, ESQ.
(via teleconference)

RECORDED BY: SARA RICHARDSON, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, APRIL 23, 2020, 11:58 A.M.

* * * * *

THE COURT: Okay. Page 1, State of Nevada versus Frederick Harris, this is case A784704. Mr. Harris is not present. He's in the Nevada Department of Corrections. Go ahead, Mr. Jackson.

MR. JACKSON: Is he present by video or is he just not present?

THE COURT: He's not present. He's in the Nevada Department of Corrections.

MR. JACKSON: Okay. Then we're just going to argue the legal matters in the writ then?

THE CLERK: You know what, Judge, I don't think James Sweetin --

THE COURT: That's correct.

THE CLERK: -- has signed in yet, I'm sorry.

THE COURT: Okay. Sorry, Mr. Jackson, we thought we could call it.

MR. JACKSON: That's fine. I'm ready to go.

THE COURT: Okay.

[Proceeding trailed until 12:03 p.m.]

THE COURT: State of Nevada versus Frederick Harris, A784704. Mr. Harris is not present. He's in the Nevada Department of Corrections. Parties can make their appearances.

MR. JACKSON: Terrence Jackson for Frederick Harris.

MR. SWEETIN: And Jim Sweetin for the State.

THE COURT: Okay. Mr. Jackson, go ahead.

MR. JACKSON: This is my post-conviction petition for Mr. Harris. I've raised about eight or nine issues. I can talk the ones the Court thinks are most significant

or I can go down each of them. I threw a lot of issues out, but I'm going to focus on the two or three that I think have maybe the most resonance in this matter. This was a sexual assault case. The defendant was represented, I think, by very able counsel. But they didn't do certain things that I think should have been done in this particular case.

In this particular case, because it was a sexual assault case, I think they should have filed a motion for individual voir dire so they could get a jury that wasn't tainted by the kind of voir dire you have in a sexual assault case. I think that was extremely important here. I raised that issue and I think that it's incumbent upon counsel to do that because jurors are -- have to go through very intense kinds of jury questioning in these matters. And I think the transcripts reveal the kind of questions that come out in these things, and I think many jurors are reluctant to reveal things that may have happened to them and I think it also affects other jurors when they listen to this. And that wasn't done in this case. And I think you never know how much it affects particular jurors when they have to decide certain things.

I think it also relates to one of the issues that occurred later in the case, which I raised when there was issues about one of -- what later came out, issues that maybe trauma that occurred to the alleged victims. I think that counsel has to go to extra lengths in these kinds of cases. They -- they should have sought a jury consultant to help them in picking a fair and unbiased jury. They didn't do that in this case. These are the kind of things where you win or lose at trial and it is particularly important to get a fair and impartial jury.

The other things counsel need to do in these kind of cases is to file all appropriate motions that might be needed and to also do a full and complete investigation. In this particular case, I think counsel needs to get whatever expert

witnesses that can assist them in preparing their case. And the courts have been very supportive of defendants seeking psychological or psychiatric evaluations of the alleged victims. Counsel did not seek that in this case. I realize it's discretionary with the Court. But counsel did not even seek such a motion.

And because they didn't, there are many cases where they have actually reversed because counsel did not seek such a motion because counsel did not do that type of motion in this case, I think there are cases that have reversed because it was *Strickland* error because they did not do that. I've cited those cases in my brief.

I think counsel also has to be very vigorous in the kinds of cross-examination counsel does of the witnesses. And I think counsel in this case did not do an adequate job in cross-examining the State's witnesses. There were several instances I pointed out in my brief where counsel was unable to adequately impeach the victim. The prosecution did a good job in objecting. But counsel was unable to respond adequately -- prosecution alleged that the defense --

[Video interruption]

THE COURT: Go ahead. Sorry, Mr. Jackson, go ahead.

MR. JACKSON: All right, well, in any event, I think counsel was not as effective as they could have been in cross-examining the State's important witnesses. And for that reason I think there was error under *Strickland.*

I'm being very brief and -- and summary in my argument here but I think I've laid it out in my opening and my responding brief, the case law, and I can go into that in more detail if the Court wishes. But --

THE CLERK: Jail, you guys need to mute your phone please. We're picking you up.

MR. JACKSON: Okay. You know, the final point I want to argue is I think that counsel was most ineffective in terms of advocating strongly at sentencing. The sentence was a very, very lengthy sentence. Whether it was deserved or not, of course, is up, you know, the Court has to make tough decisions in these kind of cases. The defendant got a total of 76 years. It was a serious crime.

I don't believe counsel acted appropriately in not filing a sentencing memorandum or doing the necessary work at sentencing to bring out mit -- any mitigating factors. And because of that, defendant got a lengthy sentence. Whether it was deserved or not, you know, we don't necessarily know because the defense counsel did not do an adequate job under *Strickland*. Because of that, I think that, you know, there's -- there's error under *Strickland* and the case should at least be reversed so we can have a new sentencing with the proper attorney input at the sentencing level.

I'd submit it with those issues and all the points and authorities in my brief that I've raised. There were arguments that -- for a new trial, which I ask the Court to look at carefully. One of the things that, I'll just end with this, there was a witness at the new trial, Kathleen Smith, she did not follow through on the original affidavit that was prepared for her, and I don't think she was adequately impeached on -- as to why she wouldn't sign that affidavit. That affidavit, of course, was a very strong affidavit that established that there were jurors that had been sexually abused -- one had been sexually abused as a child. That goes right to the point that I was making earlier about an ineffective voir dire by the attorney because there was, apparently at least was one juror that may have been prejudiced by at least the type of offense they were sitting on.

So the new trial was not granted because, in essence, the investigator

did not really confirm her affidavit strongly enough in court. I'm not sure why that happened. But I think it is directly related to ineffective assistance by counsel. I'll submit it with my points and authorities both in my opening and my reply brief.

THE COURT: Thank you.

Mr. Sweetin.

MR. SWEETIN: Yeah, and, Your Honor, you know, we've sort of laid out the opposition to the arguments in our -- in our pleadings. I would submit to you that there's no reason for an evidentiary hearing in this and it should be summarily dismissed.

Just to go through some of the points that Mr. Jackson made, you know, starting with the last point that he made in regards to the argument for a new trial, you know, the witness that he made reference to did not sign an affidavit, refused to sign an affidavit because she didn't agree with what's in the affidavit, just didn't want to be involved. There was, as I understand, a hearing that was held by the Court and that actually went up to the Supreme Court and was -- was affirmed.

I'd note in regards to jury selection, it's clear in the record that the Court made it very clear to the jury that they could approach and have a conference with the Court outside the other prospective jurors' hearing, that was made clear throughout the proceeding.

You know, in order to show ineffective, we've got to show a couple things, one thing, that they acted in an unreasonable way. Cases are tried in this way everyday in the courthouse. You know, clearly that hasn't been shown and there's been nothing to show, this is really a hypothetical as to how that might have changed anything in this case.

Another point is made in regards to the psychological examination or

motion for that, I would note that it's really a moot issue now because under the current law that would not be allowed. However, in this particular case, even if a motion would have been filed, it clearly would have had no legs on it because in this particular case the two witnesses, I think, that he made reference to, one, he cites a cognitive delay, the other anxiety disorder. If you go through the *Koerschner* factors, clearly neither of the disorders bear on credibility and there is substantial corroboration. So under the *Koerschner* factor that has no legs.

In regards to ineffectiveness during trial and the cross-examination of the witnesses, the State would submit that the record is clear, and this is laid out in the -- in the State's briefs, that in fact there were objections made by the State, the Court ruled on those objections and in the course of cross-examination, the defense did get out a very -- a lot of very positive things to the defense that assisted them in that court. Clearly, again, hasn't made the showing that this was not a reasonable cross-examine or that the result would in any way be differently.

And in regards to sentencing, again, these are just bare allegations, the sentencing was done within the parameters of the law and clearly in this particular case, there was substantial evidence to differentiate this case from -- from many cases within this jurisdiction. Clearly we have things that have happened over an extended period of time, multiple occasions involving multiple victims and a very egregious nature. So the State would submit that the defendant has not made a showing in this case that would provide any sort of relief or even the right to an evidentiary hearing and the writ should be summarily dismissed.

THE COURT: Okay. At this time the Court's going to deny the petition. The State can prepare the order.

MR. SWEETIN: Thank you, Judge.

THE COURT: Thank you.

MR. JACKSON: Thank you, Your Honor.

THE COURT: Thank you.

PROCEEDING CONCLUDED AT 12:15 P.M.

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

Electronically Filed
7/15/2020 1:57 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

FREDERICK HARRIS

Defendant.

CASE NO. A-18-7847804-W

DEPT. NO. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, JUNE 20, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS AND STATUS CHECK: CONFIRMATION OF COUNSEL

APPEARANCES:

For the State: BRIANNA K. LAMANNA
Deputy District Attorney

For the Defendant: TERRENCE M. JACKSON, ESQ.

RECORDED BY: KRISTINE SANTI, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, JUNE 20, 2019, 8:43 A.M.

* * * *

MR. JACKSON: I have a case on page 3, that's Mr. Harris, I believe, Frederick Harris.

THE COURT: Sure, case A784704. He is not present. He's in the Nevada Department of Corrections.

MR. JACKSON: I'm going to confirm as counsel --

THE COURT: Thank you.

MR. JACKSON: -- if the Court please.

THE COURT: Thank you. And then how much time -- we still have --

MR. JACKSON: Can we set it down for a status check in 30 days to see if I get all the paperwork I need before we set a briefing schedule?

THE COURT: Okay. Because it was a pretty significant case and trial.

MR. JACKSON: I heard it was a trial about sexual assault.

. THE COURT: Right.

MR. JACKSON: I wanted to try to get the transcripts and whatever and find out what it's about.

THE COURT: Okay. 30 days.

THE CLERK: August 6th, 8:30.

MR. JACKSON: 8/6/19 at 8:30, thank you.

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THE COURT: Thank you.

PROCEEDING CONCLUDED AT 8:44 A.M.

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK HAROLD HARRIS, JR., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 81255
FREDERICK HAROLD HARRIS, JR., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 81257

FILED

JUL 28 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER CONSOLIDATING APPEALS

These appeals appear to involve the same parties and the same issues; accordingly, appellant's motion to consolidate the appeals is granted. NRAP 3(b). These appeals shall be consolidated for all appellate purposes. Appellant shall have until September 29, 2020, to file and serve a combined opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

Pickering, C.J.

cc: Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney