No. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

JAMES CHAVEZ, Petitioner,

v.

ROBERT LEGRAND, WARDEN; NEVADA ATTORNEY GENERAL, Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RENE L. VALLADARES
Federal Public Defender of Nevada
JASON F. CARR
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Assistant Federal Public Defender
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Las Vegas, Nevada 89101
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Jason_Carr@fd.org

Counsel for Petitioner Chavez

Petitioner James Chavez asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the District Court and in the United States Court of Appeals. Counsel for Chavez was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 17th Day of September 2018.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ ***Jason F. Carr***

_____

JASON F. CARR
Counsel of Record
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
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Counsel for Petitioner **Chavez**

No. _____

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PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner Chavez

QUESTIONS PRESENTED

Whether, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), a Prosecution can Admit Prior Testimonial Statements, Including a Video-taped Interview, of a Witness that Died Prior to Trial and Where Defense Counsel's Only Opportunity to Cross-Examine that Witness Occurred During a Preliminary Hearing Where, Given the Standards and Practices of Nevada, Counsel had Little Incentive to Conduct a Trial-Level Cross-Examination?

LIST OF PARTIES

There are no parties to the proceeding other than those listed in the caption.

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TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

OPINIONS BELOW

On February 22, 2017, the United States District Court for the District of Nevada filed a written order dismissing Petitioner Chavez's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) B, 8-21; *see also* App. C (underlying Nevada criminal judgment).) On June 18, 2018, The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Chavez's appeal of that decision. (*See* App. A, 1-7.)

It is the unpublished Ninth Circuit decision that is at issue in this Petition. (*See* App. A.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Chavez' federal post-conviction appeal on June 19, 2018. (*See* App. A, 1-7.) Chavez mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This petition implicates Title 28 U.S.C. § 2254, which states in pertinent part:

> The Supreme Court . . . shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The standards and requirements for acquiring relief from a state court conviction in federal court is set forth in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Trial and Sentencing

On January 26, 2007, the Clerk of the Second Judicial District Court, Washoe County, Nevada, entered the criminal judgment at issue in this federal habeas action in a case entitled The *State of Nevada v. James Chavez*, case number CR04-1850.[1]

The judgment is the product of a six-day jury trial where the jury convicted Mr. Chavez of four (4) counts of sexual assault of a minor. (*See* App D, 9.) The Washoe County court sentenced Mr. Chavez to a maximum life term with a minimum parole eligibility of twenty years on all four counts each running consecutive. (*See* App. C.)

Court proceedings began when the Washoe County District Attorney [hereinafter DA] filed a criminal complaint on March 30, 2004, charging Mr. Chavez with four counts of sexual assault.

A justice court conducted a preliminary hearing. This hearing is important to Chavez's petition as it is the only proceeding in which the DA's chief complaining witness testified.[2] Following the testimony of witnesses and arguments by counsel, the justice court bound Mr. Chavez over to the state trial court.

The DA then filed an Information charging Mr. Chavez with four felony counts of Sexual Assault on a Child, a violation of Nevada Revised Statute ("NRS") 200.366.[3]

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[1] The state court filed a corrected judgment on May 6, 2013. (*See* App. C.) The corrected version contains the same sentence as the original judgment with the only change being that Mr. Chavez would be imprisoned in the Nevada Department of Corrections rather than in a "Nevada State Prison."

[2] Chavez uses an abbreviated form of the complaining witness' name because the individual was a minor at the time of the alleged offenses and preliminary hearing testimony. Chavez treats the names of D.C.'s siblings, also minors, in a similar fashion.

[3] The DA superseded the operative charging document twice prior to Mr. Chavez's trial

The Second Amended Information is the final and operative charging document.

After the preliminary hearing, D.C. committed suicide. In his motion, Mr. Chavez argued that the now deceased victim's testimony at the preliminary was inadmissible, as well as her statements to her mother, siblings, investigating nurses, other health care providers and law enforcement. As D.C. was the only witness at the preliminary hearing and her testimony was the primary evidence against Mr. Chavez, he requested the trial court dismiss the charges.

The trial court held a hearing addressing, inter alia, Mr. Chavez's Motion to Dismiss. Following arguments by counsel regarding the admission of the victim's testimony and extra-judicial statements, the court ordered the victim's statements to the forensic nurse and her siblings excluded from the trial; however, the victim's statements to her mother and law enforcement, her testimony at the preliminary hearing, and statements on audio/video tapes would be admitted at trial. Following arguments by counsel, the court determined it inform the jury the victim was now deceased.

The case proceeded to trial on October 30, 2006 and continued through November 6, 2006. At the conclusion, the jury returned verdicts finding Mr. Chavez guilty of all four counts as charged.

After the sentencing court issued its written judgment, Mr. Chavez appealed his convictions to the Nevada Supreme Court.[4]

[4] Until recently, the State of Nevada did not have an intermediate-level court of appeals.

B. The Nevada Supreme Court's Opinion

The Nevada Supreme Court issued a published opinion denying Chavez's appeal. *See Chavez v. State*, 213 P.3d 476 (Nev. 2009) (reproduced in Appendix D.) It is this decision that Chavez claims unreasonably applies this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Chavez finds that Nevada law provides sufficient latitude to allow a defense attorney to cross-examine a preliminary witness regarding credibility or motive. *See Chavez*, 214 P.3d at 485. Additionally, the discovery was almost complete at the time of the hearing. *See id.* at 486. Therefore defense counsel had both the means and ability to cross-examine the complaining witness. *See id.* 485-87. Moreover, defense counsel did cross-examine the witness asking approximately 240 questions with the justice court preventing only one significant line of questioning. *See id.* at 485.

As will be discussed infra, the Nevada Supreme Court fails to consider whether defense counsel would have motivation to extensively cross-examine a witness regarding trial matters during a preliminary hearing. Indeed, in this case defense counsel stated that he did not have that motivation and held back the majority of his cross for trial.

C. The Ninth Circuit Appeal and Decision

The judgment at issue in this Petition is the United States Court of Appeals for the Ninth Circuit [hereinafter Ninth Circuit] one-page unpublished decision denying Chavez' federal post-conviction denial appeal. The memorandum order determined that the Nevada Supreme Court's decision (*see* App. D, 24-51) is neither contrary to nor an unreasonable application of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). (*See* App. A 2.) "Crawford suggests that 'a preliminary hearing at which the defendant had examined the witness' may provide a meaningful opportunity for cross-examination." (*Id.* (quoting *Crawford*, 541 U.S. at 58).)

Because Chavez does not a agree that a preliminary hearing, with different focuses and objectives than those posed at trial, provides a fair substitute for trial cross-examination, this Petition follows.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DECIDE WHETHER PRELIMINARY HEARING CROSS-EXAMINATION IS SUFFICIENT TO ALLOW FOR THE INTRODUCTION OF A OUT-OF-COURT WITNESSES TESTIMONIAL STATEMENTS.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront any persons making accusations against him. Where "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation." *Crawford v. Washington*, 541 U.S. 36, 69–70 (2004).

In Mr. Chavez's case that right was unavailable to him due to the death of the complaining witness. As a substitute, the prosecuting attorney introduced numerous testimonial statements by the complaining witness. These statements comprised a significant portion of the evidence against him.

The prosecutor introduced the complaining witness' testimony from the preliminary hearing over trial counsel's objection. Mr. Chavez could not, of course, confront D.C. or to cross examine her at trial. It was constitutional error to admit that testimony. In addition to her preliminary hearing statements, the D.A. introduced a number of testimonial statements that the complaining witness made to officers during their investigation. These statements are testimonial because there were developed in anticipation of criminal litigation. The D.A. used multiple statements that D.C. made to Sergeant Dreelan upon arrival at the police station regarding allegations that Petitioner forced her to have intercourse and oral sex with

him. The D.A. relied upon a videotaped interview of D.C. conducted by Detective Armitage.

The videotaped interview was particularly potent.

This video is a testimonial statement contemplated by the court in *Crawford*—a category which includes statements taken by police in the course of "interrogations" which the court used "in its colloquial, rather than any technical legal sense." 541 U.S. at 52–53. At no point during any of D.C.'s statements to police was there an ongoing emergency sufficient to render these statements non-testimonial. *Cf. Davis v. Washington*, 547 U.S. 813, 822 (2006). The trial court's admission of these statements constitutes constitutional error. *Crawford* requires adequate opportunity to cross-examine a witness before the preliminary hearing testimony of an unavailable witness is admissible. *See id.* at 57. Whether there was an adequate opportunity to cross examine depends on the nature and purpose of the preliminary hearing. In Nevada, the prosecution is required to submit only slight or marginal evidence to satisfy its burden. The proceeding is not a substitute for trial.[5] Further, a defendant would have good reasons for not cross-examination a preliminary hearing witness.[6]

A preliminary hearing does not provide an opportunity for cross-examination that is adequate to overcome a defendant's constitutional right to confrontation at

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[5] For example, the justice court prevented Chavez from delving too far into the issue of D.C.'s credibility. When defense counsel began to ask D.C. questions regarding mother's boyfriend and the nature of other familial relationships, the judge curtailed this line of questioning.

[6] The Nevada Supreme Court is wrong on this point on the grounds of both policy and this case's record. Chavez's trial counsel stated that he did not conduct a full cross-examination of D.C. because he lacked the motive, means, and opportunity to do so at the preliminary hearing. (*See* Defendant's Motion to Dismiss, Sept. 28, 2006, at 7 ("the accuser's credibility is a crucial issue in the case. Chavez's counsel, however, did not inquire into the accuser's credibility because it would have been meaningless given [the "slight" evidence standard applicable to preliminary hearings].").)

trial.[7] The proceeding serves a different function than finding guilt or innocence. Further, counsel may well have good reasons for declining to foreshadow all of his trial ammunition. Finally, the Nevada Supreme Court's belief that an attorney would as prepared for the preliminary hearing as for trial does not withstand scrutiny.

Whether Chavez's truncated preliminary hearing cross-examination satisfies Crawford is the pivotal issue in the case. There is no question the statements at issue were testimony. Nor is it subject to reasoned debate that the introduction of these statements was prejudicial. The statements were the core of the prosecution's case.

This case provides an appropriate vehicle for deciding a issue of widespread, federal constitutional importance. Moreover, there is a split of authority on the question.

1. A Split of Authority

The Nevada Supreme Court's opinion is both in accord and in conflict with those of other state courts. The law is divided on this point.

People v. Fry, 92 P.3d 970 (Colo. 2004), held that the admission at trial of a preliminary hearing transcript of a dead witness violated Mr. Fry's right of confrontation. A preliminary hearing is limited to matters necessary to the determination of probable cause. *See Fry*, 92 P.3d at 977. Because of the thrust and

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[7] A preliminary hearing is not the functional equivalent of a trial. *See State v. Justice Court*, 919 P.2d 401, 402 (Nev. 1996). The proceeding is not a search for the truth or designed to determine whether the defendant is guilty or innocent. *See id.* Instead, its purpose to determine whether there is a minimal basis upon which to find that an offense has been committed and whether the court should bound this particular defendant to the district court for trial. *See id.* (citing Nev. Rev. Stat. § 171.206).

A preliminary hearing "is a much less searching exploration into the merits of the case than a trial." *Drummond v. State*, 462 P.2d 1012, 1014 (Nev. 1970). A full and complete exploration of the facts and facets of the case is reserved for trial and "is not the function of a preliminary examination." *Marcum v. Sheriff*, 451 P.2d 845, 847 (Nev. 1969). The DA need only provide slight or marginal evidence.

nature of the proceeding, including the lack of safeguards attendant to trial, a preliminary hearing cross-examination is not sufficient to overcome the defendant's right to confrontation at trial. *See id.* (noting that issues of witness credibility, while crucial trial questions, have little bearing on probable cause determinations).

In *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005), the Wisconsin Supreme Court found that the admission of a witness' preliminary hearing transcript violated the constitutional right to confrontation. A preliminary hearing is a summary proceeding to determine "essential or basic facts" relating to a probable cause determination. *See Stuart*, 695 N.W.2d at 266. It is not sufficiently similar to the full evidentiary value of a trial where the defendant's guilt must be proved beyond a reasonable doubt. *See id. But Compare State v. Henderson*, 136 P.3d 1005, 1010 (N.M. Ct. App. 2006) (distinguishing *Fry* and *Stuart* by recognizing that New Mexico courts allow for a full exploration of a witnesses credibility during preliminary hearings).

On the other hand, in *State v. Mohamed*, 130 P.3d 401 (Wash. Ct. App. 2006), the court noted that *Crawford,* at least arguably, did not change the well-established rule that: "When a witness is unavailable to testify at trial, her testimony at a preliminary hearing or previous trial is admissible, assuming a proper opportunity for cross-examination at the previous hearing." *Mohamed*, 130 P.3d at 403.

The court recognized that not all courts agree. The case distinguished contrary authority on a fact specific basis. The cross-examination at Mr. Mohamed's pretrial hearing was not limited since the witness's credibility was at issue and the court did not curtail Mohamed's cross-examination. *See id.* at 404. "The unavailable witness' sworn testimony at the pretrial hearing was subject to unfettered and properly motivated questioning about her out-of-court statements." *Id.* at 406; *see also State v. Aaron*, 218 S.W.3d 501, 508 (Mo. Ct. App. 2007) (explaining that a preliminary hearing cross-examination is presumed sufficient absent a showing that a meaningful line of material existed that was not explored in the prior examination).

The Supreme Court's decision in *California v. Green*, 399 U.S. 149, 165 (1970), recognized that preliminary hearing testimony of an unavailable witness is admissible only if the testimony is "given under circumstances closely approximating those that surround the typical trial." *See also State v. Mantz*, 222 P.3d 471, 477 (Idaho Ct. App. 2009) (recognizing that the majority of courts find preliminary hearing testimony admissible if "the defendant had an adequate opportunity to cross-examine").

CONCLUSION

State courts cannot agree on how to apply Crawford to preliminary hearing testimony. The issue is profound. The law conflicted and unclear. This Court should grant Chavez's request for habeas relief. Mr. Chavez asks that this Court reverse the Ninth Circuit and grant this Petition to resolve an important Sixth Amendment issue.

DATED this 17th Day of September 2018.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

JASON F. CARR
Counsel of Record
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
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(702) 388-6577
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Counsel for Petitioner **Chavez**

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,380 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 17th day of September 2018.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 17th day of September, 2018, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Dennis Cavanagh Wilson
Senior Deputy Attorney General
555 East Washington Avenue
Las Vegas, NV 89101

James Chavez
#95095
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Respectfully submitted,

Rene Valladares
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/s/ Jason F. Carr

JASON F. CARR
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Jason_Carr@fd.org

Counsel for Petitioner Chavez

INDEX TO APPENDIX

Case: 17-15541, 06/19/2018, ID: 10913506, DktEntry: 30-1, Page 1 of 2

APP. 001

FILED

JUN 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES CHAVEZ, Petitioner-Appellant, v. ROBERT LEGRAND, Warden and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-15541 D.C. No. 3:13-cv-00548-MMD-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Submitted June 15, 2018**
San Francisco, California

Before: MURPHY,*** PAEZ, and IKUTA, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

APP. 002

James Chavez petitions for a writ of habeas corpus under 28 U.S.C. § 2254 after he was convicted on four counts of sexual assault of his minor child, D.C., in violation of Nevada Revised Statute section 200.366. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 and we affirm.

Habeas relief is precluded because the Nevada Supreme Court's decision was neither contrary to, nor an unreasonable application of, *Crawford v. Washington*, 541 U.S. 36 (2004).[1] *See* 28 U.S.C. § 2254(d). *Crawford* suggested that "a preliminary hearing at which the defendant had examined the witness" may provide a meaningful opportunity for cross-examination. 541 U.S. at 58. At a minimum, "fairminded jurists could disagree," *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), as to whether the preliminary hearing in this case satisfied the Confrontation Clause pursuant to *Crawford* because Chavez's attorney had an opportunity to cross-examine D.C. and took advantage of that opportunity.

AFFIRMED.

[1] Chavez does not argue that the Nevada Supreme Court's decision was based on an unreasonable determination of fact.

APP. 003

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

APP. 004

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... APP. 006 ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

	v.		9th Cir. No.	

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

APP. 007

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

APP. 008

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JAMES CHAVEZ, Petitioner, v. LeGRAND, WARDEN, et al., Respondents.	Case No. 3:13-cv-00548-MMD-WGC ORDER

Before the Court for a decision on the merits is petitioner Chavez's amended petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 22).

I. BACKGROUND[1]

In November 2006, a jury in the Second Judicial District Court for Nevada found Chavez guilty of four counts of sexual assault on a child. The victim of the assaults was Chavez's daughter. The state district court sentenced Chavez to four consecutive terms of life in prison with minimum parole eligibility after twenty years on each count. Chavez appealed.

On direct appeal, Chavez raised claims asserting violations of the Confrontation Clause of the Sixth Amendment, violations of Nevada's rules of evidence, a claim of juror misconduct, and a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Nevada Supreme Court affirmed Chavez's conviction and sentence.

[1]The background information for this case was taken from the exhibits filed at ECF Nos. 16 through 21 and this Court's own docket entries.

Chavez subsequently filed a proper person petition for writ of habeas corpus. After appointment of counsel, Chavez filed a supplemental petition. The state court held an evidentiary hearing, and then entered an order denying the state petition. Chavez appealed.

On appeal, Chavez raised various claims of ineffective assistance of counsel, and asserted a claim of cumulative error. The Nevada Supreme Court affirmed the state district court's order denying the state petition.

On October 2, 2013, this Court received a federal habeas petition from Chavez initiating this proceeding. On December 23, 2013, Chavez filed, with the assistance of appointed counsel, an amended petition. Pursuant to a motion to dismiss filed by respondents, the Court issued an order for Chavez to show cause why Ground Two of his amended petition should not be dismissed as procedurally defaulted. After this Court found Chavez could not make such a showing and dismissed the claim, respondents filed an answer to Grounds One and Three. Chavez subsequently filed his reply. Grounds One and Three are now before the Court for a decision on the merits.

II. STANDARDS OF REVIEW

This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite that reached by the Supreme Court on a question

of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id*. at 409. "[A] federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411.

The Supreme Court has explained that "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti,* 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

"[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004); *see also Miller-El*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless

objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).”). Because *de novo* review is more favorable to the petitioner, federal courts can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

III. DISCUSSION

A. Ground One

In Ground One, Chavez alleges that the state trial court violated his rights under the Confrontation Clause of the Sixth Amendment by admitting statements by the deceased victim, which included her preliminary hearing testimony, her video-taped statements to the police, and other statements to law enforcement.

Under the Confrontation Clause of the Sixth Amendment, testimonial statements of witnesses not present a trial are admissible “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Crawford v. Washington*, 541 U.S. 36, 59 (2004). “To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.” *Id*. at 61. The Confrontation Clause guarantees only “an opportunity for effective cross-examination, not cross-examination that is effective whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

The victim in this case, Chavez’s daughter, testified at the preliminary hearing but died prior to trial. Chavez filed a pre-trial motion to dismiss premised on an argument that her preliminary hearing testimony and her statements to law enforcement, family members, and various health care providers were all inadmissible at trial because the presentation of such evidence would violate either the Confrontation Clause or rules of evidence prohibiting the introduction of hearsay. (ECF No. 16-7.) The trial court ruled that statements the victim made to “the forensic nurse and to her siblings would not be admitted, but that the preliminary hearing testimony and statements the victim made to law enforcement was admissible because Chavez had an opportunity to cross-examine

her on those statements at the preliminary hearing. (ECF No. 16-14, p. 25-26.)[2] With respect to statements the victim made to her mother, the court suggested that those statements would most likely be admissible at trial. *Id*. at 26-27.

At trial, the victim's preliminary hearing testimony was read to the jury. (ECF No. 17-1 at 146-48.) In addition, a police sergeant (Dreelan) testified that the victim had told him that her father had sexually assaulted her the day before he interviewed her. (ECF No. 17 at 104.) The prosecution was also permitted to play a videotape of a police detective (Armitage) interviewing the victim about the sexual assaults and present the detective's testimony about what the victim told her during a second interview. (ECF No. 17-1 at 153, 157-59.) A marriage and family therapist (Evarts) who treated the victim, testified that the victim had told her "that at five years old, her dad had ripped open her vagina." (ECF No. 16-16 at 35-36.)

On direct appeal, Chavez argued that it was constitutional error for the trial court to admit into evidence (1) the preliminary hearing testimony, (2) the videotape of the interview and the victim's statements to Dreelan and to Armitage, and (3) the victim's statements to Evarts.

In denying Chavez's Confrontation Clause claim, the Nevada Supreme Court first discussed the rule announced in *Crawford*, then surveyed its own Confrontation Clause jurisprudence. *Chavez v. State*, 213 P.3d 476, 483 (Nev. 2009). With respect to the trial court's admission of the preliminary hearing testimony and the victim's statements to law enforcement, the court determined that the statements were testimonial and that the declarant was unavailable at the time of trial. *Id*. at 484, 486.

As for the defendant's opportunity to cross-examine the witness, the Nevada Supreme Court stated as follows:

> Chavez argues that the limited nature of a preliminary hearing does not provide a defendant an adequate opportunity to cross-examine a witness appearing against him. He urges this court to adopt the standards

[2]References to page numbers for documents on the Court's electronic docket are based on CM/ECF pagination.

set forth in *People v. Fry*, 92 P.3d 970 (Colo.2004), and *State v. Stuart*, 279 Wis.2d 659, 695 N.W.2d 259 (2005). Both cases are inapposite.

In *Fry*, the Colorado Supreme Court found that a defendant's opportunity to cross-examine a witness during a preliminary hearing was not adequate for Confrontation Clause purposes because of "the limited nature of the preliminary hearing" in that state. 92 P.3d at 976-77 (explaining that in Colorado a "preliminary hearing is limited to matters necessary to a determination of probable cause"). In contrast, Nevada law is generally more permissive with regard to a defendant's right to discovery and cross-examination at the preliminary hearing. *See* NRS 171.196(5) ("The defendant may cross-examine witnesses against him and may introduce evidence on his own behalf."); NRS 171.1965(1) (stating that, before the preliminary hearing, the defendant is entitled to written or recorded statements by the defendant or a witness, reports, and other evidence within the prosecutor's custody or possession). We do not find anything in our state law that would hinder a defendant's opportunity to cross-examine a witness at a preliminary hearing.

In *Stuart*, the Wisconsin Supreme Court reversed a murder conviction, finding that the district court had erroneously admitted the preliminary hearing testimony of the defendant's brother. 695 N.W.2d at 267. During the preliminary hearing, the magistrate ruled that pursuant to Wisconsin law, the defense could not ask the brother a question that was meant to cast doubt on the brother's credibility at the preliminary hearing stage. *Id*. At trial, the brother became unavailable, and the court admitted his preliminary hearing testimony. *Id*. The Wisconsin Supreme Court reversed, determining that, at the trial level, a defendant had a right to question a witness's motive and credibility and, therefore, admitting the preliminary testimony violated the defendant's right to confrontation. *Id*.

Unlike Wisconsin, Nevada law does not preclude a defendant from questioning a witness's credibility or motive during a preliminary hearing. While the defendant in *Stuart* could not question the witness's credibility and motive, Chavez questioned D.C.'s credibility in a wide-ranging cross-examination.

Chavez's cross-examination of D.C. at the preliminary hearing consisted of almost double the amount of questions that were asked on direct examination. D.C. testified under oath and in Chavez's presence. At the time Chavez conducted the cross-examination, nearly all the discovery was complete. In fact, most of Chavez's extensive cross-examination consisted of questions based upon statements that D.C. had made to authorities about the sexual abuse. Specifically, we note that Chavez had a copy of D.C.'s videotaped statements to police, as well as a list of the witnesses that would be testifying during the State's case in chief. Therefore, Chavez had most, if not all, of the pertinent facts of the State's case in chief at the preliminary hearing.

Chavez used the discovery to ask D.C. specific questions about the molestation, including details about each instance of abuse, the description of her father's penis, and how she cleaned up afterwards by using socks. He questioned D.C.'s veracity and motives by repeatedly asking her whether she told specific people about the sexual abuse during the five years that it was ongoing. Chavez asked D.C. whether her brothers or her

> sister ever saw the sexual abuse and about the conversation in the car between D.C., her siblings, and Block, and how and why D.C. told her mother about the abuse. Chavez asked D.C. specific questions about her parents' relationship. He further questioned D.C. about the alleged accident on the fence post and how it led to her initial injuries. He even asked D.C. if she was seeing a therapist.
>
> These questions were only part of the 240 questions Chavez asked D.C. The record leaves no doubt in our minds that the preliminary hearing afforded Chavez an opportunity to cross-examine the unavailable witness, D.C., on the statements that she had made to her mother, health care providers, and law enforcement officers regarding the sexual abuse. The nature of the cross-examination was extensive and thorough because the defense took, and the magistrate judge allowed, full advantage of the opportunity to cross-examine. In fact, the magistrate judge only interrupted Chavez's cross-examination once, when Chavez asked D.C. a series of questions about her mother's new boyfriend. And, even then, the magistrate judge said that he would not allow the line of questioning unless counsel could explain its relevance. Chavez simply moved on to other questions. There is no evidence that the magistrate judge placed any inappropriate restrictions on the scope of Chavez's cross-examination of D.C. Rather, the record shows, save for one appropriate admonishment, the magistrate judge allowed Chavez to extensively question D.C. on all the key pieces of evidence the State had obtained against Chavez. Because discovery was almost entirely complete, Chavez was able to take full advantage of the opportunity to cross-examine the State's key witness against him at the preliminary hearing.
>
> Therefore, in this instance, because the discovery was almost entirely complete and the magistrate judge allowed Chavez unrestricted opportunity to confront D.C. on all the pertinent issues, we conclude that Chavez's Confrontation Clause rights were not violated by the admission of D.C.'s preliminary hearing testimony at trial.

Id. at 48-86 (footnote omitted).

Then, with respect to the victim's statements to law enforcement, the Nevada Supreme Court held as follows:

> The only remaining issue is whether Chavez had opportunity to cross-examine D.C. regarding the videotaped testimony and her other statements to police. Because of discovery, Chavez had the statements that D.C. made to Detective Armitage and Sergeant Dreelan, including a copy of the videotape, before the preliminary hearing. Chavez, therefore, had the opportunity to confront D.C. on all of her statements to law enforcement officers at the preliminary hearing. Whether he questioned D.C. on each and every statement is not the relevant inquiry, as the Confrontation Clause only guarantees the opportunity to cross-examine, not a cross-examination in whatever way the defense might wish. As we have already concluded, Chavez was afforded an adequate opportunity to confront D.C. at the preliminary hearing. The breadth and scope of Chavez's cross-examination did not run afoul of the Confrontation Clause because of the nearly complete discovery available to Chavez at the time and manner in which the magistrate judge allowed the cross-examination to proceed.

Id. at 486.

The question before this Court is whether the Nevada's Supreme Court's adjudication of Chavez's Confrontation Clause claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[3] The parties do not dispute that the statements at issue were testimonial or that the victim was unavailable to testify at trial.[4]

Thus, the inquiry here focuses on the Nevada Supreme Court's determination that Chavez had, for the purposes of *Crawford*, an opportunity to cross-examine the victim. On this particular point, the Supreme Court has provided little guidance as to the types of proceedings that do or do not qualify as providing a defendant with a sufficient opportunity for cross-examine for the purposes of *Crawford*. However, prior to *Crawford*, the Court rejected the notion that the fundamental differences between a preliminary hearing and a trial disqualified it from providing an adequate opportunity. *See Ohio v. Roberts*, 448 U.S. 56, 73 n. 12 (1980) (holding that, in the absence of "extraordinary" circumstances, the opportunity for cross-examination at a preliminary hearing is sufficient to satisfy the cross-examination requirement); *abrogated on other grounds by Crawford*, 541 U.S. 36.

In addition, a decision on point from the Court of Appeals for the Sixth Circuit provides sound guidance here. In *Williams v. Bauman*, 759 F.3d 630 (6th Cir. 2014), as in this case, a witness to the charged crimes testified at the defendant's preliminary hearing, but died before trial. 759 F.3d at 634. The state appellate court in *Williams*, as in this case, concluded that the trial court did not violate the defendant's right to

[3]Chavez makes no argument, nor is there any indication, that he Nevada Supreme Court's rejection of this claim was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[4]With respect to the victim's statements to Evarts, the Nevada Supreme Court determined that the statements were non-testimonial and admissible under NRS § 51.115, which provides for the admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof." *Id*. at 486-87. Chavez does not challenge that determination in his habeas petition or in his reply brief.

confrontation by allowing the witness's preliminary hearing testimony to be read to the jury. *Id*. at 634.

On habeas review, the Sixth Circuit noted that, in a recent case, it had "observed that 'there is some question whether a preliminary hearing necessarily offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes.'" *Id*. at 636 (citing *Al-Timimi v. Jackson*, 379 Fed. Appx, 435, 437 (6th Cir.2010)). The court then reasoned:

> If there is room for reasonable debate on the issue, the state court's decision to align itself with one side of the argument is necessarily beyond this court's power to remedy under § 2254, even if it turns out to be wrong.

Id. (citing *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

In the Ninth Circuit there is no published opinion that definitively settles the issue,[5] but unpublished decisions favor the conclusion that a preliminary hearing, notwithstanding its fundamental difference from a trial, provides an adequate opportunity for cross-examination for the purposes of *Crawford*. *See, e.g., Cogswell v. Kernan*, 648 F. App'x 624, 626 (9th Cir.), *cert. denied*, 137 S. Ct. 452, 196 L. Ed. 2d 334 (2016). At a minimum, there is at least "room for reasonable debate" on the issue. Thus, as in *Williams*, this Court must defer to the Nevada Supreme Court's decision to reject Chavez's Confrontation Clause claim.

Ground One is denied.

B. Ground Three

In Ground Three, Chavez alleges that he was deprived of effective assistance of counsel, in violation of his rights under the Sixth Amendment, because counsel (1) failed to object to certain prejudicial statements by the prosecutor; (2) failed to object to the admission of statements the victim made to her therapist; (3) asked the therapist on cross-examination whether she thought the victim had been coached, thereby allowing the

[5]Chavez cites only to the two state court cases discussed in the Nevada Supreme Court opinion — *Stuar*t and *Fry* — as instances in which a reviewing court concluded that a preliminary hearing did not provide a defendant with an opportunity for cross-examination as contemplated in *Crawford*. (ECF No. 60.)

therapist to vouch for the victim's credibility; (4) failed to object to the admission of autopsy photographs of the victim; and (5) failed to object to the State's inclusion of a theory of liability based on events that occurred on the Paiute Indian reservation.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel ("IAC"): a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

1. Prosecutor's statements and victim's statements to therapist

The statements underlying Chavez's first IAC claim are (1) the prosecutor's comment during opening argument that the victim had told her mother that Chavez "laid me on the floor like a baby changing my diaper and shoved his penis inside of me, and I tore," and (2) the prosecutor's references, while questioning witnesses, to Chavez "jamming" his penis into the victim. (ECF No. 16-16 at 15, ECF No. 18 at 87, ECF No. 19 at 115.)

The statement underlying Chavez's second IAC claim is Evart's comment during her testimony that the victim had told her that Chavez "ripped open her vagina." (ECF No. 16-16 at 35-36.)

Chavez presented these instances of alleged IAC for failure to object as one claim in his state post-conviction proceeding. (ECF No. 21-4 at 11-13.) The Nevada Supreme Court addressed the claim as follows:

> Chavez argues that counsel was ineffective for failing to object to prejudicial statements made by the prosecutor and a witness. Chavez failed to demonstrate deficiency or prejudice. The statements that Chavez asserts counsel should have objected to were direct quotes from the victim describing what happened to her and the language used accurately described the incidents as alleged and were not inflammatory. Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object on this ground.

(ECF No. 21-7 at 3.)

2. Coaching question on cross-examination

With respect to Chavez's allegation that counsel was opening the door for impermissible vouching, defense counsel asked Evarts the following question on cross-examination: "You did not give — in your treatment and meetings with [the victim], ever entertain the premise that she had not been molested, did you?" (ECF No. 16-16 at 48.)[6] In response, Evarts stated that she recognized that children she treated were not always telling the truth, but, in this case, "I did not for — I mean, for a minute, think she was lying." (*Id*.) Then, on redirect examination, the prosecutor asked Evarts several questions as to whether she considered the possibility the victim was not telling the truth, including the possibility the victim had been coached. (*Id*. at 54-60.)

On direct appeal, the Nevada Supreme Court rejected Chavez's claim that the trial court erred in not granting defense counsel's motion for a mistrial based on impermissible vouching by Evarts. *Chavez*, 213 P.3d at 487 n.2. In particular, the court concluded that, "Evarts' testimony went to her observations of [the victim] as compared to other children she had treated, not to the veracity of [the victim's] allegations." *Id*.

In Chavez's state post-conviction proceeding, the Nevada Supreme Court held as follows:

> Chavez argues that counsel was ineffective for opening the door for an expert witness to vouch for the victim's veracity. Chavez failed to demonstrate deficiency or prejudice. On direct appeal, this court stated that the expert's testimony did not go to the veracity of the victim's allegations and was not vouching. *Chavez v. State*, 125 Nev. 328, 343 n. 2, 213 P.3d 476, 487 n. 2 (2009). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to preclude the admission of this testimony.

(ECF No. 21-7 at 3.)

///

[6]Chavez alleges in his petition that defense counsel "asked Ms. Evarts whether she believed [the victim] could have been coached." (ECF No. 22 at 20.) However, he does not cite to (nor is the Court able to find) where in the record defense counsel asked this specific question.

3. Admission of autopsy photographs

At trial, the State presented autopsy photographs of the victim for the purpose of demonstrating injuries to her vaginal area. (ECF No. 17-1 at 92-93.) According to Chavez, counsel was ineffective in not objecting to the admission of these photographs because they invited the jury to speculate as to the victim's cause of death.

The Nevada Supreme Court addressed this claim as follows:

> Chavez argues that counsel was ineffective for failing to object to the introduction of photographs of the victim's vagina taken during her autopsy because it allowed the jury to infer that he was responsible for the victim's death. Chavez failed to demonstrate deficiency or prejudice. Jurors were already informed that the victim was unavailable because she was deceased and were instructed not to draw any inferences from her death. *See McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004) (presuming that jurors follow the instructions they are given). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object to the autopsy photographs on this ground.

(ECF No. 21-7 at 4.)

4. Events on Indian reservation

Chavez contends that the State filed amended charging documents that expanded the time period of the charged conduct to include events that could have only occurred on tribal land. He further contends that, because he and his children are members of the Paiute tribe, the State did not have jurisdiction over the alleged conduct. Accordingly, he claims that trial counsel was ineffective in failing to object to the amended charging documents.

> Chavez argues that counsel was ineffective for failing to object to the mention of an incident that occurred on tribal land. During opening statements, the prosecutor relayed the victim's description of an incident in which Chavez tore her vagina during a sexual assault and convinced her to tell the family that she injured it on a fence. Chavez asserts that because the jury asked multiple questions about the incident, which the State had no authority to prosecute because it occurred on tribal land, it likely found him guilty of that act rather than an act which was charged. Chavez failed to demonstrate deficiency or prejudice. In finding Chavez guilty, jurors found that each act was committed in Washoe County beyond a reasonable doubt. Further, counsel testified at the evidentiary hearing that had the State not referenced the act, he would have because Chavez's claim that the victim fell on a fence explained how she sustained vaginal injuries and was the crux of his defense. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (noting that counsel's strategy on how to proceed at trial

> is a decision that is "Virtually unchallengeable absent extraordinary circumstances." (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)) *abrogated on other grounds by Harte v. State*, 116 Nev. 1054 n. 6, 13 P.3d 420, 432. n. 6 (2000)). Accordingly, Chavez failed to demonstrate that counsel was ineffective for failing to object on this ground.

(ECF No. 21-7 at 2-3.)

The Nevada Supreme Court applied the correct federal law standard — i.e., *Strickland* — to each of Chavez's IAC claims. Chavez has not demonstrated that any of the state court's decisions discussed above constituted an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts.[7] Accordingly, this Court must deny Ground Three.

IV. CONCLUSION

For the reasons set forth above, Chavez's amended petition for habeas relief is denied.

Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

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[7]Indeed, Chavez does not address the merits of Ground Three at all in his reply brief. (ECF No. 60.)

APP. 021

Having reviewed its determinations and rulings in adjudicating Chavez's petition, the Court finds that reasonable jurists could debate the Court's resolution of Ground One, above. Specifically, it is at least arguable that the Nevada Supreme Court unreasonably applied clearly established federal law in determining that the trial court did not violate Chavez's right to confrontation in admitting statements made by the deceased victim. The Court declines to issue a certificate of appealability for its resolution of any other procedural or substantive issue.

It is therefore ordered that petitioner's amended petition for writ of habeas corpus (ECF No. 22) is denied. The Clerk will enter judgment accordingly.

It is further ordered that a certificate of appealability is granted as to the following issue:

> Whether this Court erred in its resolution of Ground One by concluding that it must defer to the Nevada Supreme Court's decision that Chavez's rights under the Confrontation Clause were not violated by the admission at trial of statements made by the deceased victim.

It is further ordered that all pending motions for extension of time (ECF Nos. 51, 52, 53, 56, 57, 58, 59) are granted *nunc pro tunc* as of their respective filing dates.

DATED THIS 22nd day of February 2017.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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Joey Orduna Hastings
Clerk of the Court
Transaction # 3707189

CODE NO. 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JAMES CHAVEZ,

Defendant.
/

Case No. CR04-1850

Dept. No. 9

CORRECTED JUDGMENT

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

That James Chavez is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Counts I, II, III and IV of the Second Amended Information, and that he be punished by imprisonment in the Nevada Department of Corrections for the term of Life With the Possibility of Parole, with parole eligibility beginning after a minimum of twenty (20) years has been served, as to each of Counts I, II, III and IV to run consecutively to each other. The Defendant is further ordered to pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee and a One Hundred Fifty Dollar ($150.00) DNA testing fee. The Defendant is given credit for three hundred twenty-two (322) days time served.

A special sentence of lifetime supervision shall commence after any period of

probation, or any term of imprisonment, or after any period of release on parole.

DATED this 6 day of May, 2013,
nunc pro tunc to *January 26, 2007.*

DISTRICT JUDGE

125 Nev., Advance Opinion 29

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48847

Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of sexual assault on a child. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Affirmed.

Jeremy Bosler, Public Defender, and John Reese Petty, Chief Deputy Public Defender, Washoe County,
for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Joseph R. Plater, Deputy District Attorney, Washoe County,
for Respondent.

BEFORE HARDESTY, C.J., PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS and PICKERING, JJ.

OPINION

PER CURIAM:

In this appeal, we consider whether the preliminary hearing testimony of an unavailable witness may be admitted into evidence at trial without violating the Sixth Amendment Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004). We hold that it can. We

conclude that this issue, along with the other issues that appellant James Chavez raises on appeal, does not warrant reversal of Chavez's conviction and sentence. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Chavez and Korby Block married in 1993 and together had four children, including their eldest, D.C. Although the couple divorced in 1997, they continued to live together in Block's apartment. In 2004, as Block was driving all four children to an outing, she asked them how it affected them when she and Chavez fought. During the conversation, one of the children told Block that Chavez was doing something to D.C. D.C. then told her mom that Chavez had been sexually molesting her. Block immediately took D.C. to the hospital.

Before D.C. was examined at Northern Nevada Medical Center, police detectives interviewed Block and D.C. There, D.C. told Sergeant Patrick Dreelan of the Reno Police Department that Chavez had sexually assaulted her the day before, forcing her to have intercourse and perform oral sex on him. Sergeant Dreelan then escorted Block and D.C. to the police station where Detective Barbara Armitage interviewed them. D.C.'s interview was videotaped. During the interview, D.C. stated that Chavez had sexually molested her for five years and sometimes she would spit out his semen into a sock. D.C. told Detective Armitage that the day before, when Chavez forced her to perform oral sex on him on the living room couch, she had been wearing a purple top and purple pants. During a second interview with Detective Armitage, D.C. recounted many of the same facts, but also recounted new incidents of sexual abuse. D.C. told the police that the sexual abuse began when she was five years old. D.C. revealed that the injury for which she had to be taken to the hospital

when she was five years old, which resulted in her receiving stitches in her vagina, was not the result of a fall on a fence post, but rather because of Chavez sexually molesting her. She further stated that Chavez had used a purple vibrator on her private parts.

With Block's permission, police officers entered Block's apartment and collected evidence, including the purple pants and top, several socks, evidentiary samples from the living room couch, and two vibrators. One of the socks contained adequate saliva and seminal fluid on which to perform DNA tests; those DNA tests revealed that D.C. was the dominant source of saliva and Chavez was the source of the seminal fluid. The other socks tested positive for seminal fluid, though it was not possible to develop a DNA profile. The couch samples, too, showed seminal fluid, but the low level of DNA prevented a determination of the source of the semen. The vibrators tested positive for Block's DNA.

The State charged Chavez with four counts of sexual assault on a child. On August 5, 2004, with almost all of the discovery complete, D.C. testified at a preliminary hearing. At the preliminary hearing, as a result of discovery, Chavez had a copy of D.C.'s videotaped interview with police and a list of the witnesses that the State planned on calling in its case in chief. On direct, D.C. testified about the sexual abuse Chavez committed upon her, including where, when, and how the assaults occurred.

During the preliminary hearing, Chavez, through his attorney, had opportunity to cross-examine D.C. In the course of the cross-examination and recross-examination, not including introductory questions, Chavez asked D.C. 240 questions. Chavez's examination of D.C. was almost twice the length of the State's examination of D.C.

Chavez confronted D.C. about the statements she made to the State during direct examination, including repeatedly questioning D.C. about her claims that Chavez had digitally, vaginally, and anally penetrated her during a five-year span. Chavez inquired about the details of the incidents, including where and when they took place, why D.C. did not mention the incidents earlier, and whether any of her siblings ever witnessed the sexual abuse. Chavez asked D.C. about his penis, including its size, description, and feel when he was committing the sexual abuse. He questioned D.C. about the semen and how she would use the sock to clean it off of her. Chavez confronted D.C. about the incident that occurred when she was five years old, when Chavez said D.C. fell on a fence post. He also extensively questioned D.C. about her family life, including her relationship with her mother, Block. Chavez cross-examined D.C. about her feelings toward Chavez, the family's financial issues, their living situation, and Block's feelings about Chavez. He confronted D.C. about statements that she made about the sexual abuse to her mother, family friends, law enforcement, and health care providers. Chavez asked D.C. about her therapy sessions with her therapist, Sally Holt-Evarts. He asked D.C. whether she told Evarts about the sexual abuse and whether Block would sit in on the sessions. Chavez extensively questioned D.C. about her sexual education classes at school, including whether she knew what semen was and how she learned about semen.

During this long cross-examination and recross-examination, the magistrate judge interrupted Chavez only once. The sole interruption occurred when Chavez was questioning D.C. about her mother's new boyfriend, whether he visited, and whether Block was happy with him. The magistrate judge said that he was not going to allow the line of

questioning unless counsel explained why it was relevant. Without objection, Chavez moved on to other questions.

After the preliminary hearing, but before trial, D.C. died. The State filed a notice of intent to admit the former testimony of deceased witness D.C. Chavez moved the district court to dismiss the charges against him. The district court denied Chavez's motion. Further, it granted the State's motion to admit D.C.'s former testimony, reasoning that pursuant to Crawford, Chavez had the opportunity to cross-examine D.C. at the preliminary hearing and, as D.C. was now unavailable, her testimony was therefore admissible.

In light of the district court's ruling, Chavez asked the district court that the jury be instructed that D.C. was unavailable and thus preclude witnesses from mentioning that D.C. had died. The court ruled that, pursuant to NRS 51.055(1)(c), Nevada's statute on witness unavailability due to death, the jury could be instructed that D.C. was unavailable because she was deceased but that no other details concerning her death could be admitted.

At trial, Evarts testified that she had nearly 25 years of experience as a family therapist and that child assault victims constituted a quarter of her family therapy practice. Evarts testified that the first time she saw D.C. was three months after D.C. first made the allegations that Chavez had sexually abused her. Evarts said that on that first visit, pursuant to her general practice, she asked D.C. to fill out a form that asked a variety of questions that would help Evarts in treating her. Evarts testified that one question on the form inquired if the patient had ever been to the hospital or required stitches, and D.C.'s answer to that question was that at five years old her dad ripped open her vagina. When

asked whether she ever doubted D.C.'s allegations of abuse, Evarts testified that "[she] had no doubt . . . at all that [D.C.] was telling the truth, and [she] didn't think that [D.C.] was coached at all."

Sergeant Dreelan testified that on March 28, 2004, he was dispatched to Northern Nevada Medical Center to respond to a report of sexual assault of a child. Sergeant Dreelan testified that he met D.C. and Block in the waiting area of the hospital. He stated that they both appeared upset and emotional and that D.C. was crying. Sergeant Dreelan testified that he had a conversation with D.C. in which he asked her what had happened. Sergeant Dreelan testified that D.C. told him that her father, Chavez, had forced her to have sex with him and to perform oral sex on him the day before.

Detective Barbara Armitage testified that she interviewed D.C. on two separate occasions. The first interview was conducted on March 28, 2004, and was videotaped. Over defense counsel's objection, the district court allowed the State to play the videotape for the jury. In it, D.C. describes how and when she was sexually molested by her father.

Doctor Ellen Clark, a specialist in clinical and forensic pathology, who performed the autopsy on D.C., testified that the autopsy revealed evidence of repetitive injury to the vaginal area, including a complete absence of a hymen.

Over defense counsel's objection, the district court allowed the State to present D.C.'s preliminary hearing testimony. The State also presented the testimony of all of Chavez and Block's children.

D.C.'s younger brother, T.C., testified that the day he and his siblings were in the car with their mother, he told Block that Chavez was doing "something" to D.C. He testified that he told Block because he

wanted D.C. to have a better life and that he had witnessed the sexual abuse once or twice, when he saw D.C. with her head on Chavez's private part. T.C. testified that sometimes Chavez would instruct him and his other siblings to go to the bathroom or their rooms while he and D.C. remained together to clean. T.C. testified that after about a half hour, D.C. would go and "clean her hands and cry."

D.C.'s other brother, B.C., testified that he too knew that Chavez was doing something "suspicious" to D.C. because Chavez would always take D.C. into a room, while asking the rest of the siblings to stay either in the living room, their rooms, or the bathroom. B.C. further testified that once Chavez thought the other children were spying on him and D.C., so Chavez "knocked" out B.C. and slapped his other siblings. B.C. testified that he saw Chavez with his pants down and D.C. with her head between Chavez's legs on one occasion. B.C. admitted that initially he told police that he never saw anything happen between Chavez and D.C. but explained he had been embarrassed to speak of sexual things. When asked why he was being forthcoming now, this exchange took place between B.C. and the prosecutor:

> Q. When you talked to the police that second time and that first time, was [D.C.] still alive?
>
> A. Yes, I think so.
>
> Q. . . . How important is it now at this point, with [D.C.] not being here anymore—how does that affect why you're wanting to talk now?
>
> A. Because since she isn't here, I can, um—I know that she is gone because he—
>
> Q. Stop.
>
> . . . .

Q. I don't want you to blame anybody. Just don't say anything like that.

Do you feel it's your place to speak for her?

A. Yes.

The final sibling to testify was D.C.'s sister, D.A.C. She testified that she once saw D.C. on the bed with Chavez on top of her. She further testified that another time she was in the bathroom and D.C. walked in with "white stuff" on her chin and that Chavez told D.C. to wipe her face clean.

Chavez testified that he never sexually molested his daughter D.C. When asked about D.C.'s preliminary hearing testimony, Chavez testified that he did not think that D.C. herself believed everything she was saying at the preliminary hearing. He testified that D.C. fell on the fence post outside their old home when she was five years old, requiring stitches to her vagina. He further testified that he did not believe the testimony of his other children. Rather, he believed all his children, including D.C., had lied. Chavez denied ever telling any of his children to go to their rooms while he and D.C. stayed together. He further denied physically punishing any of his children, beyond swatting them on their behinds or making them do pushups.

During Chavez's cross-examination, the State sought to introduce evidence of pornographic magazines found under Chavez's bathroom sink during the search of Block's apartment. In a pretrial hearing, the district court ruled the evidence inadmissible. However, the district court noted that during direct examination, "there was a line of questioning and responses that were given that would suggest that [Chavez was] shy or bashful about sexual issues." Thus, the district court

ruled that the adult magazines were relevant and allowed the State to question Chavez about the evidence. Chavez answered a series of questions regarding the adult magazines.

During the trial, the district court informed the parties that an alternate juror had expressed her opinion to as many as four other jurors that Chavez was guilty. Chavez immediately moved for a mistrial. The district court decided that a voir dire of each juror would be conducted to determine whether the jury had been tainted. The next day, the district court canvassed each juror. The alternate juror stated that she indeed had expressed her opinion that Chavez was guilty. The district court excused the juror. Three other jurors confirmed that they heard the comment but could remain impartial, while all the other jurors stated they did not hear anyone express an opinion about the ultimate outcome of the case. Accordingly, the district court found that the jury would be able to remain fair and impartial and denied Chavez's motion for a mistrial.

The jury convicted Chavez of four counts of sexual assault on a child. The district court sentenced him to four consecutive terms of life with the possibility of parole beginning after a minimum of 20 years had been served.

On appeal, Chavez assigns numerous trial errors. The most significant issue raised on appeal is whether the admission of D.C.'s preliminary hearing testimony and other statements made to police violated the Sixth Amendment Confrontation Clause. Chavez asserts an additional Confrontation Clause violation in connection with the testimony of D.C.'s therapist, Evarts. Moreover, Chavez assigns several evidentiary errors, challenging the relevance of Dr. Clark's testimony and the reference to the adult magazines found in Chavez's bathroom. Chavez

also argues that it was error to admit other bad act evidence with regard to how he punished his children. He further asserts that he is entitled to a new trial because the district court erred when it ruled that, pursuant to NRS 51.055, the jury could be instructed that D.C. was unavailable because she was deceased. In addition, Chavez argues that the exchange between B.C. and the prosecutor and the instance of juror misconduct warranted a mistrial. Finally, he asserts that the consecutive sentences constitute cruel and unusual punishment.

DISCUSSION

In resolving Chavez's arguments on appeal, we must first address whether the preliminary hearing process provides an adequate opportunity for the accused to confront the witnesses against him, as is required by the Sixth Amendment's Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004). We conclude that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford. The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed. We find support for our decision in the history and language of the Confrontation Clause and the bedrock principles of the inquisitorial process upon which the United States Supreme Court reached its decision in Crawford.

The Confrontation Clause and Crawford

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. As the United States Supreme Court observed in Crawford, the scope of the

right to confront was addressed just three years after the First Congress adopted the Sixth Amendment in State v. Webb, 2 N.C. 103 (1 Hayw. 1794), when a North Carolina court held that "depositions could be read against an accused only if they were taken in his presence." 541 U.S. at 49.

Face-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved. In Crawford, the Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. In so doing, the Supreme Court observed that the Confrontation Clause was a

> procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61.

While much of Crawford's progeny dealt with the definition of "testimonial," see Davis v. Washington, 547 U.S. 813 (2006), Crawford discussed the Confrontation Clause primarily in terms of unavailability and an opportunity for cross-examination. See Crawford, 541 U.S. at 68. Crawford is grounded in the principle that the opportunity to cross-examine is the focal point of the right to confront. See, e.g., Davis v. Alaska, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'" (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965))) (alteration in original).

This court's Confrontation Clause jurisprudence mirrors the Court's adherence to the historical roots of the Confrontation Clause. Some 200 years after the Webb decision, this court reaffirmed the cornerstone principle of the Confrontation Clause and its guarantee of a face-to-face meeting with an accuser. Smith v. State, 111 Nev. 499, 502, 894 P.2d 974, 975 (1995). In Smith, we held that the defendant's Sixth Amendment right to confrontation had been violated because the prosecutor blocked the child-victim's view of the defendant on direct examination. Id. at 502-03, 894 P.2d at 976. We determined that, even though Smith had an "unfettered opportunity" to cross-examine his accuser, it was not an effective cross-examination because the victim's view of Smith had been blocked. Id. at 502, 894 P.2d at 976. In so determining, we noted that "'[i]t is always more difficult to tell a lie about a person "to his face" than "behind his back."'" Id. (quoting Coy v. Iowa, 487 U.S. 1012, 1019 (1988)).

We have applied Crawford to cases before us, stating that the testimonial hearsay of an unavailable witness requires a prior opportunity to cross-examine the witness concerning the statement for it to be admissible. Flores v. State, 121 Nev. 706, 714, 120 P.3d 1170, 1175 (2005). Further, we have observed that "'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). And we have explained that discovery is a component of an effective cross-examination. See Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006).

Today, we further clarify our post-Crawford decisions by holding that a preliminary hearing can afford a defendant an opportunity for effective cross-examination. We will determine the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination and whether the magistrate judge allowed the defendant a thorough opportunity to cross-examine the witness. We first address the standard of review for such a claim and then address each of Chavez's claims in turn.

Standard of review

We generally review a district court's evidentiary rulings for an abuse of discretion. See, e.g., Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008). However, whether a defendant's Confrontation Clause rights were violated is "ultimately a question of law that must be reviewed de novo." U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007); see U.S. v. Holt, 486 F.3d 997, 1001 (7th Cir. 2007); U.S. v. Kenyon, 481 F.3d 1054, 1063 (8th Cir. 2007); U.S. v. Townley, 472 F.3d 1267, 1271 (10th Cir. 2007); U.S. v. Hitt, 473 F.3d 146, 155-56 (5th Cir. 2006).

D.C.'s preliminary hearing testimony and statements to law enforcement

Chavez challenges the admission of D.C.'s preliminary hearing testimony, her videotaped statements to police, and her other statements to law enforcement officers. We first address whether the district court erred in admitting D.C.'s preliminary hearing testimony.

The threshold question in the Crawford v. Washington framework is whether the statement at issue is "testimonial" hearsay. 541 U.S. 36, 68-69 (2004). While Crawford "leave[s] for another day" the definition of "testimonial," it did observe that "it applies at a minimum to

prior testimony at a preliminary hearing." Id. at 68. Accordingly, D.C.'s testimony at the preliminary hearing was testimonial. Further, because D.C. was deceased at the time of trial, she was an unavailable witness. Thus, the primary issue before this court is whether Chavez had an opportunity for an effective cross-examination at the preliminary hearing.

Chavez argues that the limited nature of a preliminary hearing does not provide a defendant an adequate opportunity to cross-examine a witness appearing against him. He urges this court to adopt the standards set forth in People v. Fry, 92 P.3d 970 (Colo. 2004), and State v. Stuart, 695 N.W.2d 259 (Wis. 2005). Both cases are inapposite.

In Fry, the Colorado Supreme Court found that a defendant's opportunity to cross-examine a witness during a preliminary hearing was not adequate for Confrontation Clause purposes because of "the limited nature of the preliminary hearing" in that state. 92 P.3d at 976-77 (explaining that in Colorado a "preliminary hearing is limited to matters necessary to a determination of probable cause"). In contrast, Nevada law is generally more permissive with regard to a defendant's right to discovery and cross-examination at the preliminary hearing. See NRS 171.196(5) ("The defendant may cross-examine witnesses against him and may introduce evidence on his own behalf."); NRS 171.1965(1) (stating that, before the preliminary hearing, the defendant is entitled to written or recorded statements by the defendant or a witness, reports, and other evidence within the prosecutor's custody or possession). We do not find

anything in our state law that would hinder a defendant's opportunity to cross-examine a witness at a preliminary hearing.[1]

In Stuart, the Wisconsin Supreme Court reversed a murder conviction, finding that the district court had erroneously admitted the preliminary hearing testimony of the defendant's brother. 695 N.W.2d at 267. During the preliminary hearing, the magistrate ruled that pursuant to Wisconsin law, the defense could not ask the brother a question that was meant to cast doubt on the brother's credibility at the preliminary hearing stage. Id. At trial, the brother became unavailable, and the court admitted his preliminary hearing testimony. Id. The Wisconsin Supreme Court reversed, determining that, at the trial level, a defendant had a right to question a witness's motive and credibility and, therefore, admitting the preliminary testimony violated the defendant's right to confrontation. Id.

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[1]Chavez cites Sheriff v. Witzenburg, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006), for the proposition that in Nevada preliminary hearings do not afford sufficient opportunity for cross-examination. This argument misreads the case. In Witzenburg, this court held that the statutory grant of cross-examination at a preliminary examination pursuant to NRS 171.196(5) was a qualified right, subject to NRS 171.197, which provides the defendant with a mechanism to challenge affidavit testimony that the State attempts to introduce against him. Id. at 1062, 145 P.3d at 1006. Contrary to Chavez's assertion, Witzenburg does not hold that Nevada's preliminary hearing procedures limit a defendant's cross-examination rights to such an extent that Confrontation Clause rights cannot be satisfied. This court held to the contrary in Aesoph v. State, 102 Nev. 316, 319-20, 721 P.2d 379, 381-82 (1986). In this pre-Crawford decision, we specifically held that cross-examination during a preliminary hearing could satisfy the Confrontation Clause, a proposition which we extend today post-Crawford. Id.

Unlike Wisconsin, Nevada law does not preclude a defendant from questioning a witness's credibility or motive during a preliminary hearing. While the defendant in Stuart could not question the witness's credibility and motive, Chavez questioned D.C.'s credibility in a wide-ranging cross-examination.

Chavez's cross-examination of D.C. at the preliminary hearing consisted of almost double the amount of questions that were asked on direct examination. D.C. testified under oath and in Chavez's presence. At the time Chavez conducted the cross-examination, nearly all the discovery was complete. In fact, most of Chavez's extensive cross-examination consisted of questions based upon statements that D.C. had made to authorities about the sexual abuse. Specifically, we note that Chavez had a copy of D.C.'s videotaped statements to police, as well as a list of the witnesses that would be testifying during the State's case in chief. Therefore, Chavez had most, if not all, of the pertinent facts of the State's case in chief at the preliminary hearing.

Chavez used the discovery to ask D.C. specific questions about the molestation, including details about each instance of abuse, the description of her father's penis, and how she cleaned up afterwards by using socks. He questioned D.C.'s veracity and motives by repeatedly asking her whether she told specific people about the sexual abuse during the five years that it was ongoing. Chavez asked D.C. whether her brothers or her sister ever saw the sexual abuse and about the conversation in the car between D.C., her siblings, and Block, and how and why D.C. told her mother about the abuse. Chavez asked D.C. specific questions about her parents' relationship. He further questioned D.C.

about the alleged accident on the fence post and how it led to her initial injuries. He even asked D.C. if she was seeing a therapist.

These questions were only part of the 240 questions Chavez asked D.C. The record leaves no doubt in our minds that the preliminary hearing afforded Chavez an opportunity to cross-examine the unavailable witness, D.C., on the statements that she had made to her mother, health care providers, and law enforcement officers regarding the sexual abuse. The nature of the cross-examination was extensive and thorough because the defense took, and the magistrate judge allowed, full advantage of the opportunity to cross-examine. In fact, the magistrate judge only interrupted Chavez's cross-examination once, when Chavez asked D.C. a series of questions about her mother's new boyfriend. And, even then, the magistrate judge said that he would not allow the line of questioning unless counsel could explain its relevance. Chavez simply moved on to other questions. There is no evidence that the magistrate judge placed any inappropriate restrictions on the scope of Chavez's cross-examination of D.C. Rather, the record shows, save for one appropriate admonishment, the magistrate judge allowed Chavez to extensively question D.C. on all the key pieces of evidence the State had obtained against Chavez. Because discovery was almost entirely complete, Chavez was able to take full advantage of the opportunity to cross-examine the State's key witness against him at the preliminary hearing.

Therefore, in this instance, because the discovery was almost entirely complete and the magistrate judge allowed Chavez unrestricted opportunity to confront D.C. on all the pertinent issues, we conclude that Chavez's Confrontation Clause rights were not violated by the admission of D.C.'s preliminary hearing testimony at trial.

D.C.'s other statements to law enforcement

In concluding that the admission of D.C.'s preliminary hearing testimony did not violate Chavez's rights pursuant to the Confrontation Clause and Crawford, we also conclude that the admission of D.C.'s videotaped testimony and other statements she made to officers did not violate Chavez's constitutional rights.

There is no question that the statements were testimonial in nature because D.C. made them to police in a formal, nonemergency setting and the interviews were conducted for the primary purpose of helping law enforcement build a case of sexual abuse against Chavez. Davis v. Washington, 547 U.S. 813, 822 (2006) (explaining that nontestimonial statements are those made during an ongoing emergency; whereas, testimonial statements are those made during an interrogation that serve the primary purpose of helping establish or prove past events "potentially relevant to later criminal prosecution").

The only remaining issue is whether Chavez had opportunity to cross-examine D.C. regarding the videotaped testimony and her other statements to police. Because of discovery, Chavez had the statements that D.C. made to Detective Armitage and Sergeant Dreelan, including a copy of the videotape, before the preliminary hearing. Chavez, therefore, had the opportunity to confront D.C. on all of her statements to law enforcement officers at the preliminary hearing. Whether he questioned D.C. on each and every statement is not the relevant inquiry, as the Confrontation Clause only guarantees the opportunity to cross-examine, not a cross-examination in whatever way the defense might wish. As we have already concluded, Chavez was afforded an adequate opportunity to confront D.C. at the preliminary hearing. The breadth and scope of

Chavez's cross-examination did not run afoul of the Confrontation Clause because of the nearly complete discovery available to Chavez at the time and manner in which the magistrate judge allowed the cross-examination to proceed.

Other testimonial hearsay

Chavez next argues that his Confrontation Clause rights were violated when D.C.'s therapist, Evarts, was allowed to testify as to how D.C. had answered a question on a medical form. Evarts testified that D.C. wrote that at "five years old, her dad ripped open her vagina."

We first consider Crawford's threshold question of whether the statement being offered is testimonial in nature. While we acknowledge that the police likely referred D.C. to Evarts, there is no evidence that Evarts' time with D.C. served the purpose of furthering the investigation of D.C.'s sexual abuse allegations. Rather, their time together served the primary purpose of helping D.C. psychologically heal from five years of abuse. One quarter of Evarts' practice was made up of child assault victims. Her general practice was to have patients fill out a medical form upon their first visit. The question that elicited the response at issue did not ask anything specific about an act of sexual assault. Rather, it asked if the patient had been to the hospital or required stitches. Given the context in which it was asked, by a family therapist specializing in sexual assault victims and for the purpose of diagnosis and treatment, we conclude that D.C.'s written statement was not testimonial.

Having concluded that D.C.'s statement was nontestimonial in nature, we must next determine whether it was admissible pursuant to a hearsay exception. NRS 51.115 provides for the admission of hearsay statements "made for purposes of medical diagnosis or treatment and

describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof." In essence, statements that are pertinent to the ongoing care of the patient are admissible pursuant to NRS 51.115. See Koerschner v. State, 116 Nev. 1111, 1118, 13 P.3d 451, 456 (2000).

We conclude that Evarts' testimony regarding D.C.'s answer that her father ripped open her vagina is admissible nontestimonial hearsay pursuant to NRS 51.115. The question was asked and answered in the context of medical/psychological treatment for sexual assault. As Evarts testified, the question was part of a medical form that all new patients routinely fill out to give Evarts an introduction to the patient for treatment and diagnosis. D.C. was at Evarts' office as a victim of sexual assault, and it was in that capacity that she filled out the form and made the statement. We therefore conclude that the district court did not abuse its discretion in allowing Evarts to testify as to D.C.'s statement on the medical form.[2]

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[2]Chavez further objects to Evarts' testimony that she had "no doubt . . . [D.C.] was telling the truth" or that D.C. had not been "coached." Chavez did not object at the time of the testimony. Rather, he moved for a mistrial the next day, alleging impermissible vouching on Evarts' part. On appeal, he argues that the district court abused its discretion when it denied his motion for a mistrial. Chavez's argument is without merit. In reviewing the district court's denial of a motion for a mistrial, we will reverse the decision only if there is a clear demonstration that the district court abused its discretion. Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). Evarts did not vouch for D.C.'s credibility in terms of the allegations in this case. A close review of the trial transcript reveals that Evarts was responding to a question by the State about whether she felt D.C. had been coached. The question was asked because Evarts earlier had testified that, in her experience, she had treated kids that she felt had

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Evidentiary issues

Chavez next raises several evidentiary issues. He contends that the district court abused its discretion when it admitted nonrelevant yet highly prejudicial evidence at trial, namely, evidence of adult magazines found in his bathroom and evidence of prior bad acts.[3]

Adult magazines

The district court initially ruled that any evidence or reference to the adult magazines found during the search of Block's apartment was inadmissible. However, after noting that Chavez conveyed a shy attitude toward sexual issues on direct examination, the district court allowed the State to question Chavez about the adult magazines.

. . . continued

been "coached[ ] or [had] falsely accused . . . their dads." Thus, Evarts' testimony went to her observations of D.C. as compared to other children she had treated, not to the veracity of D.C.'s allegations. We conclude that the district court did not abuse its discretion in denying Chavez's motion for a mistrial.

[3]Chavez also asserts that the testimony of Dr. Clark, who performed the autopsy on D.C., was not relevant because it was cumulative and highly prejudicial. Chavez did not make a contemporaneous objection and we therefore need not consider this claim. McKague v. State, 101 Nev. 327, 330, 705 P.2d 127, 129 (1985). However, in exercising our discretion to consider the claim under a plain error review pursuant to Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003), we determine that Chavez has failed to demonstrate a miscarriage of justice. As a practical matter, we note that Dr. Clark's testimony was highly probative, since it helped corroborate D.C.'s testimony that she had been sexually assaulted repeatedly over a number of years.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" and is generally admissible. NRS 48.015; NRS 48.025. However, relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). As previously indicated, we review a district court's decision to admit or exclude evidence for abuse of discretion. Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

We fail to see the relevance of the adult magazines because they have no tendency to make the existence of any fact of consequence as to whether Chavez molested his daughter more or less probable. Thus, we conclude that the district court abused its discretion by admitting evidence regarding the adult magazines. While the probative value was minimal at best and unrelated to the elements of the crimes charged, we conclude that the introduction of the adult magazines was harmless error, given the overwhelming evidence presented by the State against Chavez. See, e.g., Estes v. State, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006) (determining that the introduction of a photograph at trial of the minor sexual assault victim was harmless error "given the overwhelming evidence" presented against defendant).

Prior bad acts

Chavez also argues that he is entitled to a new trial because the district court abused its discretion when it admitted evidence of prior bad acts in the form of testimony by his three children that he had physically abused them.

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error." Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 160 (2008).

For evidence of prior bad acts to be admissible, the district court must hold a hearing outside the presence of the jury and determine "'that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.'" Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1041 (2008) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). If evidence of the prior bad act is admitted, the district court must then issue a limiting instruction to the jury about the limited use of bad act evidence, unless waived by the defendant. See, e.g., Mclellan, 124 Nev. at ___, 182 P.3d at 110-11.

Here, the district court conducted a pretrial hearing on the State's notice of intent to admit prior bad act evidence. It asked for the specific instances of conduct that the State wished to introduce and reserved ruling on the matters until trial. At trial, B.C. was the only child who testified to any prior bad acts by Chavez. B.C. testified that on one occasion Chavez "knocked" him out and slapped his other siblings because Chavez thought they were all spying on him and D.C. while the two were in the bedroom. We note that B.C. testified under oath and appeared to be a credible witness. Further, the prior bad act was relevant to show B.C.'s fear of Chavez and why B.C. did not initially report the sexual abuse he had witnessed. Moreover, the district court instructed the jury about the limited use of the prior bad act. We therefore conclude that there was no

manifest error in the district court's decision to admit B.C.'s testimony regarding a prior bad act.

Prejudicial exchange between prosecutor and witness

Chavez argues that the district court committed reversible error when it denied his motion for a mistrial based upon the exchange between the prosecutor and B.C. in which B.C. alluded to D.C.'s death. Prior to trial, the district court ruled that the parties could not discuss the cause or circumstances of D.C.'s death.[4] Chavez asserts that the exchange between the prosecutor and B.C. violated that court order and educated the jury to the fact that at least one sibling blamed Chavez for D.C.'s death. The exchange occurred on re-direct. We note that the prosecutor was trying to rehabilitate B.C., because during cross-examination, Chavez questioned B.C.'s motivation as to why he was more forthcoming at trial, when he had repeatedly told investigators he had not seen any instances of sexual abuse of D.C. by Chavez.

We conclude that the exchange did not violate the district court order not to discuss the circumstances of D.C.'s death. At most, it revealed that B.C. knew that D.C. was deceased—a fact of which the jury was already aware.[5] Further, the district court instructed the jury not to

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[4]Because of the sensitive nature of the cause of death, the district court forbade any reference to the manner of D.C.'s death.

[5]Regarding D.C.'s unavailability, Chavez also argues that the district court abused its discretion when it, pursuant to NRS 51.055(1)(c), informed the jury that D.C. was unavailable because she was deceased. NRS 51.055(1)(c) states, in pertinent part, that "[a] declarant is 'unavailable as a witness' if he is: . . . [u]nable to be present or to testify . . . because of death." The statute does not speak to whether the jury can

continued on next page . . .

speculate about D.C.'s death and that anything counsel said was not evidence. Because "this court generally presumes that juries follow district court orders and instructions," Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), we conclude the district court did not abuse its discretion when it denied Chavez's motion for a mistrial based on the exchange between the prosecutor and B.C.

Juror misconduct

Chavez further contends that reversal is required because of juror misconduct. We disagree.

We review a district court's decision to deny a motion for a mistrial based upon juror misconduct for an abuse of discretion. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 475 (2008). We have held that a district court has discretion to remove a juror mid-trial for violating a court's admonishment, rather than declaring a mistrial. Viray v. State, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005). Specifically, we have stated that:

. . . continued

be informed as to why the declarant is unavailable. However, we note that the district court created a safeguard when it permitted the jury to be instructed regarding D.C.'s unavailability by ordering that nothing beyond the fact that she was deceased, such as the circumstances of her death, would be conveyed to the jury. We conclude that the measure taken was sufficient to protect Chavez's rights. Further, we note that informing the jury that D.C. was unavailable because she is deceased was relevant as to why she did not testify. See U.S. v. Accetturo, 966 F.2d 631, 637 (11th Cir. 1992) (observing that the fact that the declarant was unavailable because she was dead was relevant as to why she had not testified).

> [i]n exercising its discretion, a district court must conduct a hearing to determine if the violation of the admonishment occurred and whether the misconduct is prejudicial to the defendant. Prejudice requires an evaluation of the quality and character of the misconduct, whether other jurors have been influenced by the discussion, and the extent to which a juror who has committed misconduct can withhold any opinion until deliberation.

Id. at 163-64, 111 P.3d at 1082.

In this case, the district court properly determined that the violation of the admonishment occurred when the alternate juror expressed her opinion to the other jurors that she believed Chavez was guilty. The district court proceeded in accord with Viray and held a hearing to determine the nature and quality of the misconduct, conducting a voir dire of each juror to determine whether the jury had been tainted. After canvassing each juror, the district court excused the alternate juror, who had expressed her opinion that Chavez was guilty. While three other jurors confirmed that they heard the alternate juror's comment, they stated that they could remain impartial. All the other jurors stated that they did not hear anyone express an opinion about the ultimate outcome of the case. Accordingly, a mistrial was not required. We, therefore, conclude that the district court properly exercised its discretion to remove the alternate juror for violating its order not to discuss any opinion about the trial until the case was submitted to the jury.

Cruel and unusual punishment

Chavez contends that the sentence he received constitutes cruel and unusual punishment, in violation of the United States and

Nevada Constitutions because the sentence was excessive. The district court sentenced Chavez to four consecutive life terms.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Regardless of its severity, a sentence that is 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.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 222 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In the instant case, Chavez does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes. See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967). Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment and, therefore, the district court did not

abuse its discretion by imposing on Chavez a sentence of four consecutive life terms.

CONCLUSION

For the reasons discussed above, we reject all of Chavez's arguments on appeal and affirm the district court's judgment of conviction. In so doing, we clarify our Confrontation Clause jurisprudence post-Crawford, holding that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him. The adequacy of the opportunity will be determined on a case-by-case basis, determined by such considerations as to how much discovery was available to the defendant at the time of the cross-examination and the manner in which the magistrate judge allows the cross-examination to proceed.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering