No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DUANE WILSON, 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

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Counsel for Petitioner Wilson

Petitioner Michael Duane Wilson 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. The United States District Court for the District of Nevada determined was without sufficient means to hire an attorney and therefore appointed the Federal Public Defender under 18 U.S.C. § 3599(a)(2).

Supreme Court Rule 39 authorizes leave to proceed in forma pauperis.

Dated this 4th Day of February 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

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

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit Erred in Sanctioning the Ability of Courts to Refashion a Habeas Claims into Various Subparts and then Find that the Newly Constituted Habeas Claims are Unexhausted?

LIST OF PARTIES

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

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On January 4, 2017, a United States District Court for the District of Nevada filed a written order dismissing Petitioner Wilson's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) B, 30-38; *see also* App. F (underlying Nevada criminal judgment).) Also relevant is district court's April 12, 2016, ruling on exhaustion. (*See* App. D.)

On November 6, 2019, The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Wilson's appeal of those decisions. (*See* App. A, 1-3.)

It is the unpublished Ninth Circuit decision that is at issue in this Petition.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The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Wilson' federal post-conviction appeal on November 6, 2018. (*See* App. A, 1-3.) Wilson 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.

The exhaustion of state court requirement is codified at 28 U.S.C. § 2254(b) and states:

> (b)(1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Appellant-Petitioner Wilson's convictions are for lewdness with a minor, violations of Nevada Revised Statute (NRS) §201.230. Under Nevada Revised Statute (NRS) § 201.230, a person is guilty of lewdness with a minor under the age of 14 years when:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

Nev. Rev. Stat. § 201.230 (West 2017).

STATEMENT OF THE CASE

A. Trial and Sentencing

Proceeding on a criminal complaint, on April 16, 2008, in a justice court in the Eighth Judicial District of Nevada, Las Vegas, Nevada, Wilson pleaded not guilty to six (6) counts of Lewdness with a Child Under the Age of 14 and two (2) counts of Sexual Assault with a Minor Under Fourteen Years of Age. The court set the matter for a May 14, 2008 preliminary hearing.

The case began to unravel at the preliminary hearing. After hearing the testimony of the Clark County, Nevada, District Attorney's [hereinafter DA] alleged

child victims, the justice court found insufficient probable cause to bind over the seven lewdness counts. The court did, reluctantly, allow the case to proceed on one count of sexual assault of a minor.

The justice court's dismissal of the seven lewdness counts prompted the DA to go before the grand jury on June 5, 2008. In contravention of the justice court's factual and legal findings, the grand jury returned an Indictment which the DA filed on June 6, 2008.

The Indictment charged Wilson as follows:

> Counts 1-6; 8-9; and, 11: Lewdness with a Child Under the Age of 14.
>
> Count 7: Unlawful Contact with a Child.
>
> Count 10: Sexual Assault with a Minor Under Fourteen Years of Age.
>
> (*See* Ex. 8; ER 182-86.)

To combat the DA's abuse of process, on August 5, 2008, Wilson filed a motion to dismiss. On September 3, 2008, the district court denied the motion.

A four-day jury trial began on August 3, 2009 before Judge Valerie Adair and concluded on August 6, 2009. Following deliberations, the jury returned a verdict finding Wilson guilty of Counts 1, 2, 3, 4, 6, 7, 8, 9, and 11, and not guilty of Counts 5 and 10. The acquitted counts include one count of lewdness and the most serious count of sexual assault of a minor; the only count the justice court found was supported by slight or marginal evidence; Nevada's modest preliminary hearing burden of proof.

On August 12, 2009, Wilson filed a Motion for Judgment of Acquittal/ Alternatively Motion for a New Trial due to insufficiency of the evidence. On September 22, 2009, the district court sentenced Wilson and orally denied his Motion for Judgment of Acquittal. The district court entered a written order denying Wilson's Motion for Judgment of Acquittal, on October 1, 2009.

That same day, the court issued the judgment of conviction, after a jury trial, memorializing the following sentence:

> **Count 1** (Lewdness with a Child Under the Age of 14): 10 years to life in the Nevada Department of Corrections (NDC).
>
> **Count 2** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Count 1.
>
> **Count 3** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1 and 2.
>
> **Count 4** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1, 2 and 3.
>
> **Count 6** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1, 2, 3 and 4.
>
> **Count 7** (Unlawful Contact with a Child): 12 months, concurrent with Counts 1, 2, 3, 4 and 6.
>
> **Count 8** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1, 2, 3, 4, 6 and 7.
>
> **Count 9** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1, 2, 3, 4, 6, 7 and 8.
>
> **Count 11** (Lewdness with a Child Under the Age of 14): 10 years to life, concurrent with Counts 1, 2, 3, 4, 6, 7, 8 and 9.

The court also ordered Wilson to pay $1,726.40 in restitution. (*See* App. F (criminal judgment).) Because the sentencing court ran all counts concurrent, Wilson is essentially serving a sentence of ten-years to life.

A. Direct Appeal of the Judgment of Conviction and Jury Trial

Appellate counsel for Wilson filed his Opening Brief on August 6, 2010 in Nevada Supreme Court, Case No. 54814. Relevant to this petition, Wilson argued, inter alia, that the DA failed to prove his guilt beyond a reasonable doubt.

On December 9, 2011, the Nevada Supreme Court issued an Order of Affirmance denying all of Wilson's claim. (*See* App. E.) On December 27, 2011,

Wilson filed a Petition for Rehearing. On May 9, 2012, the Nevada Supreme Court issued an Order Denying the Petition for Rehearing.

B. State Post-Conviction Proceedings

After losing his direct appeal, Wilson filed a state court habeas petition. The trial court denied Wilson's petition in a written order.

Wilson filed a notice of appeal from that written order. On January 15, 2014, the Nevada Supreme Court denied Wilson's post-conviction appeal in an Order of Affirmance. (*See* App. E.)

C. Federal Post-Conviction Proceedings

On January 31, 2014, Wilson mailed his proper person Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody (Not Sentenced to Death). (*See* Electronic Court Filing number (ECF) 4 (petition's mailing date).) A District of Nevada district court appointed the Federal Public Defender. (*See* ECF 3.)

Thereafter, Wilson filed an amended petition. (*See* ECF 14.) Appellee Warden, represented by the Nevada Office of the Attorney General [hereinafter State] filed a motion to dismiss. The portion relevant to this case sought to dismiss Ground One of Wilson's First Amended Petition.[1] (*See* ECF 21.)

The State's motion is innovative in that it breaks the sole ground into three sub-parts and then argues those subparts are unexhausted. Specifically, although

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[1] Ground One reads:

> Wilson's continued confinement is in violation of the Fifth, Sixth, and Fourteenth amendments to the United States Constitution as the state of Nevada produced insufficient evidence at trial to support a conviction for lewdness a minor and unlawful contact with a child.
> (ER 87-95.)

the State concedes Wilson raised the claim's core operative facts on appeal, Wilson failed to properly federalize the grounds that the State itself created in reconstituting the petition.

While Wilson did divide Ground One into subparts for organizational purposes, Wilson made clear that he intended to plead one unitary claim; one tethered to a *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency analysis. (*See* ECF 23.) The lower court disregarded Wilson's intent as the pleader and instead adopted the State's reformulation. (*See* App. D, at 37 & n.2.) Utilizing this divide and conquer tactic, the district court then found that refashioned claims 1(b) and 1c were not properly federalized. (*See id.* at 2-5.) The court demanded that Wilson abandon the Ground 1(b) and 1(c) or suffer a dismissal of the petition. (*See id.* at 5.)

Wilson filed a Motion for Reconsideration pointing out that even if the sub-claims were not properly federalized a *Rose v. Lundy*, 455 U.S. 509 (1982), dismissal was not appropriate because Wilson had no reasonable means for further exhaustion in Nevada courts. Hence the claims were, at worst, technically exhausted but anticipatorily defaulted. (*See* ECF 26.)

Second, Wilson pointed out that even if the sub-claims needed to be individually federalized, Wilson's briefs to the Nevada Supreme Court alerted that court to the constitutional nature of the claims. (*See id.*)

The district court persisted in finding the sub-claims set forth separate constitutional claims than and therefore denied Wilson's motion for reconsideration. (*See* ECF 27.)

Wilson was then forced to abandon Grounds 1(a) and 1(b) under protest and specifically reserving his right to appeal the ruling. (*See* ECF 29.)

The damage wrought by the court's order permeated its final ruling on the substantive merits of Ground One. (*See* App. B.) The district court did not analyze Ground One as a unity but in its balkanized and weakened form. Using the

inaccurate and editorialized version of the facts provided by the DA and State, the district court denied Wilson's claim.[2] In doing so, the court ignored crucial credibility determinations from state justice and district courts. Both courts questioned the DA's case finding the witnesses incredible and the prosecution's theory unviable.

The State persuaded the district court to deny a substantial ground for relief by first convincing the court to dissect and dismiss the underlying narrative and legal rulings that led to Wilson's unconstitutional conviction.

D. The Ninth Circuit's Unpublished Opinion

The Ninth Circuit denied relief. (*See* App. A (memorandum decision).) The court found it was permissible to disregard Wilson's pleading intent and instead to refashion the grounds that increased their vulnerability to procedural challenges. (*See id.* at 2.) The court ignored Wilson's claim that he has the right to tell the complete res gestae of all procedural and substantive rulings and occurrences relevant to his core issue of insufficiency of the evidence. There is no legal error in balkanizing a claim to its individual components and then discarding those components regardless of their relevancy to the underlying core constitutional claim. (*See id.* at 2-3.)

E. Facts in Support of Wilson's Sufficiency of the Evidence Claim

To apprize this Court of the basic facts of this case, the following summary is taken from the State's answering brief on direct appeal, trial transcripts, as well the Nevada Supreme Court's unpublished decision. (*See* Ex. 30 (Respondent's Answering

[2] For instance, the lower court's order states that C.S. testified that Wilson touched her on her breasts. (*See* App. B, at 8.) C.S. did not testify to that effect stating only that Wilson touched her "armpit" area.

Brief); Ex. 16 (Trial Transcript-Second Day (2TT)); *cf.* App. E (Nevada Supreme Court's unpublished Order of Affirmance).)[3]

Lisa Smith ("Lisa") is the mother of C.S. and A.S.[4] Lisa worked as a cab driver, and beginning in February 2007, her shift switched from the day shift to the night shift. (*See* TT 2.) This switch in Lisa's work schedule, coupled with the death of her ex-husband, forced Lisa to seek child care while she was at work.

Ja'nae Foster ("Ja 'nae" aka "Skittles" or "Hotshot"), Lisa's sixteen-year-old neighbor, began babysitting the girls. (*See* Ex. 18, Trial Transcript Day 3 (TT 3).) When the schedule became too much for Ja'nae, Ja'nae's mother, Tonja Tennant ("Tonja") began to babysit C.S. and A.S. Tonja babysat the girls in her house and the girls often spent the night at Tonja's.

In addition to Tonja and Ja'nae, the other individuals living in the house were: Tonja's boyfriend, Wilson; Tonja's mother, Roberta Foster ("Bobby"); Tonja's father, Marshall Foster, and Wilson and Tonja's son, Michael aka "Chubs." Wilson lived in the house during the entire period Tonja was babysitting C.S. and A.S.

On March 2008, Tonja, Ja'nae, Chubs, Bobby and Marshall left town. At this time, C.S. and A.S. went to live with Lisa's stepson, Demetrius, and his girlfriend, Anika, for approximately a month and a half. One day while Anika was brushing C.S.'s and A.S.'s hair, the girls disclosed information regarding Petitioner Wilson that prompted Anika to contact Lisa. (*See id.*) Based on this information, after waiting a couple of days, Lisa contacted the Las Vegas Metropolitan Police Department ("Metro').

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[3] "Ex." refers to state court record exhibits filed by the parties in the federal district court.

[4] This petition uses the initials of the juvenile complaining witnesses in solicitude of their juvenile status at the time of the alleged offenses and trial. The juvenile complaining witnesses are identified in the state court record but Wilson ensured the names were redacted in the federal record.

At trial, 10-year-old A.S. testified as follows. A.S. was eight-years-old during the time Tonja was babysitting her. Wilson was sometimes there when Tonja was babysitting. Sometimes, Wilson would take A.S., C.S., Ja'nae and Michael to the park or to the library.

A.S. testimony was strongly led by the prosecution. Despite this, the testimony was contradictory with A.S. denying on many occasions that Wilson had touched her. Both A.S. and C.S. claimed that, within broad and undefined time frames, that Wilson touched A.S. and C.S. Wilson allegedly put his hand up their pants and/or shorts about three times, and squeezed their thighs from underneath their clothes. One time when Wilson had his hand up A.S.'s pant leg, "he went up too far and hit [her] private part." The touching was inadvertent.

Wilson allegedly touched A.S.'s breasts over her shirt in the living room but the witness could not remember where and when. She did not remember exactly how it happened or the number of times, but she knew that her sister, C.S., was present. Testimony about the alleged prurient nature of the "touching" is scant. A.S. indicated the behavior occurred over her shirt, in the living room and "like he always plays with us." She admitted the touching occurred during otherwise innocuous behavior—"Because he used to tickle us and stuff like all around our bodies, usually like this and stuff, but he touched it." Wilson touched A.S.'s buttocks on top of her clothes, in the living room.

Further, Wilson would show A.S. pictures on his phone. She saw kissing and girls' private areas. She also saw "a boy's twinkie in a girl's mouth" and naked girls and boys. Once, Wilson showed her the phone at nighttime and allegedly told her "when you grow up, sex is going to feel so good."

Twelve-year-old C.S.'s testimony at trial is as follows: C.S. was ten-years old at the time Tonja was babysitting her. (*See* TT 2.) Wilson lived at Tonja's house during the entire time Tonja was babysitting C.S. and A.S., and Wilson was usually

home when they were there. Wilson touched C.S. more than once on her breasts, buttocks, upper shoulders, thighs and lower back area in Tonja's living room, the garage and in parks.

Wilson had more than one television in the garage, as well as approximately fifteen pictures of naked women and men on the walls in the garage. Wilson brought C.S. into the garage more than once to show her the nude pictures on the wall and on his cell phone. While Wilson was showing C.S. the pictures on his phone, he would put his arm around her and "rub on my shoulders." This made her feel uncomfortable. Wilson would also touch the sides or her rib cage, and that did not feel right to her.

C.S. most incredible testimony involved a couch. In the living room, Wilson would supposedly bend his foot from the bottom of the couch up through a hole in the couch and then rub her buttocks with his foot from underneath but through a cushion.

Tonja and Ja'nae testified that C.S. and A.S. spoke to them regarding Wilson's actions. (*See* TT 3.) The three witnesses testified there was pornography on the walls in the garage. Tonja and Ja'nae testified that Wilson had more than one cell phone. Ja'nae saw photos taken from pornography magazines on Wilson's phone.

Roberta Foster (aka "Bobby") testified that she observed Wilson touch C.S. on top of her shirt near her clavicle area, and then he tried to put his hands down her shirt.

Ms. Foster never reported the activity. Ms. Foster's testimony should be taken with a grain of salt given she admits she is largely immobile and "going blind" to the extent that she could only see "shapes." The immobility being a salient point given the juvenile complaining witnesses testified the untoward touching occurred in public areas.

Ja'nae saw Wilson rub the girls' backs. Ja'nae testified that she thought she saw Wilson's hands on C.S.'s chest as she was leaving the residence. Ja'nae went over to C.S. and C.S. talked to her about what had happened and started to cry.

Ja'nae also observed Wilson messing with both C.S.'s and A.S.'s legs underneath the bottom edge of their shorts.

On April 10, 2008, two weeks after the mother initially contacted the police, Detective Jason Lafreniere ("Detective Lafrenier") met with Lisa, C.S. and A.S., and interviewed each of them separately. The day after the interviews, Detective Lafreniere took Wilson into custody. After the detective read Wilson his *Miranda* rights, Wilson agreed to waive those rights and make a statement.

Wilson denied ever touching the complaining witnesses in an inappropriate matter. Wilson informed Detective Lafreniere there was no pornography on his phone or in the garage. Wilson explained he had a new phone because he had lost his other one which played movie clips. There was a Playboy bunny on his old phone as a screen saver.

Wilson told Tonja that A.S. saw a girl naked from the waist up on his phone. Wilson further stated A.S. admitted to lying when he and Tonja talked to her about this incident. Wilson told Detective Lafreniere that he did not have any pornography hanging on the walls in his garage, and adamantly denied ever touching the girls inappropriately.

On April 17, 2008, Dr. Neha Mehta performed a SCAN exam on A.S., based on A.S.'s disclosure to Detective Lafreniere that Wilson penetrated her with his finger. (*See* Ex. 17, TT 2.) Dr. Mehta did not find any physical evidence of abuse. .)

After the close of evidence, the jury convicted Wilson of eight counts of lewdness with a minor under the age of fourteen years, and one count of unlawful contact with a child. The jury acquitted Wilson of sexual abuse, the most serious count. (*See* Ex. 21 (Verdict).) Interestingly, this is the only count for which the justice court found sufficient evidence to bind-over for trial. Had the DA not abused the grand jury process, Wilson would have been fully acquitted.

Wilson submits he should have received a new trial based on the fact that the evidence does not demonstrate Wilson ever touched a minor for prurient reasons.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DECIDE WHETHER A DISTRICT COURT MAY BREAK-DOWN A SINGLE CONSTITUTIONAL CLAIM IN VARIOUS SUBPARTS AND THEN RULE THAT PARTS OF THE COURT-CREATED CLAIMS ARE UNEXHAUSTED

Appellant/Petitioner Pierre Wilson submits the Ninth Circuit erred in allowing the federal district court to break up his sufficiency of the evidence claim into various sub-claims. Then the court determined that the claims it fashioned were not exhausted. (*See* App. D (federal district court's ruling on exhaustion).)

To appreciate the prejudice this imparted to Petitioner Wilson, it is necessary to appreciate how weakness of the DA's evidence.

A. Examining the Sufficiency of the Trial Evidence

In this prosecution, construed in a light most favorable to the prosecution, the evidence presented at Wilson's trial fails to support a rational finding of guilt beyond a reasonable doubt for eight counts of lewdness with a child under the age of fourteen, and one count of unlawful contact with a child. *See generally Jackson v. Viriginia*, 443 U.S. 307, 319 (1979) (setting forth the standards for examining a sufficiency of the evidence claim).

The prosecution failed to establish the elements for a conviction of lewdness with a minor. Under Nevada Revised Statute (NRS) § 201.230, a person is guilty of lewdness with a minor under the age of 14 years when:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

Nev. Rev. Stat. § 201.230 (West 2017) (emphasis added.)

The plain meaning of the words of the statute requires not only proof that Wilson touched the girls inappropriately, but also proof beyond a reasonable doubt that he did so "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires" of himself or the alleged victims. *Gay v. Sheriff*, 508 P.2d 1, 2 n.2 (Nev. 1973).

There was no testimony or evidence establishing Wilson harbored the intent required for lewdness because neither A.S. nor C.S. testified to any facts that demonstrating that intent. There was no testimony that Wilson touched or fondled C.S.'s breast as pled in Count One (there was some testimony that Wilson touched the area on the side of C.S.'s breasts). The trial court concluded that the conduct testified to was "not per se sexual" and "could be construed as innocuous." (Ex. 23; ("I'm going to say [it was] an unusual verdict.").)

The conduct the complaining witnesses testified to was either innocuous or described activities that violated the laws of physics. Regarding activities at the park, C.S. testified: "We would sit or go down the slide, and he would come catch me at the end and would rub on my thighs...he would try to catch me, but he would rub on my thighs going up...and he would catch me at the waist." (*See* Ex.16, at pp.147 (trial transcript).) She also claimed that Wilson touched her "near my upper shoulders and the bottom of where I said where my – where my shirt ended, near there (lower back and shoulders)." (Ex.7.) At the time of the later alleged touching, she and Wilson were playing freeze tag, and he touched her quickly.

The "touches" in question were nonsexual in nature. It is clear that Nevada law requires the touching be coupled with the specific intent to gratify. The Nevada statute is specifically worded so that the terms "willfully and lewdly" prevent a wrongful conviction for ordinary benign acts such as: (1) a father and mother giving their eight-year-old daughter a bath; (2) a school football or basketball coach slapping

a child on the butt as a sign of "good play"; (3) a doctor giving a child a physical examination; (4) a parent catching a child coming down a slide; or (5) a father hugging his child and kissing the child on the cheek. *Cf. State v. Catnaio*, 102 P.3d 588, 592-93 (Nev. 2004) ("the Nevada statutory language providing that a lewd act be done 'upon or with' a child's body clearly requires specific intent by the perpetrator to encourage or compel a lewd act in order to gratify the accused's sexual desires).

The testimony of C.S. and A.S. was problematic given the lack of particularity as to the timing and number of incidents. Curiously, the children never distinguished one day from another, and the touches were pled by general types of touching rather than listing specific locations. (*See* Ex. 8 (Indictment).) The prosecution provided few if any details regarding the alleged incidents and the number of acts charged. Against this murky backdrop, A.S. vaguely testified that Wilson touched her three times or less while they were in the living room and that she was in the third grade when it happened. She never distinguished one day from another, and she only testified with particularity as to one incident.

By A.S.'s own testimony, none of the touches were of a sexual nature. To the contrary, the touches were playful rather than sexual in nature:

> My buns, well, it wasn't like – like a guy at a – like at a bar like slapping somebody's butt. It wasn't like that. But it was just like – like you know on the roof of your buns, like it's like this and then right under it, that's like how he touched me...well, he would just like under, like when he's playing – remember when I told you he would go under our pants and stuff, he would just be like touching us...over my pants...

A.S. couldn't remember any specific instance of Wilson touching her breasts although it was over her shirt, in the living room, and "like he always plays with us." The few specifics that A.S. testified to are obvious fabrications. For instance, A.S. claims that Wilson put his arm all the way up a pair of jeans she was wearing, which went to her ankles, and then "poked" her vagina. (*See* Ex. 18.) Only a child would

make up such an implausible story. It is no wonder the trial judge felt she had to discuss its verdict with the jury after deliberations in order to try to ascertain the bases of the verdicts. The court was found the verdict unusual and uncomfortable but felt it had to defer to the jury. (*See* Ex. 22, 23.)

Despite these ambiguities and lack of witness specificity, the jury convicted Wilson of three counts of lewdness with this complaining witness/minor.[5]

Similarly, while C.S. testified that Wilson touched her in the garage, in the living room, in the park, in the jumper, and in the library, she failed to provide any particular dates or specific times of the occurrences. C.S.'s testimony is a mess but most incredible is her testimony about Wilson's ability to touch her by bending his leg at a 90 degree angle to touch her buttocks with his foot through a couch cushion, putting his hand up shirt sleeves, and up full-length pants.

Despite these vague details, the jury convicted Wilson of six counts of lewdness with C.S. as the alleged victim.

Location was a key issue in this prosecution. Although C.S. testified as to locations, the Indictment reflected only specific types of touching without regard to any locations. If the court only used location to show particularity then C.S. testified

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[5] One aspect of this issue Wilson raised, but neither the Nevada Supreme Court nor the State addressed, was Wilson's inability to present witnesses or other exculpatory evidence due to the State's charging documents' lack of notice. (*See* Ex. 22.) If the State had provided specific dates of illicit touching, in the park for example, Wilson could have called percipient witnesses who were at the park on that specific date, been able to present an alibi, etc.

There is little question that the charging document's lack of notice made it difficult for Wilson to mount a defense.

Given the lack of any physical evidence, and the vague testimony and timeline provided by the prosecution, there is no way Wilson, assuming his innocence, could prove his innocence against these accusations. All he could do is what he did do—vehemently deny the accusations.

Anyone, no matter who they are or how innocent, is vulnerable to this type of unprincipled prosecution.

with particularity to five instances in five separate locations. But because C.S. testified that Wilson touched her in the butt, the shoulders, her sides, her thighs, near cups of her bra all in the living room and all of these alleged touches are pled within six different counts, she arguably only testified with particularity to one instance of unlawful touching.

The prosecution did not prove the elements for the other count of conviction, unlawful contact with a child (count seven), either. Under Nevada Revised Statute § 207.260:

> A person who, without lawful authority, willfully and maliciously engages in a course of conduct with a child who is under 16 years of age and who is at least 5 years younger than the person which would cause a reasonable child of like age to feel terrorized, frightened, intimidated or harassed, and which actually causes the child to feel terrorized, frightened, intimidated or harassed, commits the crime of unlawful contact with a child.

Nev. Rev. Stat. § 207.260 (West 2017).

A "course in conduct" is described as "a pattern of conduct which consists of a series of acts over time that evidences a continuity of purpose directed at a specific person." *Id.* § 207.260(5)(a). But in this prosecution, there were infirmities with Indictment and the evidence.

To begin, the DA failed to plead facts establishing a course of conduct, instead choosing to erroneously plead the factual allegations in the alternative as "and/or." The term "and/or" means that either one or more of the facts listed within the sentence could occur, and the jury could find one touch to be enough evidence to establish a pattern even though NRS 207.260 requires a series of facts or acts; or that one mere touch would amount to a pattern under this pleading.

Next, the Indictment alleged that Wilson was: "touching and/or fondling the breast and/or waist and/or side by her breasts, and/or touching and/or squeezing the shoulders and/or upper thighs and/or butt and/or rubbing her butt with his foot."

(Ex.8.) By using the "and/or" the State failed to correctly plead a series of acts which would be sufficient for a conviction under Nevada Revised Statute 207.060 and instead allowed the jury to convict Wilson based on one act rather than a series of acts.

Further, there was insufficient evidence to convict Wilson of the misdemeanor set forth in count seven because the State failed to: 1) present any evidence showing any acts that Wilson did which would "cause a reasonable child...to feel terrorized, frightened, intimidated or harassed"; 2) establish a pattern of harassment or a course in conduct; and (3) failed to establish that Wilson acted maliciously. *See* Nev. Rev. Stat. § 207.260 (West. 2017).

To the contrary, there is no evidence that Wilson asked the girls to come to the garage for the purpose of showing them the pictures of women and to touch them. There was no proof that Wilson had unlawful contact with A.S. because the display of female pictures in this garage or on a cell phone is not enough to show intent; particularly when the viewing and the alleged unlawful touching does not occur simultaneously.

A.S. said Wilson never touched her when she saw the pictures on the cell phone, and she only mentioned one instance that she saw the cell phone pictures while standing in the front yard. (*See* Ex.18.) C.S. said he only touched A.S. while they were in the garage as if to counsel her like a therapist. Along these same lines, Wilson did not touch A.S. when he showed her pictures of the naked women on the garage wall. Therefore, without more, the State failed to show that Wilson caused A.S. "to feel terrorized, frightened, intimidated or harassed," and there existed an established pattern of harassment or course in conduct.

B. Wilson's Sufficiency Claim is Enhanced by the Fact the Justice Court Found that the DA Failed Provide Slight or Marginal Evidence to Support the Lewdness Counts

Wilson's pretrial motions should have been granted because the district court lacked jurisdiction to entertain an Indictment based on the same facts that a court of competent Nevada jurisdiction found lacking. (*See* Ex. 11(Motion to Dismiss).) The Justice Court, after hearing the testimony of the complaining witnesses, found the DA failed to meet its burden of proving slight or marginal evidence supported binding the lewdness counts over to the district court. (*See* Ex. 4.)

The trial court did not have jurisdiction to proceed under the Indictment because the DA lacked the ability to use grand jury proceedings after a contrary preliminary hearing finding. The preliminary hearing finding became law of the case. The DA misused the grand jury to circumvent judicial factual finding and process. A grand jury may be empaneled only in the case of a person "imprisoned in the jail of the county, on a criminal charge, against whom an indictment has not been found **or an information or complaint filed**." Nev. Rev. Stat. § 172.175 (a) (West 2017). The reason the legislature established these limitations on the scope and use of a grand jury to prevent abuse of the process:

> A district attorney shall not use a grand jury to discover tangible, documentary or testimonial evidence to assist in the prosecution of a defendant who has already been charged with the public offense by indictment or information.

Nev. Rev. Stat. § 172.107 (West 2017).

While the Information, based on facts arising out of the same facts as those within the Indictment, was still pending, the prosecutor improperly used the grand jury to assist Wilson's prosecution, and engaged in improper forum shopping in the process. *See United States v. DeRobertis*, 546 F. Supp. 40, 43-44 (N.D. Ill. 1982) (expressing disdain at the prosecutor's blatant forum shopping where, as in the instant matter, a justice court found insufficient evidence to bind over the charges).

C. The Trial Court, Duly Concerned with the Quality of the DA's Evidence, Would Have Granted Wilson's Request for a Directed Verdict had the Presiding Judge Not Applied the Wrong Legal Standard

Nevada Revised Statute § 175.381(2) allows the district court to, sua sponte or upon motion by the defense, "set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction." When deciding a motion for judgment of acquittal the district court determines if the prosecution has produced a minimum threshold of evidence upon which a conviction may be based if the evidence were believed by the jury. *See Evans v. State*, 926 P. 2d 265, 279 (Nev. 1996). The "minimum threshold" is a sufficient amount of evidence to sustain the burden of proof beyond a reasonable doubt.

In this case the trial judge held serious reservations about the sufficiency of the evidence. The court was concerned about the inconsistencies in the alleged victims' testimony, and the prosecutor's failure to prove the lascivious intent required for a lewdness with a minor conviction.

The innocuous nature of the touches was at the forefront of her mind when she was faced with making a decision on Wilson's motions:

> I don't really need to read anything else because I remember everything, but it's an unusual ...verdict. It's an unusual set of circumstances especially when he's acquitted of the sexual assault charge which I think if he had been convicted of that, I think everything else would be sort of academic. So I'm going to think more about this.

(Ex. 22; ER 589 (transcript of hearing on defendant's Motion for Acquittal).)

The trial court considered dismissing the counts until sentencing on September 22, 2009, where it ruled:

> This is obviously an unusual case in that the conduct is not per se sexual. You have to look to the intent with which the touching was done.
>
> Although the Court isn't entirely comfortable with the verdict, I do have to defer to the jury. The jury was instructed on what to look for with intent, and if you look at the totality of the circumstances, the pictures on the cell phone, the pictures in the garage, the jury could reasonably infer that there was an improper motivation in the contact, although again, the contact taken in a vacuum without the other evidence would be completely innocuous and unsexual contact.
>
> I think this again is an unusual case. I don't know that anything like this has been before the Supreme Court, but like I said, **you know, you have to defer to the jury's judgment.** The jury was instructed on this, and Ms. Jones did an excellent job as indicated by the jurors themselves when they spoke to me later about arguing this and pointing out that the contact could be construed as innocuous, but like I said, there was evidence to support the inference which the jury obviously drew.

(Ex. 24; ER 592) (emphasis added).)

Despite its repeated questioning of the verdict, the court erroneously concluded that the court was bound by the jury's verdict, and denied Wilson's motion for a judgment of acquittal or new trial. In doing so, the court failed to follow the correct standard of review for a motion for a new trial based on insufficient evidence.

Pursuant to Nevada Revised Statute 176.515(4) the district court may grant a motion for a new trial based on conflicting evidence if the trial court acts as the thirteenth juror and determines that the evidence was insufficient to convict due to the conflicting evidence. By not acting as a thirteenth juror when reviewing the evidence and instead deferring to the jury's verdict, the court violated Wilson's right to due process. Based on the trial court's own comments, it should have reversed the conviction by granting a motion for a new trial. Therefore, the court erred by denying

Wilson's motion for judgment of acquittal, alternatively motion for a new trial, asking the court to either set aside the verdict. *See* Nev. Rev. Stat. § 175.381 (West 2017). The facts and procedural posture of this case reveal how Wilson stands convicted of counts carrying life sentences based on insubstantial occurrences and vague facts. It is not true, as the lower court determined, that the DA's abuse of grand jury proceedings or that the lower court applied the wrong judgment notwithstanding the verdict standard are independent claims for habeas relief. Those developments are part of the story of how a man became convicted of felony child sex charges in a case with no corroborating physical evidence, based on indefinite, contradictory, and sometimes patently incredible testimony. The fact the DA called a blind witness to testify to what that witness "saw" speaks volumes for the weakness of the evidence. The lower court went astray in deciding it could decide Wilson's issue without looking at the entire record and dismissing contrary factual findings by Nevada courts of competent jurisdiction. *Cf.* 28 U.S.C. § 2254(e) (2012) (explaining that state court factual findings are entitled to a presumption of correctness).

D. This Court Should Consider Whether the District Court was Correct to Isolate and Decide Wilson's Sufficiency of the Evidence Claim Without Resorting to the Full Record on Appeal that the Nevada Supreme Court Considered

If Wilson's convictions stand then it is clear that no man is safe. None of us, no matter how moral and upstanding or what one's life achievements may be, is safe. If this case stands then anyone can be convicted and sentenced to prison for life, on the mere word of a child regardless of the lack of any corroborating evidence or how facially incredible the story. Wilson had no way of mustering an alibi or otherwise present a defense because the DA charged only vague allegations and indefinite timelines.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In collaterally reviewing a state court conviction for sufficiency of evidence, a federal court does not determine whether the prosecution established the petitioner's guilt beyond a reasonable doubt. Rather, the federal court "determines only whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When faced with a record that supports conflicting inferences, the federal court "must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Wright v. West*, 505 U.S. 277, 296-97 (1992). Here, even construed in a light most favorable to the prosecution, the evidence presented at Wilson's trial fails to support a rational finding of guilt beyond reasonable doubt for eight counts of lewdness with a child under the age of fourteen, and one count of unlawful contact with a child.

But whether Wilson is entitled to habeas relief on his sufficiency claim is not directly at issue in this petition. What is at issue is the federal court's procedure ruling where it divided the story of Wilson's convictions into three parts and then cut out two parts of the story. (*See* App. D (procedural ruling at issue).) The lower court refused to consider the impact of the justice court's factual findings regarding the paucity of evidence. Further, the trial court, which was present for all of the DA's case, would have acquitted Wilson but for its incorrect application of *Jackson v. Virginia* and Nevada directed-verdict law.

The lower court's procedural rulings allowed it deny Wilson's claim without consideration of the impression of two Nevada judges who witnessed the credibility and testimony of the DA's witnesses and found them lacking. The lower court's

adoption of the State's procedural arguments allowed it rule against Wilson without grating the proper deference to Nevada court factual and credibility findings. In doing so, the court was added by the State's selective and inaccurate assessment of the trial evidence.

Wilson concedes that in only the most rare and unusual circumstances should a conviction be reversed for sufficiency of the evidence. This is one of those cases yet the appellate court refused to give the issue fair consideration. Only by engaging in a divide and conquer tactic did Wilson's claim lose its persuasive force.

The Ninth Circuit's exhaustion findings should be reversed and the matter remanded with instructions to consider Wilson's claim in its entirely.

CONCLUSION

Following a four-day jury trial, a jury found Wilson not guilty of sexual assault but convicted him of eight counts of lewdness and one count of unlawful contact with a minor.

The evidence in this case failed to support those convictions. A.S. and C.S. provided inconsistent testimony. The DA failed to prove every element of the offenses for which Wilson was convicted.

Wilson's last chance to right this wrong was waylaid by a series of improper procedural rulings that denuded the force of his contentions.

This case is troubling. Both a man's life and the integrity of our system of justice is at stake. Both this Court and the State should be concerned with this matter. If Wilson's convictions pass muster, any person is vulnerable. There need be nothing other than accusations so vague and indefinite that a defense is impossible to convict someone of a serious sex crime. Innocent conduct, such as rubbing someone's shoulder or playing tag will carry the risk of life imprisonment.

The bottom line is that A.S. and C.S. provided inconsistent and factually impossible testimony. The DA failed to prove the offenses for which Wilson stands

convicted. Yet the lower court and federal court of appeals never addressed that claim and instead denied Wilson relief based on an unfavorable reworking of his core constitutional claim.

Wilson has the right, as the initiator and pleader of his lawsuit, to have the court address the claims that he plead. Because the lower court's determination is based on erroneous factual findings and improper procedural rulings, Petitioner Appellant Michael Duane Wilson respectfully requests that this Court reverse the Ninth Circuit and consider the merits of Wilson's sufficiency of the evidence claim.

DATED this 4th Day of February 2019.

Respectfully submitted,

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II.CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,241 words, excluding the parts of the document that are exempted by Supreme Court Rule 33(g).

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

Dated this 4th day of February 2019.
Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 4th day of February, 2019, 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:

Heather Procter
Chief Deputy Attorney General
555 East Washington Avenue
Las Vegas, NV 89101

Respectfully submitted,

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INDEX TO APPENDIX

APP. 001

2018 WL 5805981
Only the Westlaw citation
is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure
32.1 generally governing citation
of judicial decisions issued on
or after Jan. 1, 2007. See also
U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of
Appeals, Ninth Circuit.

Michael Duane WILSON,
Petitioner-Appellant,
v.
Robert LEGRAND, Warden; and
Attorney General for the State of
Nevada, Respondents-Appellees.

No. 17-15153
|
Submitted October 19, 2018 *
San Francisco, California
|
Filed November 06, 2018

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

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Nevada, Robert Clive Jones, District Judge, Presiding, D.C. No. 3:14-cv-00071-RCJ-VPC

Before: WALLACE, KLEINFELD, and GRABER, Circuit Judges.

MEMORANDUM **

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

***1** Michael Duane Wilson, a Nevada state prisoner, appeals from the district court's order denying his petition for writ of habeas corpus. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We AFFIRM.

Wilson asserts six separate "Grounds" for habeas relief. Ground One is divided into subsections 1(a), 1(b), and 1(c): 1(a) challenges the sufficiency of the evidence to support a conviction under the standard set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); 1(b) challenges the state trial court's decisions to deny Wilson's pretrial motions for improper grand jury involvement, improper forum-shopping, and failure to sever the counts; and 1(c) challenges the standards of review applied by the trial court in denying Wilson's motion for judgment of acquittal or new trial. Wilson argues that the three Ground One subsections are part of one

overarching claim for insufficient evidence under Jackson.

The district court dismissed all six Grounds for habeas relief. In dismissing Ground One, the district court analyzed subsections 1(a), 1(b), and 1(c) as separate claims. Claim 1(a) was denied on the merits. Claims 1(b) and 1(c) were dismissed for lack of exhaustion "to the extent they set forth federal constitutional claims separate from the insufficiency of evidence claim" in claim 1(a). (Emphasis added.) The other Grounds were similarly denied on the merits or dismissed for lack of exhaustion.

A motions panel of this court granted a Certificate of Appealability limited to the following issues: "whether the district court erred by (1) reorganizing Ground One in the amended habeas petition, and (2) finding that the reorganized subclaims were unexhausted." We review the district court's dismissal for lack of exhaustion de novo, but may also affirm on any ground supported by the record. Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005); White v. Klitzkie, 281 F.3d 920, 922 (9th Cir. 2002).

The district court properly considered the Ground One subsections as separate claims. As alleged in the petition, 1(b) and 1(c) are irrelevant to a due process claim under Jackson. Cf. Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008) ("[A] petitioner has 'fairly presented' a claim not named in a petition if it is 'sufficiently related' to an exhausted claim."). Wilson argues that 1(b) and 1(c) "enhance" the Jackson claim because the trial court and justice court both viewed the evidence to be weak. [1] Jackson, however, requires considering the sufficiency of the evidence—not what different courts or judges thought about the evidence. See United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (holding that a "reviewing court must [first] consider the evidence presented at trial in the light most favorable to the prosecution" under Jackson (emphasis added)).

1 Justice courts are state courts in Nevada with limited jurisdiction over criminal matters.

We affirm the district court's judgment dismissing the 1(b) claim. Claim 1(b) can be divided into three subclaims. The claimed improper grand jury involvement, failure to sever, and improper forum-shopping claims were not federalized and are unexhausted. See Petrocelli v. Baker, 869 F.3d 710, 725 (9th Cir. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 984, 200 L.Ed.2d 249 (2018); Galvan v. Alaska Dep't of Corr., 397 F.3d 1198, 1205 (9th Cir. 2005) (holding petitioners asserting federal constitutional claims must "explicitly alert[ ]" state courts that they are making such claims despite contextual inquiry as to exhaustion).

***2** We also affirm the dismissal of the 1(c) claim. The 1(c) claim is either duplicative of the 1(a) Jackson claim or a matter of state law. The district court found 1(c) unexhausted only to the extent that it alleged a separate claim from the general 1(a) Jackson claim. If Wilson meant to collapse 1(a) and 1(c) into one due process claim for insufficiency of evidence, that claim has already been addressed and denied on the merits. Exhaustion or lack thereof played

no role in the denial. The district court properly reviewed the evidence and the Nevada Supreme Court's determination—and not the actions of the trial court. See Murray v. Schriro, 745 F.3d 984, 996 (9th Cir. 2014) ("Under AEDPA, we review the last reasoned state-court decision."). To the extent the 1(c) claim concerns the application of the wrong standard of review under state law, separate from any federal due process concerns, the matter is one merely of state law. See Hudson v. Louisiana, 450 U.S. 40, 44 n.5, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) ("Whether a state trial judge in a jury trial may assess evidence as a '13th juror' is a question of state law"). The 1(c) claim has therefore been denied properly on the merits as part of the 1(a) Jackson claim or is not a claim covered under federal habeas. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); Gutierrez v. Griggs, 695 F.2d 1195, 1199 (9th Cir. 1983) ("Insofar as [the petitioner] simply challenges his conviction as a matter of state law, § 2254 and, consequently, the doctrine of exhaustion are not applicable.").

For these reasons, we AFFIRM the district court's judgment. We decline to broaden the Certificate of Appealability. See Hiivala v. Wood, 195 F.3d 1098, 1104 (9th Cir. 1999) (explaining that broadening of a certificate of appealability requires "substantial showing of the denial of a constitutional right" (quoting 28 U.S.C. § 2253(c)(2))).

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 5805981

APP. 004

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL DUANE WILSON,

Petitioner,

vs.

ROBERT LeGRAND, *et al.*,

Respondents.

_____/

3:14-cv-00071-RCJ-VPC

ORDER

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Michael Duane Wilson, a Nevada prisoner. The case is before the court with respect to the merits of the claims remaining in Wilson's first amended petition after the resolution of respondents' motion to dismiss. The court will deny Wilson's petition.

Background

Wilson was convicted on October 1, 2009, following a jury trial in Nevada's Eighth Judicial District Court, in Clark County, of eight counts of lewdness with a child under the age of fourteen, and one count of unlawful contact with a child under the age of sixteen. *See* Judgment of Conviction, Exhibit 26 (ECF No. 18-4) (The exhibits referred to in this order were filed by Wilson, and are located in the record at ECF Nos. 15, 16, 17, 18 and 19.). He was sentenced to eight

concurrent terms of ten years to life in prison for the lewdness convictions, and, for the conviction of unlawful contact with a child, he was sentenced to a concurrent one-year term. *See id*.

The Nevada Supreme Court affirmed the judgment of conviction on December 9, 2011. *See id*. The court denied Wilson's petition for rehearing on May 9, 2012. *See* Order Denying Rehearing, Exhibit 37 (ECF No. 19-1).

On July 16, 2012, Wilson filed a post-conviction petition for writ of habeas corpus in the state district court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39 (ECF No. 19-3). The state district court denied the petition, in a written order, on February 4, 2013. *See* Findings of Fact, Conclusions of Law and Order, Exhibit 44 (ECF No. 19-8). Wilson appealed, and the Nevada Supreme Court affirmed on January 15, 2014. *See* Order of Affirmance, Exhibit 48 (ECF No. 19-12).

This court received Wilson's federal habeas petition, initiating this action *pro se*, on February 4, 2014 (ECF No. 4). The court granted Wilson's motion for appointment of counsel, and appointed counsel to represent him. *See* Order entered February 18, 2014 (ECF No. 3). With counsel, Wilson filed a first amended habeas petition (ECF No. 14) on January 29, 2015. Wilson's first amended petition -- the operative petition in the case -- asserts the following claims:

1a. Wilson's federal constitutional rights were violated because "the State of Nevada produced insufficient evidence at trial to support a conviction for lewdness [with] a minor and unlawful contact with a child." First Amended Petition (ECF No. 14), p. 12.

1b. "The trial court erroneously denied Wilson's pretrial motions challenging jurisdiction and requesting severance of the counts based on insufficiency of the evidence." *Id*. at 16.

1c. "The trial court applied an incorrect standard of review and erroneously denied Wilson's motion for judgment of acquittal or new trial." *Id*. at 18.

2. "Wilson's sentence violated the Double Jeopardy Clause of the Fifth Amendment and the presumption against the pyramiding of punishment for a single transaction and occurrence." *Id*. at 20.

3. "Wilson's constitutional rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments were violated when A.S. and C.S. were allowed to testify." *Id*. at 23.

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4. Wilson's federal constitutional rights were violated because of prosecutorial misconduct during closing arguments. *Id*. at 25.

5a. Trial counsel was ineffective, in violation of Wilson's federal constitutional rights, with respect to her cross-examination of C.S. *Id*. at 29.

5b. Trial counsel was ineffective, in violation of Wilson's federal constitutional rights, because she "failed to seek dismissal of all charges because Wilson did not "willfully and lewdly commit any lewd or lascivious act" pursuant to Nevada Revised Statute § 201.230." *Id*. at 30.

5c. Trial counsel was ineffective, in violation of Wilson's federal constitutional rights, because she "failed to object to multiple instances of prosecutorial misconduct during closing arguments." *Id*. at 30.

6a. Appellate counsel was ineffective, in violation of Wilson's federal constitutional rights, because he "failed to include in Wilson's direct appeal the fact that the State of Nevada did not prove [with respect to] each element of the crime of lewdness with a minor that Wilson "willfully and lewdly committed a lewd or lascivious act." *Id*. at 31.

6b. Appellate counsel was ineffective, in violation of Wilson's federal constitutional rights, with respect to his presentation of Wilson's petition for rehearing. *Id*. at 32-33.

On April 1, 2015, respondents filed a motion to dismiss (ECF No. 21), arguing that Claims 1b, 1c and 3, and part of Claim 6b, were unexhausted in state court, and should be dismissed, and that Claims 1b, 1c, 2, 3, 6a and 6b failed to state claims cognizable in this federal habeas corpus action. The court ruled on the motion to dismiss on November 9, 2015, granting it in part and denying it in part; the court found Claims 1b, 1c and 3 to be unexhausted in state court, and granted Wilson an opportunity to make an election to either abandon those claims or move for a stay of this action to allow him to exhaust those claims in state court. *See* Order entered November 9, 2015 (ECF No. 25). Wilson filed a motion for reconsideration (ECF No. 26), seeking reconsideration of the court's November 9, 2015, order. The court denied the motion for reconsideration. *See* Order entered April 12, 2016 (ECF No. 27).

Wilson filed a declaration, abandoning unexhausted Claims 1b, 1c and 3. *See* Petitioner's Declaration of Abandonment (ECF No. 29); *see also* Notice to Court of Intent to Abandon Claims (ECF No. 28).

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Respondents then filed an answer (ECF No 31) on August 4, 2016, responding to the claims remaining in Wilson's first amended petition. Wilson filed a reply on November 30, 2016 (ECF No. 36).

Discussion

Standard of Review

28 U.S.C. § 2254(d) sets forth the primary standard of review applicable in this case under the Antiterrorism and Effective Death Penalty Act (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 state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than

incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

The Supreme Court has instructed that "[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, 131 S.Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1398 (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)).

Claim 1a

In Claim 1a, Wilson claims that his federal constitutional rights were violated because "the State of Nevada produced insufficient evidence at trial to support a conviction for lewdness [with] a minor and unlawful contact with a child." First Amended Petition (ECF No. 14), p. 12.

Wilson asserted this claim on his direct appeal (*see* Appellant's Opening Brief, Exhibit 29, pp. 10-18 (ECF No. 18-7, pp. 21-29)), and the Nevada Supreme Court ruled as follows:

> Wilson argues that the State presented insufficient evidence because it failed to prove that his acts with the children were sexual, and nonsexual acts cannot be considered lewd or lascivious for purposes of NRS 201.230. Although we agree that the statute requires a lewd or lascivious act and that a lewd act must be accompanied by the necessary sexual intent, we concluded that a rational juror could find beyond a reasonable doubt that Wilson's conduct was lewd or lascivious, and he acted with the necessary sexual intent.
>
> When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It is for the jury to assess the witnesses' credibility and determine the weight to give their testimony, and the jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict. *McNair*, 108 Nev. at 56, 825 P.2d at 573; *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

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* * *

> NRS 201.230(1) defines the crime of lewdness with a minor under 14 years:
>
> > A person who willfully and lewdly commits *any lewd or lascivious act*, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.
>
> (Emphasis added.) The material elements of the crime of lewdness with a minor are (1) a lewd or lascivious act, (2) upon or with the child's body or any part of the child's body, (3) the child's age, and (4) the intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. NRS 201.230(1); *Gay v. Sheriff*, 89 Nev. 118, 119 n.1, 508 P.2d 1, 2 n.1 (1973); *see also* 43 C.J.S. *Infants* § 120 (2004).
>
> * * *
>
> We conclude that the State presented sufficient evidence that Wilson's conduct was lewd or lascivious, and was sexually motivated as required by NRS 201.230(1). The charges against Wilson involved two young girls who are sisters, A.S. and C.S. Wilson lived next door to the girls with his girlfriend Tonja, her teenage daughter J.F., and other family members. From February 2007 to early 2008, J.F. and Tonja babysat A.S. and C.S. while their mother worked the night shift as a cabdriver. Occasionally, the two girls would sleep at Wilson's home while their mother worked. A.S. and C.S. were 8 and 10 years old, respectively, when this childcare arrangement began.
>
> During that time, Wilson at various times touched A.S.'s genitals, breasts, buttocks, and the "roof" of her buttocks. Wilson also showed her pornography on his cell phone and on the walls of his garage, though A.S. explained that he did not touch her during those incidents. Similarly, Wilson touched C.S.'s buttocks, clavicle area, sides of her breasts, and thighs. He also touched her on her shoulders, lower back, and sides of her body while showing her pornography. Additionally, he told both girls that he would hurt their mother if they told anyone about the touchings. Based on this evidence, we conclude that a rational juror could find beyond a reasonable doubt that Wilson committed eight counts of lewdness with a minor under the age of 14 years.

Order of Affirmance, Exhibit 33, pp. 2-5 (ECF No. 18-11, pp. 3-6) (footnote omitted).

A federal habeas petitioner who alleges that the evidence at trial was insufficient to support his conviction states a constitutional claim that, if proven, entitles him to federal habeas relief. *See Jackson v. Virginia*, 443 U.S. 307, 321, 324 (1979). The Supreme Court has emphasized, however,

that "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam).

A federal habeas court reviewing a state court conviction does not simply determine whether the evidence established guilt beyond a reasonable doubt. *See Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1993); *see also Coleman*, 132 S. Ct. at 2065. Rather, the question is "whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Payne*, 982 F.2d at 338 (quoting *Jackson*, 443 U.S. at 319) (emphasis in original). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt is habeas relief warranted. *Jackson*, 443 U.S. at 324; *Payne*, 982 F.2d at 338. In applying this standard, a jury's credibility determinations are entitled to near-total deference. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

28 U.S.C. § 2254(d) imposes a second layer of deference: the state court's decision denying a sufficiency of the evidence claim may not be overturned on federal habeas unless the decision was "objectively unreasonable." *See Williams*, 529 U.S. at 409-10; *Parker v. Matthews*, 132 S.Ct. 2148, 2152 (2012) (quoting *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (per curiam)).

Under NRS 201.230, the crime of lewdness with a child under the age of fourteen has the following elements: (1) a lewd or lascivious act; (2) upon or with the child's body or any part of the child's body; (3) the child being under the age of fourteen; and (4) intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. *See* Order of Affirmance, Exhibit 33, pp. 3-5 (ECF No 18-11, pp. 3-6). The Nevada Supreme Court's construction of this Nevada law is beyond the scope of this federal habeas action. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (federal habeas court cannot reexamine a state court's interpretation of state law).

With respect to the crime of unlawful contact with a child, NRS 207.260(1) provides:

> A person who, without lawful authority, willfully and maliciously engages in a course of conduct with a child who is under 16 years of age and who is at least 5 years younger than the person which would cause a reasonable child of like age to feel terrorized, frightened, intimidated or harassed, and which actually causes the child to

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> feel terrorized, frightened, intimidated or harassed, commits the crime of unlawful contact with a child.

NRS 207.260(1).

There was ample evidence presented at trial to support Wilson's convictions. Most importantly, CS and AS testified that Wilson touched them -- CS, then ten to eleven years old, and AS, then eight to nine years old -- in a manner the jury could reasonably have found to be lewd, including as follows:

- CS on her breasts (Count 1) (Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 128-31 (ECF No. 17, pp. 129-32));
- CS on her shoulders (Count 2) (*id*. at 125, 148-51 (ECF No. 17, pp. 126, 149-52));
- CS on her waist, sides, and sides of her breasts (Count 3) (*id*. at 126-27, 130-31, 151-52 (ECF No. 17, pp. 127-28, 131-32, 152-53));
- CS on her upper thighs (Count 4) (*id*. at 129-30, 142, 145-47 (ECF No. 17, pp. 130-31, 143, 146-48));
- CS on her buttocks, with his foot (Count 6) (*id*. at 127, 144-45, 152-53 (ECF No. 17, pp. 128, 145-46, 153-54));
- AS on her chest (Count 8) (Testimony of AS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 59-60, 70, 73-76 (ECF No. 17, pp. 60-61, 71, 74-77) (AS referred to her breasts as her "chi chis," *see id*. at 56 (ECF No. 17, p. 57));
- AS on her buttocks (Count 9) (*id*. at 60, 76-79 (ECF No. 17, pp. 61, 77-80) (AS referred to her buttocks as her "buns," *see id*. at 56 (ECF No. 17, p. 57));
- AS in the genital area (Count 11) (*id*. at 57-59, 79-82, 85, 89 (ECF No. 17, pp. 58-60, 80-83, 86, 90) (AS referred to her vaginal region as her "private part," *see id*. at 55-56 (ECF No. 17, pp. 56-57)).

CS and AS testified that they felt uncomfortable when Wilson touched them. For example, AS testified as follows regarding how she felt when Wilson touched her genital area:

> Q. ... Okay. How did it feel when his finger poked your private part?
>
> A. Well, it felt uncomfortable. And, well, it just like shocked me and I really don't remember.

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Testimony of AS, Trial Transcript, August 4, 2009, Exhibit 17, p. 59 (ECF No. 17, p. 60); *see also id.* at 80 (ECF No. 17, p. 81). AS also testified that she felt "[r]eally uncomfortable" when Wilson touched her breasts. *Id*. at 60 (ECF No. 17, p. 61). CS testified that when Wilson touch her near her buttocks, she felt "scared." Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, p. 126 (ECF No. 17, p. 127); *see also id.* at 122, 125-30 (ECF No. 17, pp. 123, 126-31). Ja'nae testified that when Wilson would take CS and AS to a park, CS "really wanted [Ja'nae] to go," because she "was scared to go alone." Testimony of Ja'nae Foster, Trial Transcript, August 5, 2009, Exhibit 18, p. 112 (ECF No. 17-1, p. 113).

Two witnesses, who lived with Wilson at the time, corroborated the victims' testimony, testifying that they saw Wilson touch them inappropriately. Roberta Foster testified as follows:

> Q. Did you see him do anything to [CS]?
>
> A. Yes, I did.
>
> Q. What did you see him do to [CS]?
>
> A. He touched her breasts, tried to get his hands down the top of her shirt. I mean touching her breasts through her shirt. And then he tried putting his hand down there. He'd run his hands up the top of her -- her shorts, run his hand up, and he would reach over and like, you know, go like this, kind of like that on the side of her breasts.
>
> Q. And, I'm sorry, for the record because we are tape recorded in here, when you said that he put his hands on her breasts and then down her shirt like this, were your hands in the areas of the clavicle? So under her shoulder, but above her actual breast in the front --
>
> A. Yes.
>
> Q. -- of her chest?
>
> A. Yes, that's where he -- yeah.
>
> Q. Okay. And you're doing that again with your hand just --
>
> A. Right.
>
> Q. -- for the record. And then when you were doing the pinching motion and describing that his hands were on the side of her breasts, that's on the side of her body, under her armpit, but above her waist; is that correct?

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A. Yes, on the side of the breast, you know, there. The -- the -- you know where it's heavier, you know --

Q. Okay. Did you see him do anything to [AS]?

A. Yes.

Q. What did you see him do?

A. Even though she wasn't developed, he put his hands -- he took both of his hands down her shirt, and then would like slap where they should be.

Q. Okay. And you're -- with your hands, you're showing the front --

A. On the breasts.

Q. -- of your body where the breasts --

A. Right.

Q. -- would be?

A. Would be, right.

Testimony of Roberta Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 78-79 (ECF No. 17-1, pp. 79-80); *see also id*. at 86-87 (ECF No. 17-1, pp. 87-88) (regarding her reaction to what she observed). Ja'nae Foster testified as follows:

Q. Was there a time that you ever saw the defendant do anything to [CS]?

A. There was a couple of times, yes.

Q. What did you see him do?

A. The one time I went to walk out, and his hands were up on the chest area, and then when I walked out they were gone. And I asked him about it, and he said it was none of my -- I really don't like using this language or anything.

Q. What word did he use?

A. He said it was none of my fucking business, and he walked into the garage.

Q. Okay. What else did you say?

A. I just walked over to [CS] and she started talking to me and everything, and then she started crying.

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Q. Okay. Did you see him touch [CS] another time?

A. Well, he would try to like -- he would mess with their legs and stuff, and it was kind of like underneath their shorts at the bottom of where the shorts would come down around the legs.

Q. Both [CS] and [AS]?

A. Yes.

Q. Did you ever see him rub [CS]'s or [AS]'s back?

A. Yes.

Testimony of Ja'nae Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 112-13 (ECF No. 17-1, pp. 113-14).

AS and CS testified that Wilson showed them pornography. AS testified as follows:

Q. What did he show you?

A. He showed me a phone.

* * *

Q. What kind of phone did he show you?

A. He showed me -- well, I don' remember what kind of phone it was.

Q. Okay. Was it the kind of phone that is like in the house and attached to a wall or something or a cell phone kind of phone?

A. A cell phone.

Q. Okay. And when he showed it to you, what did you see on it?

A. Well, I seen kissing and girls private areas. I seen girls -- well, a boy's twinkie in a girl's mouth, and I seen naked girls and boys.

* * *

A. ... Because all I remember was when he showed me the phone at night time and he said when you grow up, S-E-X is going to feel so good.

Q. What did he tell you? When you grow up what? I'm sorry. I didn't hear that.

A. S-E-X is going to feel so good.

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Testimony of AS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 60-61 (ECF No. 17, pp. 61-62).

CS testified as follows:

Q. ... Did you see anything else in the garage that was maybe a little unusual?

A. There was pictures of naked women on the walls.

Q. Okay. Why would you be in the garage?

A. Because he would bring me in there to show me stuff or I would go ask him for something.

Q. When you say he would bring you in there to show you stuff, what would he show you?

A. Pictures.

Q. What kind of pictures?

A. Nude pictures.

Q. When he showed you nude pictures, how did he show them to you? Like what were they in or on?

A. They were on a wall, a phone, and yeah.

Q. When you say on the wall, do you mean just naked pictures kind of pinned up to the wall?

A. Yes.

Q. When you say on the phone, tell me what you mean by that.

A. He had a phone that had -- that had some pictures on there.

* * *

Q. Okay. And when -- what kind of pictures?

A. There were naked women and sometimes -- and I -- I remember there being a naked man on there too. There was a couple of pictures like that on there.

Q. Did he show you the phone one time or more than one time?

A. More than one time.

Q. Were there times that he would show you the phone and he would touch you also?

A. Yes.

Q. And where did that happen?

A. In the garage. He would sometimes put his arm around me and he would like rub on my shoulders.

Q. How would he rub on your shoulders?

A. He like -- you know how a therapist would rub on your shoulders, or a -- or a masseuse.

Q. Did that happen in the garage?

A. Yes.

Q. What position would you be in?

A. I would be standing in front, he would be on the side with his arm around me.

Q. Okay. When he rubbed your shoulders lie that and showed you pictures, how did you feel?

A. I felt uncomfortable.

Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 123-25 (ECF No. 17, pp. 124-26); *see also id*. at 127, 137-40 (ECF No. 17, pp. 128, 138-41). Tonja Tennant and Roberta Foster corroborated the girls' testimony that there was pornography on the wall in the garage. *See* Testimony of Tonja Tennant, Trial Transcript, August 5, 2009, Exhibit 18, pp. 67-68 (ECF No. 17-1, pp. 68-69); Testimony of Roberta Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 75-76, 81-82 (ECF No. 17-1, pp. 76-77, 82-83). Also, Ja'nae Foster testified that she saw pornography both on the wall in the garage and on Wilson's telephone. Testimony of Ja'nae Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 113-15, 121-22 (ECF No. 17-1, pp. 114-16, 122-23).

Furthermore, CS and AS both testified that Wilson threatened to hurt their mother if they told anyone about what he was doing to them. AS testified as follows:

Q. Did he ever say anything to you about him touching you about whether or not you should tell anyone?

A. He said if you ever touch -- sorry. If you ever tell anyone, I'm going to hurt your mom.

Q. How did that make you feel?

A. It made me feel really mad inside. It made me -- I wouldn't tell no one in the world.

Testimony of AS, Trial Transcript, August 4, 2009, Exhibit 17, p. 62 (ECF No. 17, p. 63).

CS testified as follows:

Q. Did he ever say anything to you about talking about what he was doing?

A. He said that if I would tell anybody that he would hurt my mom and the person that she was going out with, Greg, and my family.

Q. When he told you that, did you believe him?

A. Yes.

Q. How did that make you feel?

A. I felt scared.

Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, p. 131 (ECF No. 17, p. 132); *see also id*. at 132-33, 154-55 (CS testified that she felt Wilson looked at her so as to intimidate her when she testified at preliminary hearing).

In light of the testimony of AS and CS regarding the manner in which Wilson touched them, their testimony about how Wilson touching them made them feel, their testimony that Wilson showed them pornography, AS' testimony about Wilson talking to her about how sex would feel when she grew up, the testimony of AS and CS about Wilson's threats regarding what he would do if they told anyone about what he was doing to them, and the corroborating testimony of Tonja Tennant, Roberta Foster, and Ja'nae Foster, all viewed in the light most favorable to the prosecution, this court determines that there was, without question, sufficient evidence presented at trial to support Wilson's convictions.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of, *Jackson*, or any other Supreme Court precedent. The court will, therefore, deny Wilson habeas corpus relief with respect to Claim 1a.

Claim 2

In Claim 2, Wilson claims that his sentence "violated the Double Jeopardy Clause of the Fifth Amendment and the presumption against the pyramiding of punishment for a single transaction and occurrence." First Amended Petition, p. 20.

Wilson asserted this claim on his direct appeal (*see* Appellant's Opening Brief, Exhibit 29, pp. 24-29 (ECF No. 18-7, pp. 35-40)), and the Nevada Supreme Court denied relief on the claim without discussion. *See* Order of Affirmance, Exhibit 33, p. 1, footnote 1 (ECF No. 18-11, p. 2).

When the state court has denied a federal constitutional claim on the merits without explanation, the federal habeas court "must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme Court]." *Harrington*, 562 U.S. at 102.

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the Supreme Court established a test for determining whether or not two convictions are punishments for the same crime for purposes of the Double Jeopardy Clause; the question under *Blockburger* is whether each offense contains an element that the other does not. The Supreme Court has further held, however, that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *see also Jones v. Thomas*, 491 U.S. 376, 381 (1989) (Double Jeopardy Clause protects against multiple punishments for the "same offense" in a single proceeding where a state legislature does not intend to allow punishment for both offenses). Therefore, legislative intent is a key to determining whether multiple charges and punishments violate the Double Jeopardy Clause. *See Hunter*, 459 U.S. at 368-69. There is no violation where the legislature intends to impose multiple punishments. *Id.*

The Nevada Supreme Court's denial of relief on this claim was not an unreasonable application of *Blockburger* and *Hunter.*

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The lewdness charges upon which Wilson was convicted involved his touching of CS and AS on different parts of their bodies; each of those charges was, by definition, for a separate act.

As between the lewdness convictions and the conviction for unlawful contact with a child, those crimes involve completely different elements. Under NRS 201.230, the crime of lewdness with a child under the age of fourteen has the following elements: (1) a lewd or lascivious act; (2) upon or with the child's body or any part of the child's body; (3) the child being under the age of fourteen; and (4) intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. *See* Order of Affirmance, Exhibit 33, pp. 3-5 (ECF No 18-11, pp. 3-6). And, under NRS 207.260(1), the crime of unlawful contact with a child under 16 is committed when "[a] person ... without lawful authority, willfully and maliciously engages in a course of conduct with a child who is under 16 years of age and who is at least 5 years younger than the person which would cause a reasonable child of like age to feel terrorized, frightened, intimidated or harassed, and which actually causes the child to feel terrorized, frightened, intimidated or harassed...." NRS 207.260(1). These are two very different crimes. Lewdness with a child is committed by a single lewd act with a particular intent; the crime of unlawful contact with a child is committed by a course of conduct with a particular impact on a child. There is no showing that the Nevada legislature intended that one convicted of lewdness with a child could not also be convicted of unlawful contact with a child.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of, *Blockburger*, *Hunter*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 2.

Claim 4

In Claim 4, Wilson claims that his federal constitutional rights were violated because of prosecutorial misconduct during closing arguments. First Amended Petition, pp. 25-28.

Wilson asserted this claim on his direct appeal (*see* Appellant's Opening Brief, Exhibit 29, pp. 40-42 (ECF No. 18-7, pp. 51-53)), and the Nevada Supreme Court denied relief on the claim without discussion. *See* Order of Affirmance, Exhibit 33, p. 1, footnote 1 (ECF No. 18-11, p. 2).

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Wilson also asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, pp. 16-22 (ECF No. 9-3, pp. 18-24). The state district court ruled as follows:

> The Supreme Court of Nevada summarily rejected Defendant's claims of prosecutorial misconduct on appeal, finding them to be without merit. Order of Affirmance, December 9, 2011, p. 1, n.1. That ruling is the law of the case and precludes review of Defendant's claims here.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, p. 4 (ECF No. 19-8, p. 6). In the Nevada Supreme Court's ruling on the appeal in Wilson's state habeas action, the court did not address this claim.

"Improper argument does not, per se, violate a defendant's constitutional rights." *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993). It "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Rather, a defendant's constitutional right to due process of law is violated only if the prosecutor's misconduct renders a trial "fundamentally unfair." *Id.*; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Claims of prosecutorial misconduct are reviewed "'on the merits, examining the entire proceedings to determine whether the prosecutor's [actions] so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (citation omitted); *see also Greer v. Miller*, 483 U.S. 756, 765 (1987); *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir. 2002). In *Darden*, the Supreme Court "measured the fairness of the petitioner's trial by considering, *inter alia*, (1) whether the prosecutor's comments manipulated or misstated the evidence; (2) whether the trial court gave a curative instruction; and (3) the weight of the evidence against the accused." *Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005) (citing *Darden*, 477 U.S. at 181-82). If there is constitutional error resulting from prosecutorial misconduct, a harmless error analysis is applied: the error warrants relief if it "had substantial and injurious effect or influence in determining

the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks omitted); *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012).

Wilson claims, first, that the prosecutor improperly vouched for witnesses in her closing argument. *See* First Amended Petition, pp. 25-26. In this regard, Wilson points to the following arguments made by the prosecutor:

> What you heard was two young girls who have absolutely nothing to gain here. Think about that. You know, people -- you see stuff on TV about custody battles and, you know, mom puts kiddo up to saying dad touched me so that mom can get custody away from dad, or dad puts kiddo up to saying mom's boyfriend touched her because dad is mad that mom's got a new boyfriend. You don't have any of that here.
>
> These children have absolutely no reason to make anything like this up, none whatsoever. What do they have to gain by this? Nothing. But what happens instead is, first, they have to tell the detective what happened. [AS] has to go and be examined. Imagine, if you will, being 10 years old and having to lay on a table in the hospital with nothing on below the waist and show your genital area to a strange doctor. It's bad enough when you're an adult having to do that, but as a child?
>
> So [AS] has to also talk to the detective, go through the exam. And then they come to a preliminary hearing where they testify and tell a judge what the defendant has done to them. And what happens, he stares them down, makes faces, they're scared, they can barely talk.
>
> So how are they rewarded by coming in and -- and telling what somebody did? They have to come back and testify in front of a grand jury. And then they come back here and are examined and cross-examined. That's what these girls have to gain by telling somebody that he touched them. They have absolutely nothing to gain and they have no reason to lie.
>
> So you have girls with pure motive, who all they want is to have it stop. And it did. Here we are. You've heard all the evidence. You've heard the testimony. And it is up to you. The instructions tell you that you must be convinced beyond a reasonable doubt that the defendant touched these girls. Their evidence, their testimony was clear. They weren't embellishing.
>
> You heard them say in the beginning, the defense, every time they tell their story it gets bigger, they embellish more and more. In fact, the contrary is true. They're not embellishing any. They're trying to remember as best they can. But when you go through a bad experience like that, you're not sitting there going home and writing down all the details so that you could recount it two years later to a jury. They told you as best they could.
>
> * * *

APP. 022

> A bath, bathing a child who can't bathe herself, not a bad touch of course. But with the pornography on the walls, on the phone, no legitimate reason to touch, no reason for the kids to make it up, all of that adding up together shows that, yes, it was inappropriate touching.

Trial Transcript, August 5, 2009, Exhibit 18, pp. 129-31, 146 (ECF No. 17-1, pp. 130-32, 147); *see also* First Amended Petition, p. 26.

As a general rule, "a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of [government] witnesses." *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985). Improper vouching for the credibility of a witness occurs when the prosecutor places the prestige of the government behind the witness or suggests that information not presented to the jury supports the witness's testimony. *United States v. Young*, 470 U.S. 1, 7 n.3, 11-12 (1985). Here, the prosecutor argued that AS and CS were believable witnesses. Her argument was based on the circumstances as revealed by the evidence; she sought to show that, under the circumstances, AS and CS had no reason to lie. The prosecutor did not state her argument in this regard as a matter of personal opinion, and did not suggest that there were facts beyond the jury's knowledge that supported the testimony of AS and CS. This argument was not improper vouching.

Wilson also claims the following argument by the prosecutor was improper:

> The pictures in the garage. There was pornography that Bobby saw, that Ja'nae saw, that the girls saw. Did the detective see it? No. Why? The defendant was packing. You heard there were boxes everywhere. He had pulled it off the walls. Does that mean the girls didn't see it, that it wasn't there because the detective didn't see it? Of course not. The defendant pulled it down.

Trial Transcript, August 5, 2009, Exhibit 18, p. 148 (ECF No. 17-1, p. 149); *see also* First Amended Petition, pp. 26, 27-28. Wilson claims that this was improper vouching, and that it suggested the prosecutor had knowledge of facts not in evidence. This, however, was acceptable argument, based on evidence presented at the trial. There was no suggestion that the prosecutor had information not available to the jury, and the prosecutor did not make the argument in terms of her personal opinion. The prosecutor based this argument on evidence -- the evidence that there were boxes in the garage,

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indicating that Wilson had been packing his belongs -- and properly argued that the jury should infer that Wilson had removed the pictures from the walls before the detective saw the garage.

Wilson also claims that the prosecutor "usurped the function of the jury" by referring to Wilson as guilty; he complains, in this regard, of the following arguments of the prosecutor:

> You have the unique opportunity of hearing from children telling you about how he was touching them and touching them inappropriately, but you have somebody, not only one person, two different people who saw it and corroborated it. That does not happen often. So the lewdness counts have also been proven.
>
> * * *
>
> He's guilty of touching these girls.
>
> * * *
>
> He's guilty of these counts. Find him guilty. Thank you.

Trial Transcript, August 5, 2009, Exhibit 18, pp. 128, 131, 150 (ECF No. 17-1, pp. 129, 132, 151); *see also* First Amended Petition, p. 26. This was not improper argument by the prosecutor. The prosecutor was simply arguing, properly, based on the evidence at trial, that Wilson was guilty.

Next, Wilson claims that the prosecutor misstated the law in the following arguments:

> In certain circumstances, when you look at everything, the pornography on the wall, on the phone, all of those things combined is what makes that a lewd act. I'm sure the defense is going to come up here and talk to you about, well, there's no evidence that he intended to gratify his lust, passions, or sexual desires. Well, you know, think about it.
>
> * * *
>
> A bath, bathing a child who can't bathe herself, not a bad touch of course. But with the pornography on the walls, on the phone, no legitimate reason to touch, no reason for the kids to make it up, all of that adding up together shows that, yes, it was inappropriate touching.

Trial Transcript, August 5, 2009, Exhibit 18, pp. 127, 146 (ECF No. 17-1, pp. 128, 147); *see also* First Amended Petition, pp. 26-27. In these arguments, however, the prosecutor was addressing the mens rea element of the lewdness charges -- that the defendant acted with the intent to arouse, appeal to, or gratify, the lust or passion of himself or the child. *See* NRS 201.230. The evidence the

prosecutor referred to was plainly relevant to that element of the crime. The argument was not improper.

Wilson claims, similarly, that the following argument of the prosecutor misstated the law regarding the crime of lewdness with a child:

> You know what, when you touch a 10 year old child inappropriately and she recognizes and she feels uncomfortable, then that's a bad touch.

Trial Transcript, August 5, 2009, Exhibit 18, p. 127 (ECF No. 17-1, p. 128); *see also* First Amended Petition, p. 27. This, too, was acceptable argument. The child's feelings regarding the touch, and reaction to it, were relevant to the questions whether the touches were lewd or lascivious, and whether they were committed with intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. *See* NRS 201.230.

Next, Wilson claims that the prosecutor improperly attempted to inflame the passions of the jury by characterizing as "pornography," and as "dirty pictures," pictures that were evidently on the wall in Wilson's garage. For example, the prosecutor argued:

> But you've got to think about the whole picture of what you heard about how he would bring [CS] into the garage where, what's in there? The pornography on the walls, dirty pictures. You heard that from [CS], you heard that from [AS], you heard it from Bobby and Tonja -- well, maybe not Tonja -- and Ja'nae about the pornography on the walls. He would bring her into the garage. He would touch her. She felt uncomfortable.

Trial Transcript, August 5, 2009, Exhibit 18, p. 127 (ECF No. 17-1, p. 128); *see also* First Amended Petition, p. 27. This was not unduly inflammatory. It was a fair characterization of the evidence. *See* Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 123-25 (ECF No. 17, pp. 124-26) ("pictures of naked women on the walls," "nude pictures"); Testimony of Tonja Tennant, Trial Transcript, August 5, 2009, Exhibit 18, pp. 67-68 (ECF No. 17-1, pp. 68-69) ("Pornography," "Naked women, women in lingerie"); Testimony of Roberta Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 75-76 (ECF No. 17-1, pp. 76-77) ("Pornography pictures," "naked women and naked women and men together, you know, together, you know, men with women in the pictures");

Testimony of Ja'nae Foster, Trial Transcript, August 5, 2009, Exhibit 18, pp. 113-15 (ECF No. 17-1, pp. 114-16) ("pornography things," "really gross stuff," "they didn't have really anything on or anything," "Mostly the chest area, but there were some that you could see the [genital area]").

Finally, Wilson asserts that the prosecutor referred to facts not in evidence when she argued that Wilson touched CS's breast. *See* First Amended Petition, p. 28. There was, however, evidence from which the jury could reasonably have concluded that Wilson touched CS's breast. *See* Testimony of CS, Trial Transcript, August 4, 2009, Exhibit 17, pp. 126-31 (ECF No. 17, pp. 127-32). This was not improper argument.

In short, this court finds that Wilson has not identified any improper argument on the part of the prosecutor, and certainly none that could have so infected Wilson's trial with unfairness as to make the resulting convictions a denial of due process. The Nevada Supreme Court's summary rejection of this claim was not contrary to, or an unreasonable application of Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 4.

Claim 5a

In Claim 5a, Wilson claims that his trial counsel was ineffective, in violation of his federal constitutional rights, with respect to her cross-examination of CS. First Amended Petition, pp. 29-30.

Wilson asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, pp. 9-13 (ECF No. 9-3, pp. 11-15). The state district court ruled as follows:

> Trial counsel was not ineffective in the cross-examination of [CS]. How to cross examine a witness is a strategic decision for counsel to make. Furthermore, Defendant cannot demonstrate that, but for counsel's errors, there is a reasonable probability that the outcome would have been different. Thus, Defendant's petition as to this ground is denied.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, p. 4 (ECF No. 19-8, p. 6). On the appeal in Wilson's state habeas action, the Nevada Supreme Court ruled as follows regarding this claim:

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> [A]ppellant claimed that trial counsel's cross-examination of the victim C.S. constituted ineffective assistance of counsel. Specifically, appellant claimed that trial counsel asking the victim about other incidences of touching was inappropriate cross-examination. Appellant failed to demonstrate that trial counsel was deficient. Trial counsel asked about these other incidents in order to demonstrate and later argue that the victim changed her story often. The other incidents were incidents that the victim told to the police and the grand jury but denied at trial. In addition, the victim added an incident to the story at trial that she had never told anyone before. Therefore, this was a tactical decision to undermine the testimony of the victim and is virtually unchallengeable absent extraordinary circumstances, *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant failed to demonstrate. Therefore, the district court did not err in denying this claim.

Order of Affirmance, Exhibit 48, pp. 4-5 (ECF No. 19-12, pp. 5-6).

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: the petitioner 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. A court considering a claim of ineffective assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Where a state court has adjudicated a claim of ineffective assistance of counsel, under *Strickland*, establishing that the decision was unreasonable under AEDPA is especially difficult. *See Richter*, 562 U.S. at 104-05. In *Richter*, the Supreme Court instructed:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a

> general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105; *see also Cheney*, 614 F.3d at 994-95 (acknowledging double deference required to state court adjudications of *Strickland* claims).

This court agrees with the analysis of the Nevada Supreme Court. Counsel's cross-examination of CS regarding allegations of touching by Wilson that she had made before, but not at trial, was plainly calculated to show that her story was not consistent. In this court's view, examining the record of the trial, it appears that this approach -- attempting to undermine the credibility of the two child victims -- was likely the only viable defense strategy available to counsel. Whether or not that strategy ultimately succeeded, counsel's performance, in choosing to pursue that strategy, certainly was not unreasonable.

Also, Wilson claims that his counsel was ineffective for cross-examining CS about the pornography that she testified she saw on the wall in the garage. *See* First Amended Petition, p. 29. Wilson asserts that "the pornography on Wilson's garage wall and cell phone are not elements of the crimes Wilson was charged with," and, therefore, counsel should not have highlighted those allegations. *See id.* This argument is meritless. The testimony of CS about Wilson showing her pornography was plainly relevant to the question of Wilson's intent in touching CS and AS as he did, and it was also relevant to the course of conduct that Wilson engaged in, and its effect on CS and AS, with regard to the charge of unlawful contact with a child. Wilson's counsel was not ineffective for cross-examining CS about the pornography she saw in the garage.

The Nevada Supreme Court's denial of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 5a.

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Claim 5b

In Claim 5b, Wilson claims that his trial counsel was ineffective, in violation of his federal constitutional rights, because she "failed to seek dismissal of all charges because Wilson did not "willfully and lewdly commit any lewd or lascivious act" pursuant to Nevada Revised Statute § 201.230." First Amended Petition, p. 30.

Wilson asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, pp. 2-3, 13-15 (ECF No. 19-3, pp. 4-5, 15-17). The state district court ruled as follows:

> Counsel was not ineffective for declining to move to dismiss the charges on the grounds Defendant's acts were not "willful." The question of Defendant's intent was a jury issue that was resolved against Defendant. Thus, any motion to dismiss the charges on the grounds Defendant's acts were not "willful" would have been futile and defense counsel was not ineffective in deciding not to file such. Defendant's claim is hereby denied.
>
> * * *
>
> To the extent Defendant complains that his acts with the victims were "playful" and not of a criminal nature, this was a matter for the jury to decide and the jury rejected Defendant's claim. The Nevada Supreme Court upheld the sufficiency of the evidence on appeal, thus, that ruling is the law of the case and precludes further review.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, pp. 4-5 (ECF No. 19-8, pp. 6-7). On the appeal in Wilson's state habeas action, the Nevada Supreme Court ruled as follows regarding this claim:

> [A]ppellant claimed that trial counsel was ineffective for failing to seek dismissal of all of the charges because appellant did not willfully and lewdly commit any lewd or lascivious act. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. On appeal, appellant argued that the touching that occurred in this case did not constitute a lewd or lascivious act. *See Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). To the extent that appellant is claiming that trial counsel did not seek dismissal on this basis or did not raise this argument on appeal, this claim is belied by the record. To the extent that appellant claims that trial counsel should have sought dismissal because he did not willfully and lewdly commit the act, appellant failed to demonstrate that this argument would have been successful because this court already determined that the acts were lewd and that he had the intent to commit the acts. *See id*. Therefore, the district court did not err in denying this claim.

Order of Affirmance, Exhibit 48, p. 5 (ECF No. 19-12, p. 6).

This claim fails because, as is discussed above with regard to Claim 1, there was ample evidence presented at trial to support Wilson's convictions for lewdness with a child. A motion to dismiss those charges would have been unsuccessful, and Wilson's counsel was not ineffective for not making such a motion.

The Nevada Supreme Court's denial of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 5b.

Claim 5c

In Claim 5c, Wilson claims that his trial counsel was ineffective, in violation of his federal constitutional rights, because she "failed to object to multiple instances of prosecutorial misconduct during closing arguments." First Amended Petition, pp. 30-31.

Wilson asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, p. 16 (ECF No. 19-3, p. 18). The state district court ruled as follows:

> Trial counsel was not ineffective for not objecting to alleged prosecutorial misconduct. The Supreme Court of Nevada summarily rejected Defendant's claims of prosecutorial misconduct on appeal. Order of Affirmance, December 9, 2011, p. 1, n.1. Thus, any objections to alleged misconduct would have been futile. Additionally, whether to object to alleged prosecutorial misconduct during closing arguments is a virtually unchallengeable strategic decision of counsel. Finally, Defendant cannot show that, but for counsel's alleged error in failing to object, there is a reasonable probability that the result of his trial would have been different. Thus, Defendant's petition as to this ground is denied.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, p. 4 (ECF No. 19-8, p. 6). On the appeal in Wilson's state habeas action, the Nevada Supreme Court ruled as follows regarding this claim:

> [A]ppellant claimed that trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct during closing arguments. Specifically, he claimed that the State improperly vouched for the witnesses, improperly referenced appellant's guilt, misrepresented the law, inflamed the jury, and argued facts not in evidence. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced because appellant failed to demonstrate that these were misconduct that trial counsel should have objected to, *see Epps v. State*, 901 F.2d 1481 (8th Cir. 1990) (explaining that prosecutor's comments that were not objectionable could not

> be a basis for an ineffective-assistance claim based on counsel's failure to object); *Broussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that decision whether to object is a strategic one and "must take into account that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"), or that had trial counsel objected, the objection would have resulted in a different outcome at trial. The record demonstrates that the State was simply pointing out the lack of motive for the victims to fabricate, which did not rise to vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004), the statements were reasonable inferences based on the evidence and were proper argument to the jury, and the discussion of the pornography was proper as testimony regarding those pictures was in evidence. Therefore, the district court did not err in denying this claim.

Order of Affirmance, Exhibit 48, pp. 5-6 (ECF No. 19-12, pp. 6-7).

This claim of ineffective assistance of counsel is without merit because, as is discussed above with regard to Claim 4, Wilson points to no objectionable arguments made by the prosecution. Wilson's counsel was not ineffective for refraining from asserting meritless objections.

The Nevada Supreme Court's denial of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 5c.

Claim 6a

In Claim 6a, Wilson claims that his appellate counsel was ineffective, in violation of his federal constitutional rights, because he "failed to include in Wilson's direct appeal the fact that the State of Nevada did not prove [with respect to] each element of the crime of lewdness with a minor that Wilson "willfully and lewdly committed a lewd or lascivious act." First Amended Petition, p. 31.

Wilson asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, pp. 23-24 (ECF No. 19-3, pp. 25-26). The state district court ruled as follows:

> Appellate counsel was not ineffective in not raising claims concerning Defendant's intent. What issues to raise on direct appeal is a strategic decision. The question of Defendant's intent was for the jury and it decided the issue against Defendant, which decision was affirmed by the district court in denying Defendant's Motion for Acquittal. Thus to raise the issue again on direct appeal would have been a weaker argument and was appropriately winnowed out. Furthermore, Defendant

> cannot show a reasonable probability that the argument would have succeeded if raised on direct appeal, and so cannot demonstrate prejudice.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, p. 5 (ECF No. 19-8, p. 7). On the appeal in Wilson's state habeas action, the Nevada Supreme Court ruled as follows regarding this claim:

> [A]ppellant claimed that appellate counsel was ineffective for failing to argue that the State failed to prove that appellant willfully and lewdly committed a lewd and lascivious act. Specifically, he claimed that the victims did not tell him that they did not like that type of touch and, therefore, he had no idea that his conduct was inappropriate. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. As stated above, this court concluded on appeal that appellant had the intent to, and committed, a lewd and lascivious act. *Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). Appellant failed to show that the victim's failure to inform him they did not like to be touched would have had a reasonable likelihood of success on appeal. Further, we note that the [victims] testified that they moved away from him when he would touch them and that appellant threatened them to keep them quiet. Therefore, the district court did not err in denying this claim.

Order of Affirmance, Exhibit 48, p. 7 (ECF No. 19-12, p. 8).

This claim fails because, as is discussed above with regard to Claim 1, there was ample evidence presented at trial to support the jury's findings with respect to all elements of the crimes of lewdness with a child, including the mens rea element. Wilson's counsel was not ineffective for not making an argument regarding the sufficiency of the evidence in that regard on appeal.

The Nevada Supreme Court's denial of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 6a.

Claim 6b

In Claim 6b, Wilson claims that his appellate counsel was ineffective, in violation of his federal constitutional rights, with respect to his presentation of Wilson's petition for rehearing. First Amended Petition, pp. 32-33.

Wilson asserted this claim in his state habeas action. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 39, pp. 25-26 (ECF No. 19-3, pp. 27-28). The state district court ruled:

> Appellate counsel was not ineffective in declining to raise certain issues in the Petition for Rehearing by the Nevada Supreme Court. What issues to include in a Petition for Rehearing is a strategic decision of appellate counsel. The claims Defendant alleges should have been included in appellate counsel's Petition for Rehearing were summarily rejected by the Nevada Supreme Court on direct appeal. Order of Affirmance, December 9, 2011, p. 1, n.1. Thus, it was a reasonable decision of appellate counsel to winnow out weaker arguments and exclude them from the Petition for Rehearing. Further, Defendant cannot show a reasonable probability that the arguments would have succeeded if raised for rehearing, and so cannot demonstrate prejudice.

Findings of Fact, Conclusions of Law and Order, Exhibit 44, p. 5 (ECF No. 19-8, p. 7). On the appeal in Wilson's state habeas action, the Nevada Supreme Court ruled as follows regarding this claim:

> [A]ppellant claimed that appellate counsel was ineffective for failing to reargue the claims summarily denied in the order of affirmance and for failing to argue that appellant did not commit a willful and lewd act. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. Appellant failed to provide any specific argument as to the summarily denied claims and how rearguing them would be successful on rehearing. *See* NRAP 40(c)(1); *Hargrave v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, as stated above, appellant failed to demonstrate that argument regarding a willful and lewd act would have been successful on rehearing. *See* NRAP 40(c)(1) and (2). Therefore, the district court did not err in denying this claim....

Order of Affirmance, Exhibit 48, p. 8 (ECF No. 19-12, p. 9).

Here again, with respect to Wilson's argument that there was insufficient evidence at trial to support his convictions for the crimes of lewdness with a child, this claim of ineffective assistance of appellate counsel fails because, as is discussed above with regard to Claim 1, there was ample evidence presented at trial to support the jury's findings with respect to all the elements of those crimes. With regard to Wilson's other assertions that his counsel was ineffective concerning the presentation of the petition for rehearing, Wilson's claims are wholly pro forma and unsupported. *See* First Amended Petition, pp. 32-33. Wilson has not shown that his counsel was ineffective with regard to his presentation of the petition for rehearing in the Nevada Supreme Court.

The Nevada Supreme Court's denial of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other Supreme Court precedent. The court will deny Wilson habeas corpus relief with respect to Claim 6b.

Certificate of Appealability

The standard for issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. §2253(c) as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The 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); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

The court has considered Wilson's claims with respect to whether they satisfy the standard for issuance of a certificate of appealability, and the court determines that none of them do. The court will deny Wilson a certificate of appealability.

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IT IS THEREFORE ORDERED that petitioner's First Amended Petition for Writ of Habeas Corpus (ECF No. 14) is **DENIED**.

IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court shall **ENTER JUDGMENT ACCORDINGLY.**

Dated this January 4, 2017.

UNITED STATES DISTRICT JUDGE

APP. 035

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

MICHAEL DUANE WILSON,

Petitioner,

V.

ROBERT LEGRAND, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **3:14-cv-00071-RCJ-VPC**

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner's First Amended Petition for Writ of habeas corpus ECF No. 14 is DENIED.

IT IS FURTHER ORDERED that Petitioner is denied a certificate of appealability.

January 4, 2017

DEBRA K. KEMPI
Clerk

/s/ K. Walker
Deputy Clerk

APP. 036

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL DUANE WILSON,

Petitioner,

vs.

ROBERT LeGRAND, *et al.*,

Respondents.

_____/

3:14-cv-00071-RCJ-VPC

ORDER

In this habeas corpus action, brought by Nevada prisoner Michael Duane Wilson, the court ruled on the respondents' motion to dismiss in an order entered on November 9, 2015 (ECF No. 25), granting the motion to dismiss in part and denying it in part. The court determined that three claims in Wilson's first amended habeas petition -- Claims 1b, 1c and 3 -- are unexhausted in state court. *See* Order entered November 9, 2015 (ECF No. 25). With regard to those unexhausted claims, the court gave Wilson thirty days to make an election to either abandon the unexhausted claims or move for a stay of this action so that he may exhaust those claims in state court. *See id*. The court warned that if Wilson did not, within the time allowed, file a notice of abandonment of Claims 1b, 1c and 3, or a motion for a stay to allow exhaustion of those claims in state court, Wilson's entire first amended habeas petition would be dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). *See id.*

On December 10, 2015, Wilson filed a motion for reconsideration (ECF No. 26), seeking

reconsideration of the November 9, 2015 order. Respondents did not respond to the motion for reconsideration.

The court has inherent power to entertain motions for reconsideration of interlocutory orders. *See Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) ("[I]nterlocutory orders ... are subject to modification by the district judge at any time prior to final judgment."); *see also* Fed.R.Civ.P. 54(b). The standard governing reconsideration of an interlocutory order is the same as the standards governing motions to alter or amend final judgments under Federal Rule of Civil Procedure 59(e) or 60(b). Motions for reconsideration are disfavored, and "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1254 (9th Cir. 1999) (per curiam) (internal quotation and citation omitted). Furthermore, "[a] motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

In his motion for reconsideration, Wilson argues that the court erred finding Claims 1b and 1c to be unexhausted in state court. *See* Motion to Reconsider (ECF No. 26), pp. 4, 7-9, 12. In Claim 1b, Wilson claims that his federal constitutional rights were violated because "[t]he trial court erroneously denied Wilson's pretrial motions challenging jurisdiction and requesting severance of the counts based on insufficiency of the evidence." First Amended Petition (ECF No. 14), p. 16. In Claim 1c, Wilson claims that "[t]he trial court applied an incorrect standard of review and erroneously denied Wilson's motion for judgment of acquittal or new trial." *Id*. at 18. In the November 9, 2015 order, the court ruled:

> To the extent that Claims 1b and 1c set forth separate claims for relief -- that is, separate from the more general insufficiency of the evidence claim asserted as Claim 1a -- they are unexhausted in state court. In state court, on his direct appeal, Wilson did not cast these as claims of violations of his federal constitutional rights. *See* Appellant's Opening Brief, Exhibit 29, pp. 18-24, 42-45; Appellant's Reply Brief, Exhibit 31, pp. 4-7, 15-17.

Order entered November 9, 2015 (ECF No. 25), p. 5. Wilson argues in his motion for reconsideration that he exhausted Claims 1b and 1c by citing federal authority in support of those claims in his opening brief before the Nevada Supreme Court on his direct appeal. The court has revisited the question of exhaustion of Claims 1b and 1c, with Wilson's new arguments in mind, and the court has reexamined Wilson's opening brief before the Nevada Supreme Court in that regard. *See* Appellant's Opening Brief, Exhibit 29. (The exhibits referred to in this order were filed by Wilson, and are located in the record at ECF Nos. 15, 16, 17, 18 and 19.) The court remains of the view that Claims 1b and 1c -- to the extent they set forth federal constitutional claims separate from the insufficiency of evidence claim in Claim 1a -- were not presented to the Nevada Supreme Court. Claims 1b and 1c are unexhausted in state court. Claim 1a, on the other hand, sets forth a claim that there was insufficient evidence at trial to support Wilson's convictions, and that claim is exhausted in state court.

Wilson also argues in his motion for reconsideration that the court erred in finding Claim 3 to be unexhausted in state court. *See* Motion to Reconsider, pp. 5, 11-12. In Claim 3, Wilson claims that his "constitutional rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments were violated when A.S. and C.S. were allowed to testify." First Amended Petition, p. 23. In its November 9, 2015 order, the court ruled that "Wilson did not make this claim, based on his federal constitutional rights, in state court." Order entered November 9, 2015, p. 5. The court explained that, in his briefing before the Nevada Supreme Court, Wilson's argument that A.S. and C.S. were incompetent to testify was made purely as a matter of state law. *Id*. at 5-7. The court further explained that Wilson's citations to federal authorities with respect to this argument, in his briefs before the Nevada Supreme Court, were not such as to notify that court that he intended to raise a federal constitutional claim. *See id*. In his motion for reconsideration, Wilson argues that Claim 3 should be considered exhausted because, in his opening brief before the Nevada Supreme Court, Wilson incorporated into his federal constitutional claim that there was insufficient evidence to

support his convictions his argument that A.S. and C.S. were incompetent to testify. *See* Motion to Reconsider, pp. 5, 11-12. The court finds this argument to be meritless. Wilson's incorporation of his argument that A.S. and C.S. were incompetent to testify into his insufficiency of evidence claim did not serve to notify the Nevada Supreme Court that he intended to raise a separate claim that his federal constitutional rights were violated because A.S. and C.S. were allowed to testify. Claim 3 is unexhausted.

Finally, Wilson argues in his motion for reconsideration that if the court determines that he did not present Claims 1b, 1c and 3, as federal claims, to the state courts, he no longer has any available state-court remedies with respect to those claims, and this court should therefore treat those claims as exhausted but procedurally defaulted, and should allow him an opportunity to attempt to show cause and prejudice to overcome the procedural default. *See* Motion to Reconsider, pp. 5-7. Wilson's argument in this regard, in his opposition to the motion to dismiss, was as follows:

> Even a claim never submitted to a state's highest court is exhausted, but procedurally defaulted, "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Reese v. Bladwin*, 282 F.3d 1184, 1190 (9th Cir. 2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)), *overruled on other grounds by Baldwin v. Reese*, 541 U.S. 27 (2004); *accord Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("Anticipatory procedural bar occurs when the federal courts apply procedural bars to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it."); *cf. Phillips v. Woodford*, 267 F.3d 966, 974 (9th Cir. 2001) (affirming district court's determination that claims not presented to the state's highest court were nonetheless exhausted because "a return to state court would be futile"); *see also Valerio v. Crawford*, 306 F.3d 742, 769 (9th Cir. 2002) (en banc) (opining that it is possible one of petitioner Valerio's claims is exhausted since it will likely be time barred if Valerio returns to state court); *Engle v. Issac*, 456 U.S. 107, 125 n.28 (1982) (explaining the exhaustion "requirement ... refers only to remedies still available at the time of the federal petition"). This has been the law of this Circuit for a number of years. *See*, *e.g.*, *Batchelor v. Cupp*, 693 F.2d 859, 862-64 (9th Cir. 1982). It is the law of the other federal courts of appeal. *See*, *e.g.*, *Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001). The principle is also codified in the statute governing federal state conviction habeas litigation. *See* 28 U.S.C. § 2254(b)(1)(B)(i) (2012).
>
> Hence, even if this Court finds that Wilson failed to properly federalize some of his claims as the State suggests, the claims are procedurally defaulted. If this Court finds the claims defaulted, Wilson formally requests the right to brief whether he can establish cause and prejudice to excuse the defaults.

Opposition to Motion to Dismiss (ECF No. 23), pp. 4-5. And, in his motion for reconsideration, Wilson argues:

> Wilson does not need to abandon any of these claims. If this Court finds that Wilson did not adequately federalize the grounds in dispute, the analysis then shifts to whether Wilson can demonstrate cause and prejudice to overcome the anticipated defaults. Wilson requests the right to brief cause and prejudice should this Court continue to find Wilson did not adequately federalize his claims.

Motion to Reconsider, p. 7.

Under Nevada law, the procedural bars applicable to untimely and successive state habeas petitions may be overcome by a showing of cause and prejudice. *See* NRS 34.726(1) (statute of limitations), 34.810(3) (successive petitions). Wilson has repeatedly stated that he wishes to assert in this court an argument that he can show cause and prejudice regarding his procedural defaults. Wilson does not explain why that cause and prejudice argument would necessarily be unavailing in state court. Therefore, Wilson has not shown that he is without an available remedy in state court. Claims 1b, 1c and 3 are unexhausted in state court.

The court will, therefore, deny Wilson's motion for reconsideration, and will set a new deadline for Wilson to either abandon his unexhausted claims are move for a stay of this action pending the exhaustion of his claims in state court.

IT IS THEREFORE ORDERED that petitioner's Motion to Reconsider Order on Exhaustion (ECF No. 26) is **DENIED**.

IT IS FURTHER ORDERED that petitioner shall have **20 days**, from date of entry of this order, to file a notice of abandonment of Claims 1b, 1c and 3, or a motion for a stay of this action to allow him to exhaust those claims in state court, as described in the order entered November 9, 2015 (ECF No. 25).

IT IS FURTHER ORDERED that, if petitioner files a notice of abandonment of Claims 1b,

APP. 041

1c and 3, respondents shall then have 90 days to file an answer, responding to petitioner's remaining claims. After respondents file an answer, petitioner shall have 60 days to file a reply.

IT IS FURTHER ORDERED that, if petitioner files a motion for a stay to allow exhaustion of Claims 1b, 1c and 3 in state court, respondents shall thereafter have 30 days to file a response to that motion, and petitioner shall thereafter have 20 days to file a reply.

IT IS FURTHER ORDERED that, if petitioner does not, within the time allowed, file a notice of abandonment of Claims 1b, 1c and 3, or a motion for a stay to allow exhaustion of those claims in state court, petitioner's entire first amended habeas petition will be dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

DATED: This 12th day of April, 2016.

UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62805

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition filed on July 16, 2012, appellant raised several claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012,

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that trial counsel was ineffective for failing to file a motion for rehearing or reconsideration when the district court denied his motion for judgment of acquittal. Specifically, appellant claimed that trial counsel should have argued that the district court applied the wrong standard when reviewing this claim. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellate counsel raised this claim on appeal and this court concluded that the claim lacked merit. *Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to defend him against administrative collateral estoppel and double jeopardy. Specifically, appellant claims that trial counsel should have filed a motion to dismiss arguing that the State violated his double jeopardy rights because it sought an indictment after being unsuccessful at his preliminary hearing. Further, he argues that the State should have been estopped from pursuing the indictment. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. While trial counsel did challenge the State's seeking of the indictment in a motion to dismiss, trial counsel did not argue double jeopardy or estoppel. However, appellant failed to demonstrate that a claim of double jeopardy or estoppel would have been successful. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding that counsel is not deficient for

failing to make futile motions). NRS 178.562(2) specifically states that "the discharge of a person accused upon preliminary examination is a bar to another complaint against the person for the same offense, but does not bar the finding of an indictment or filing of an information." Further, double jeopardy does not attach until a jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 34-35 (1978). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to request a lesser-included offense or an alternative offense of battery. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Battery is not a lesser-included offense of lewdness with a minor under the age of 14. *See* NRS 200.481; NRS 201.230; *Smith v. State*, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (defining lesser-included offense). Further, appellant was not entitled to an instruction on a lesser-related offense. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss arguing that his speedy trial rights were violated. Appellant failed to demonstrate that trial counsel was deficient. According to a hearing held on December 2, 2008, trial counsel stated that appellant had waived his speedy trial rights because a writ petition was filed. It appears that the petition may have been filed in a separate but related case, but counsel and the district court believed that the waiver was for both cases. Therefore, because appellant had waived, a motion to dismiss based on a speedy trial violation would have been futile. *Donovan*,

94 Nev. at 675, 584 P.2d at 711. As such, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to move for the dismissal of the criminal complaint in justice court for lack of jurisdiction. Specifically, appellant claimed that the justice court lacked jurisdiction because appellant was charged with felonies and the justice court only has jurisdiction over misdemeanors. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. The justice court has jurisdiction to conduct a preliminary hearing on felony charges and bind a defendant over for trial in the district court. *See* NRS 171.196 (providing for a preliminary examination in the justice court); NRS 171.206 (providing that the magistrate shall bind a defendant over to the district court if there is probable cause to believe an offense has been committed and the defendant has committed it). Thus, a motion to dismiss on this basis would have been futile. Counsel cannot be deemed ineffective for failing to file a futile motion. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel's cross-examination of the victim C.S. constituted ineffective assistance of counsel. Specifically, appellant claimed that trial counsel asking the victim about other incidences of touching was inappropriate cross-examination. Appellant failed to demonstrate that trial counsel was deficient. Trial counsel asked about these other incidents in order to demonstrate and later argue that the victim changed her story often. The other incidents were incidents that the victim told to the police and the grand jury but denied at trial. In addition, the victim added an incident to the story at

trial that she had never told anyone before. Therefore, this was a tactical decision to undermine the testimony of the victim and is virtually unchallengeable absent extraordinary circumstances, *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant failed to demonstrate. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to seek dismissal of all of the charges because appellant did not willfully and lewdly commit any lewd or lascivious act. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. On appeal, appellant argued that the touching that occurred in this case did not constitute a lewd or lascivious act. This court concluded that the touching did constitute a lewd or lascivious act. *See Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). To the extent that appellant is claiming that trial counsel did not seek dismissal on this basis or did not raise this argument on appeal, this claim is belied by the record. To the extent that appellant claims that trial counsel should have sought dismissal because he did not willfully and lewdly commit the act, appellant failed to demonstrate that this argument would have been successful because this court already determined that the acts were lewd and that he had the intent to commit the acts. *See id.* Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct during closing arguments. Specifically, he claimed that the State improperly vouched for the witnesses, improperly referenced appellant's guilt, misrepresented the law, inflamed the jury, and argued facts not in

evidence. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced because appellant failed to demonstrate that these were misconduct that trial counsel should have objected to, *see Epps v. State*, 901 F.2d 1481 (8th Cir. 1990) (explaining that prosecutor's comments that were not objectionable could not be a basis for an ineffective-assistance claim based on counsel's failure to object); *Broussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that decision whether to object is a strategic one and "must take into account that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"), or that had trial counsel objected, the objection would have resulted in a different outcome at trial. The record demonstrates that the State was simply pointing out the lack of motive for the victims to fabricate, which did not rise to vouching, *see Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004), the statements were reasonable inferences based on the evidence and were proper argument to the jury, and the discussion of the pornography was proper as testimony regarding those pictures was in evidence. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that the cumulative errors of trial counsel required reversal of his conviction. Because appellant failed to demonstrate any error, we conclude that the district court did not err in denying this claim.

Next, appellant raised three claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability

of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford*, 105 Nev. at 853, 784 P.2d at 953.

First, appellant claimed that appellate counsel was ineffective for failing to argue that the State failed to prove that appellant willfully and lewdly committed a lewd and lascivious act. Specifically, he claimed that the victims did not tell him that they did not like that type of touch and, therefore, he had no idea that his conduct was inappropriate. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. As stated above, this court concluded on appeal that appellant had the intent to, and committed, a lewd and lascivious act. *Wilson v. State*, Docket No. 54814 (Order of Affirmance, December 9, 2011). Appellant failed to show that the victim's failure to inform him they did not like to be touched would have had a reasonable likelihood of success on appeal. Further, we note that the victim's testified that they moved away from him when he would touch them and that appellant threatened them to keep them quiet. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel should have raised his speedy trial claim on appeal. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. As stated above, appellant waived his speedy trial rights and, therefore, this claim did not have a reasonable likelihood of success on appeal had appellate

counsel raised it. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective for failing to reargue the claims summarily denied in the order of affirmance and for failing to argue that appellant did not commit a willful and lewd act. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. Appellant failed to provide any specific argument as to the summarily denied claims and how rearguing them would be successful on rehearing. *See* NRAP 40(c)(1); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, as stated above, appellant failed to demonstrate that argument regarding a willful and lewd act would have been successful on rehearing. *See* NRAP 40(c)(1) and (2). Therefore, the district court did not err in denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Valerie Adair, District Judge
Michael D. Wilson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APP. 051

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DUWAIN WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54814

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of eight counts of lewdness with a child under the age of 14 years and one count of unlawful contact with a child. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Michael Wilson was convicted of eight counts of lewdness with a minor under the age of 14 years, and one count of unlawful contact with a child. On appeal, Wilson raises numerous arguments, only one of which we address in detail in this order.[1]

Wilson argues that the State presented insufficient evidence to support several of the convictions for lewdness with a child under the age of 14 years. In particular, he claims that the State failed to prove that

[1]Wilson argues that: (1) the district court erred when it denied his motion for a judgment of acquittal or new trial because it applied the wrong standard of review, (2) his conviction violates the Double Jeopardy Clause, (3) A.S. and C.S. were not competent to testify, (4) the district court erred when it provided incorrect jury instructions, (5) the State committed prosecutorial misconduct during closing arguments, and (6) the district court erred when it denied his pretrial motions challenging the court's jurisdiction and seeking severance. After thorough review, we conclude that these contentions are without merit.

the acts were lewd or lascivious because the conduct was not sexual and a nonsexual act is not a "lewd or lascivious" act under NRS 201.230.

Based on the evidence presented in this case, we conclude that a rational jury could find beyond a reasonable doubt that Wilson's actions were lewd and lascivious with the necessary sexual intent. We therefore affirm the judgment of conviction.

Discussion

Wilson argues that the State presented insufficient evidence because it failed to prove that his acts with the children were sexual, and nonsexual acts cannot be considered lewd or lascivious for purposes of NRS 201.230. Although we agree that the statute requires a lewd or lascivious act and that a lewd act must be accompanied by the necessary sexual intent, we conclude that a rational juror could find beyond a reasonable doubt that Wilson's conduct was lewd or lascivious, and he acted with the necessary sexual intent.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It is for the jury to assess the witnesses' credibility and determine the weight to give their testimony, and the jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict. McNair, 108 Nev. at 56, 825 P.2d at 573; Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Wilson's sufficiency-of-the-evidence challenge raises two questions: (1) whether NRS 201.230 requires the prosecution to prove both

sexual motivation and that a lewd or lascivious act occurred, and (2) what constitutes a lewd or lascivious act. We address these questions in turn.

Statutory interpretation is a question of law that we review de novo. Sims v. Dist. Ct., 125 Nev. 126, 129-30, 206 P.3d 980, 982 (2009). When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction. Seput v. Lacayo, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). When interpreting statutes, the primary consideration is the Legislature's intent. Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). This court, however, will not render any part of the statute meaningless and will not read the statute's language so as to produce absurd or unreasonable results. Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

NRS 201.230(1) defines the crime of lewdness with a minor under 14 years:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

(Emphasis added.) The material elements of the crime of lewdness with a minor are (1) a lewd or lascivious act, (2) upon or with the child's body or

any part of the child's body,[2] (3) the child's age, and (4) the intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. NRS 201.230(1); Gay v. Sheriff, 89 Nev. 118, 119 n.1, 508 P.2d 1, 2 n.1 (1973); see also 43 C.J.S. Infants § 120 (2004).

The statute plainly and unambiguously prohibits only lewd or lascivious acts with a minor under the age of 14 years. A contrary reading of the statute would render the modifier "lewd or lascivious" meaningless so that any act with the requisite sexual intent would be criminal. That is simply not the social harm that NRS 201.230 seeks to prohibit. If it were, the Legislature easily could have proscribed that any act upon or with the body of a child with sexual intent is the crime of lewdness with a minor. It did not do so. In Berry v. State, 125 Nev. 265, 282, 212 P.3d 1085, 1097 (2009), abrogated on other grounds by State v. Castaneda, 126 Nev. ___, ___ n.1, 245 P.3d 550, 553 n.1 (2010), we concluded that the term "lewd" was sufficiently definite to give notice of the prohibited conduct such that it was not unconstitutionally vague. Berry, 125 Nev. at 282, 212 P.3d at 1097; see also Summers v. Sheriff, 90 Nev. 180, 521 P.2d 1228 (1974). We noted that

> [m]odern authorities define "lewd" as pertaining to sexual conduct that is "[o]bscene or indecent; tending to moral impurity or wantonness," Black's

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[2]This court has held that the statute does not require that the accused have physical contact with the child; instead, "[a]n act committed 'with' the minor's body indicates that the minor's body is the object of attention," and thus, "the perpetrator need only cause the child to perform a lewd act upon him or herself to satisfy the elements set forth in the statute." State v. Catanio, 120 Nev. 1030, 1033-34, 102 P.3d 588, 591 (2004).

> Law Dictionary 927 (8th ed. 2004), "evil, wicked" or "sexually unchaste or licentious," Merriam-Webster's Collegiate Dictionary 715 (11th ed. 2003), and "[p]reoccupied with sex and sexual desire; lustful," The American Heritage Dictionary of the English Language 1035 (3d ed. 1996).

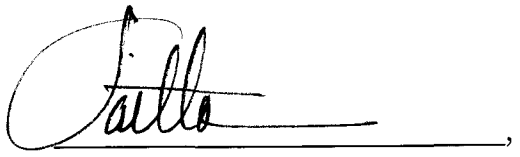
Berry, 125 Nev. at 281, 212 P.3d at 1096 (alterations in original).

We conclude that the State presented sufficient evidence that Wilson's conduct was lewd or lascivious, and was sexually motivated as required by NRS 201.230(1). The charges against Wilson involved two young girls who are sisters, A.S. and C.S. Wilson lived next door to the girls with his girlfriend Tonja, her teenage daughter J.F., and other family members. From February 2007 to early 2008, J.F. and Tonja babysat A.S. and C.S. while their mother worked the night shift as a cabdriver. Occasionally, the two girls would sleep at Wilson's home while their mother worked. A.S. and C.S. were 8 and 10 years old, respectively, when this childcare arrangement began.

During that time, Wilson at various times touched A.S.'s genitals, breasts, buttocks, and the "roof" of her buttocks. Wilson also showed her pornography on his cell phone and on the walls of his garage, though A.S. explained that he did not touch her during those incidents. Similarly, Wilson touched C.S.'s buttocks, clavicle area, sides of her breasts, and thighs. He also touched her on her shoulders, lower back, and sides of her body while showing her pornography. Additionally, he told both girls that he would hurt their mother if they told anyone about the touchings. Based on this evidence, we conclude that a rational juror could find beyond a reasonable doubt that Wilson committed eight counts of lewdness with a minor under the age of 14 years.

Therefore, we affirm the district court's judgment of conviction.[3]

It is so ORDERED.



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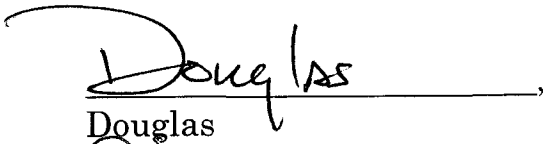

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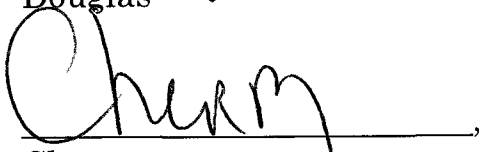
Douglas



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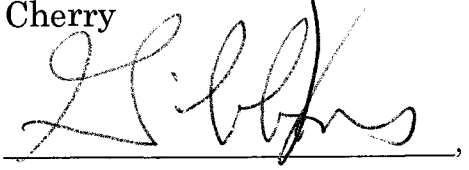
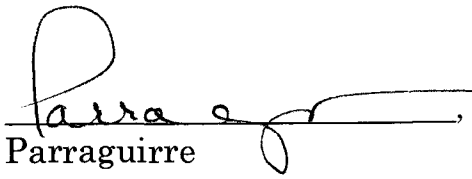
Cherry



_____, J.
Gibbons



_____, J.
Parraguirre

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[3]We note that the district court did not use the correct standard in deciding the motion for a new trial. Wilson sought a new trial based on conflicting evidence. The standard enunciated in Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996), requires the district court to conduct an independent evaluation of the conflicting evidence. Here, the district court concluded that it must defer to the jury rather than independently evaluate and resolve any conflicting evidence for purposes of the motion for a new trial. Though the district court was not obligated to order a new trial even if it disagreed with the jury, it may not abrogate its duty to independently evaluate the evidence and resolve conflicting evidence of guilt by deferring to the jury. We nevertheless conclude that the error was harmless beyond a reasonable doubt.

stricken per order filed 5-9-12

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

PICKERING, J., with whom HARDESTY, J. agrees, concurring:

While I concur in the result, I respectfully disagree with the majority's statutory analysis, in particular, its statements that NRS 201.230(1) "plainly and unambiguously prohibits only lewd or lascivious acts with a minor under the age of 14 years"; that "[a] contrary reading of the statute would render the modifier 'lewd or lascivious' meaningless so that any act with the requisite sexual intent would be criminal [which] is simply not the social harm that NRS 201.230 seeks to prohibit"; and that "the Legislature easily could have proscribed . . . any act upon or with the body of a child with sexual intent [but] did not do so."

Nevada's lewdness with a child statute is almost identical to California's. Compare NRS 201.230(1) with Cal. Penal Code § 288. Although it does not cite the decision, the majority's element-based statutory analysis appears to be drawn from People v. Wallace, 14 Cal. Rptr. 2d 67 (Ct. App. 1992), which a unanimous California Supreme Court overruled in People v. Martinez, 903 P.2d 1037, 1045-46 (Cal. 1995) (rejecting Wallace's statutory analysis as "hyperliteral" and unsound). Martinez explains why we should not introduce the Wallace formulation into Nevada law, even in an unpublished disposition.

The existence of a "lewd or lascivious act" cannot be determined separate and apart from the perpetrator's intent:

> It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and, groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective

> purposes of [the lewdness with a child statute]. As the vast majority of courts have long recognized, the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances. . . . [A]ny other construction could exempt a potentially broad range of sexually motivated and harmful contact from the statute's reach. In light of the statutory purpose, we cannot conceive that the Legislature intended such a result.

Id. at 1046 (emphasis added). Parsing NRS 201.230(1) in such a way as to require an inherently lewd act, separate and apart from the sexual intent that motivates the act, "is not supported by [the statute's] language, context, purpose, and long-settled construction." It also runs counter "to the overwhelming weight of authority," Martinez, 903 P.2d at 1041, including prior Nevada case law. See State v. Catanio, 120 Nev. 1030, 102 P.3d 588 (2004) (cataloguing the many mainstream Nevada cases in this area and citing with approval People v. Austin, 168 Cal. Rptr. 401 (Ct. App. 1980), a case Wallace disapproved, 14 Cal. Rptr. 2d at 71-74, but Martinez specifically endorsed, Martinez, 903 P.2d at 1044 in overruling Wallace).

Although old enough to be called "venerable," Martinez, 903 P.2d at 1041, the wording used in NRS 201.230(1) does not support the "plain meaning" the majority ascribes to it. By its terms, the statute applies to any contact "upon or with the [victim's] body, or any part or member thereof," so long as the requisite sexual motivation and intent are shown. Martinez, 903 P.2d at 1041 (alteration in original) (emphasis added) (citations and quotations omitted). "When contact with or penetration of a specific body part or cavity is required, or when use of a particular appendage or instrument is necessary to commit the offense,

this fact has been made eminently clear" by the Legislature. Id. Thus, "[w]e can only assume that the absence of similar language in [the lewdness with a child statute] was deliberate, and that the statute was intended to include sexually motivated conduct not made criminal elsewhere in the scheme." Id. See also NRS 201.230(1) (excluding sexual assault from the crime of lewdness with a child; NRS 200.366 defines sexual assault in terms of "sexual penetration," which NRS 200.364(4) in turn defines in terms of intrusion into "the genital or anal openings of the body of another").

"The Legislature's decision to cast a prohibited lewd act in such general terms is consistent with the basic purpose of the statute," which "recognizes that children are uniquely susceptible to [sexual] abuse as a result of their dependence upon adults, smaller size, and relative naiveté," that "young victims suffer profound harm whenever they are perceived and used as objects of sexual desire," and that "such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned." Martinez, 903 P.2d at 1042 (citations and quotations omitted).

For these reasons, I would not endorse, even in dictum, the argument that no crime occurs unless the victim was touched in an inherently lewd manner. I would instead follow Martinez and the weight of authority elsewhere that holds that any touching of an underage child is

"lewd and lascivious" within the meaning of NRS 201.230(1) when sexual arousal or gratification is its goal.

Pickering, J.

Pickering

I concur:

Hardesty, J.

Hardesty

JOC

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL DUWAIN WILSON
aka Michael Duane Wilson
#1214362

Defendant.

CASE NO. C244838

DEPT. NO. XXI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 2 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 3 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 5 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 6 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 7 - UNLAWFUL CONTACT WITH CHILD (Gross Misdemeanor) in

violation of NRS 207.260; COUNT 8 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 9 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 10 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 200.364, 200.366; and COUNT 11 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNTS 1, 2, 3, 4, 6, 8, 9, 11 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230, and COUNT 7 – UNLAWFUL CONTACT WITH CHILD (Gross Misdemeanor) in violation of NRS 207.260; thereafter, on the 22nd day of September, 2009, the Defendant was present in court for sentencing with his counsel, TIERRA JONES, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, and to PAY $1,726.40 RESTITUTION, the Defendant is SENTENCED as follows: AS TO COUNT 1 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC); AS TO COUNT 2 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 2 to run CONCURRENT with COUNT 1; AS TO COUNT 3 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 3 to run CONCURRENT with COUNT 2; AS TO COUNT 4 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT

4 to run CONCURRENT with COUNT 3; AS TO COUNT 6 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 6 to run CONCURRENT with COUNT 4; AS TO COUNT 7 – TWELVE (12) MONTHS in the Clark County Detention Center (CCDC), COUNT 7 to run CONCURRENT with COUNT 6; AS TO COUNT 8 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 8 to run CONCURRENT with COUNT 7; AS TO COUNT 9 – LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 9 to run CONCURRENT with COUNT 8; and AS TO COUNT 11 - LIFE with a MINIMUM parole eligibility of TEN (10) YEARS in the Nevada Department of Corrections (NDC), COUNT 11 to run CONCURRENT with COUNT 9; with FIVE HUNDRED TWENTY-29 (529) DAYS Credit for Time Served. Defendant found NOT GUILTY on COUNTS 5 and 10.

DATED this 19th day of September, 2009.

VALERIE ADAIR
DISTRICT JUDGE