No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

DONALD GLEN ESTES, Petitioner,

v.

RENE BAKER, WARDEN; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RENE L. VALLADARES
Federal Public Defender of Nevada
JASON F. CARR
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Jason_Carr@fd.org

Counsel for Petitioner Estes

Petitioner Donald Glenn Estes 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 federal district court for the District of Nevada and in the United States Court of Appeals for the Ninth Circuit. Counsel for Estes was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 19th Day of February 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

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

JASON F. CARR
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Counsel for Petitioner **Estes**

No. _____

OCTOBER TERM, 2019

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DONALD GLENN ESTES, Petitioner,

v.

RENEE BAKER, WARDEN; ATORNEY GENERAL FOR THE STATE OF NEVADA, Respondents.

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PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner Estes

QUESTIONS PRESENTED

1. Whether this Court's Decisions in *Wainwright v. Greenfield*, 474 U.S. 284 (1996), and *Buchanan v. Kentucky*, 483 U.S. 402 (1987), Allow a Prosecutor to Introduce Evidence Gained During Involuntary Confinement at a Mental Institution in Order to Restore Competency of that Defendant's Conduct and Insistence on Remaining Silent About the Charged Offenses?

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

OPINIONS BELOW

On July 13, 2017, the United States District Court for the District of Nevada filed a written order dismissing Petitioner Estes's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) C, 4-23; *see also* App. B (accompanying civil judgment).) The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Estes's appeal of that decision on November 21, 2018. (*See* App. A, 1-3.) Both decisions are unpublished.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Estes' federal post-conviction appeal on November 21, 2019. (*See* App. A, 1-4.) Estes mails and electronically files this petition within ninety days of the entry of that order; given February 18, 2019, was Washington's Birthday. *See* Sup. Ct. R. 13(1); *see also* Sup. Ct. R. 30(1) (excluding the last day of the period if it falls on a federal holiday). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

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

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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

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

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

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

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

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

STATEMENT OF THE CASE

A. Nevada Trial Court Proceedings

On January 11, 2007, the clerk of the Eighth Judicial District Court, Clark County, Nevada, entered an Amended Judgment of Conviction in the case entitled The State of Nevada vs. Donald Glenn Estes, case number C180728.[1] (*See* Appendix (App.) F, 40-42.)

The case began on December 10, 2001, when the Clark County, Nevada, District Attorney (DA) filed a criminal complaint. The DA amended the complaint to list the following crimes: Preventing or Dissuading Person from Testifying or Producing Evidence (Counts 1, 15); First Degree Kidnapping (Count 2); Battery With Intent to Commit a Crime (Counts 3-4); Sexual Assault with a Minor Under Fourteen Years of Age (Counts 5-9); Coercion (Counts 10, 14); Child Abuse and Neglect (Count 11); and Lewdness with a Child Under the Age of 14 (Counts 12-13).

Competency quickly became an issue. A hearing took place on January 4, 2002, before the Justice of the Peace where the court conditionally waived Estes' case up to the district court, without a preliminary hearing, based on a psychiatrist's findings that Estes was incompetent. (*See* State Court Record Exhibit (Ex.) 1 (minute entry).)

The DA then filed an Information charging Estes with the following crimes: Preventing or Dissuading Person from Testifying or Producing Evidence, a violation of Nev. Rev. Stat. 199.230 (Counts 1, 15); First Degree Kidnapping, a violation of Nev. Rev. Stat. 200.310, 200.320 (Count 2); Battery With Intent to Commit a Crime, a

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[1] The state sentencing court filed the original judgment on May 20, 2004. (*See* App. H.) After a Nevada Supreme Court remand order in *Estes v. State*, 146 P.3d 1114, 1128-29 (Nev. 2006), the trial court entered an amended judgment on January 12, 2007. (*See* App. F, 40-42.)

The trial court failed to address a time served issue that was part of the Nevada Supreme Court's remand order. On March 23, 2007, the trial court filed a second amended judgment rectifying that failing. Otherwise, the second amended judgment is identical to the first.

violation of Nev. Rev. Stat. 200.400 (Counts 3-4); Sexual Assault with a Minor Under Fourteen Years of Age, a violation of Nev. Rev. Stat. 200.364, 200.366 (Counts 5-9), Coercion, a violation of Nev. Rev. Stat. 207.190 (Counts 10, 14); Child Abuse and Neglect, a violation of Nev. Rev. Stat. 200.508 (Count 11); and Lewdness with a Child Under [sic] the Age of 14, a violation of Nev. Rev. Stat. 201.230 (Counts 12-13). (*See* App. G, 44 (Nevada Supreme Court's summary).)

Estes' trial counsel advised that Estes was found incompetent to stand trial by two psychiatrists and asked that he be referred to Lake's Crossing Center for Mentally Disordered Offenders (Lake's Crossing).[2] The district court entered an order of commitment for competency restoration. (*See id.*)

After approximately five months of commitment, Lake's Crossing staff determined Estes was competent to stand trial. The district court agreed with that assessment. (*Id.*)

The justice court held a preliminary hearing and bound the matter over to the district court. (*See* Ex. 1 (minutes).) Pursuant to the finding, the DA filed a criminal Information. Estes entered pleas of not guilty to the charges as listed in the Information.

Trial counsel informed the court that Estes would be changing his plea to not guilty by reason of insanity. The issue of Estes' competency to stand trial arose again. The trial court conducted a hearing where defense counsel proffered two psychiatric exams finding Este incompetent to stand trial. (*See* Ex. G, 44-45.)

Counsel requested that the court return Estes to Lake's Crossing. The district court acquiesced and filed another order of commitment.

---

[2] Lakes' Crossing is a mental health treatment center whose goal is to restore people accused of committing criminal offenses to legal competency so that their Nevada state prosecutions may proceed. *See Estes v. State*, 146 P.3d 1114, 1122 n.27 (Nev. 2006) ("Estes correctly describes Lake's Crossing as a facility whose goal is to assist accused persons to gain legal competency so that prosecutions against them may go forward.") (attached as Exhibit G).

After a half-year period of commitment, staff at Lake's Crossing once again found Estes competent to stand trial. The district court entered a second finding of competency.

Trial preparation ensued. On or about the first day of trial the DA filed another amended information charging Estes with essentially the same criminal conduct and crimes but deleting a child abuse and neglect count. (*See* Ex. 30.) This document is the final charging instrument.

The trial took approximately four days. (*See* Ex. 28-29, 31, 33 (trial transcripts).) Counsel for Estes did not present any expert witnesses or testimony. Estes supported his insanity and insanity by involuntary intoxication by lithium poisoning defenses solely by his testimony at trial. (*See* Ex. G., 44-45.) The jury rejected the insanity defense and found Estes guilty of all of the charges as listed in the Second Amended Information. (*See* Ex. 34 (Verdicts).)

The trial court sentenced to a life sentence with parole eligibility after approximately forty-years. (*See* Ex. F (amended judgment). The court filed its original judgment of conviction on May 20, 2004. (*See* App. H.) Estes filed a timely notice of appeal thereafter. (*See* Ex. 40.)

B. The Nevada Supreme Court's Opinion

The Nevada Supreme Court docketed Estes's appeal under Case No. 46610. On October 10, 2006, Estes filed his opening brief. Estes raised the following assignments of error:

> I. The court erred when it allowed staff from Lake's Crossing to testify regarding information gained during evaluations performed at lake's crossing.
>
> II. There was insufficient evidence to find Mr. Estes guilty of first degree murder.

The Nevada Supreme Court filed its Order of Affirmance denying Estes's appeal on December 24, 2007. *See Estes v. State*, 146 P.3d 1114 (Nev. 2006) (Appendix G.) This is this opinion that Estes challenged in his federal post-conviction appeal. (*See* App. A (Ninth Circuit Memorandum decision).)

C. Federal Post-Conviction Proceedings

On February 14, 2012, Estes mailed his "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody" to the United States District Court for the District of Nevada. The district court appointed Estes counsel. Counsel filed a First Amended Petition on November 12, 2013. (*See* Ex. 20.)

On June 29, 2015, the district court entered a written order denying Estes's petition. (*See* App. C, 4-23.) Estes filed a timely notice of appeal thereafter.

D. The Ninth Circuit Appeal and Decision

The judgment at issue in this Petition is the United States Court of Appeals for the Ninth Circuit [hereinafter Ninth Circuit] unpublished decision denying Estes' federal post-conviction denial appeal. (*See* App. A, 1-2.) The memorandum order determined that the Nevada Supreme Court's published decision (*see* App. E, 34-40) is not contrary to or an unreasonable application of this Court's decisions in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and *Wainwright v. Greenfield*, 474 U.S. 284 (1986). (*See* App. A, 1-2.) "Estes's Fifth Amendment claim fails because Estes's

reliance on medical records from the mental health facility to prove his insanity justified the prosecution's reliance on such evidence to rebut the insanity defense." (*Id.* at 2-3 (citing *Buchanan*, 483 U.S. at 422-23.) Further *Wainwright v. Greenfield* does not apply because that case did not involve a situation "where the prosecution relied on evidence that had already been used by the defense to argue insanity." (*Id.* at 3.)

This Petition follows.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DECIDE WHETHER THERE ARE ANY CONSTITUTIONAL LIMITATIONS TO THE NATURE AND EXTENT OF ADMISSIBLE EVIDENCE GATHERED DURING A DEFENDANT'S INVOLUNTARY COMMITMENT AT A MENTAL INSTITUTION

This Petition involves the tension between three of this Court's opinions. *Compare Estelle v. Smith*, 451 U.S. 454, 466 (1981), *with Buchanan v. Kentucky*, 483 U.S. 402, 423 (1987), and *Wainwright v. Greenfield*, 474 U.S. 284 (1986). *Smith* holds that a prosecutor cannot admit the results and statements contained with a compelled psychiatric exam against a criminal defendant. *Buchanan*, on the other hand, allows the prosecution to admit a psychiatric evaluation when a petitioner requested that evaluation and used portions of it to his benefit.

In *Wainwright v. Greenfield*, 474 U.S. 284 (1996), Mr. *Greenfield* went to trial raising a defense of insanity. At the time of his arrest, law enforcement officers read Mr. Greenfield the required warnings required by *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1996). Mr. Greenfield invoked his right thereafter to remain silent on at least two occasions. *See Greenfield*, 474 U.S. at 286.

In his closing argument, and over defense counsel's objection, the prosecutor reviewed the testimony of the arresting officers and suggested that Mr. Greenfield's repeated refusals to answer questions without first consulting an attorney

demonstrated a degree of comprehension that was inconsistent with his claim of insanity. *See id* at 287. The jury found respondent guilty and the judge sentenced him to life imprisonment. *Id.*

This Court found the prosecutor's presentation and argument violated the Fifth Amendment. *See id.* at 293.

In *Estelle v. Smith*, this Court found that the "essence" of the Fifth Amendment is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." 451 U.S. at 462 (citation omitted). The availability of the Fifth Amendment privilege "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle*, 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)). Therefore, the State may not use court-ordered competency examinations as affirmative evidence and such use constitutes a violation of the Fifth Amendment privilege against self-incrimination. *See id.* at 464-65.

The State of Nevada purports to follow this Court's precedent as set forth in *Buchanan* and *Estelle*. *See Estes v. State*, 146 P.3d 1114, 1136 (Nev. 2006) (allowing the admission of Lake's Crossing staff observations when a defendant puts his mental state at issue) (App. G.) As the instant matter demonstrates, that court has unduly expanded the scope of the *Buchanan* holding.

This case is controlled by *Estelle v. Smith*, and *Wainwright v. Greenfield*, not as found by the Ninth Circuit, *Buchanan v. Kentucky*. (*See* App. A, 2.) *Buchanan* concerned the admission of a psychiatric report that the prosecution and defense jointly requested. The prosecutor offered the report solely to rebut the psychiatric evidence presented by the defendant.

What the District Attorney did here goes far beyond the admission allowed in *Buchanan*. The DA called Lake's Crossing staff witnesses to comment on the observations and conclusions that were derived from Estes's stay at the facility. This was not a case concerning a jointly requested psychiatric report.

A. The District Attorney's Rebuttal Evidence

In rebuttal, the DA presented the testimony of three members of the Lake's Crossing staff: Elizabeth Neighbors, Ph.D., a forensic psychologist and facility director; Hale Henson, M.D., psychiatrist; and A.J. Coronella, a licensed clinical social worker. All three either observed or treated Estes during the evaluation process.

Dr. Elizabeth Neighbors is a forensic psychologist who also served as the director at Lake's Crossing. Dr. Neighbors testified concerning psychological testing of Estes that revealed occasional malingering, i.e., feigned mental illness. Dr. Neighbors testified that neither she, nor members of Estes' treatment team, observed him in a psychotic state. Dr. Neighbors did not believe Estes to be incompetent during his second commitment.

Howard Hale Henson, M.D., a psychiatrist who also served as Lake's Crossing's medical director, rendered an opinion that Estes attempted to present a history of mental illness to avoid conviction. That Estes did not suffer from lithium poisoning. Estes desired to be medicated to support his claim that he had a disabling medical condition.

Doctors Neighbors and Henson also testified, to a reasonable degree of medical certainty, that under the M'Naghten standard, Estes knew right from wrong and suffered from no mental condition that would impair his judgment during the alleged incidents with the victim, B.C. Dr. Neighbors stated that Estes' behavior seemed deliberate and thoughtful. Both derived their opinions from police reports and statements to the police made by Estes and B.C. Dr. Henson admitted that Lake's

Crossing prescribed Estes robust psychotropic medications such as Haldol, Cogentin, and Trazodone.

The most questionable rebuttal witness was a licensed social worker named Adrianne J. Coronella. Coronella ran a "legal processes" class at the facility. The class is designed to inform defendants about legal procedure and to prepare defendants to be able to assist defense counsel during trial. The social worker testified to Estes' interest in preparing an insanity defense as revealed in a discussion with him during her "legal process" class at Lake's Crossing. She also recounted Estes' comment to her, in an interview, that an affair between his wife and brother was the underlying reason for his divorce.

It is this rebuttal evidence that forms the factual nucleus of Estes' claim that his trial and convictions violate his constitutional rights.

B. The Trial Court Violated Petitioner Estes's Fifth and Fourteenth Amendment Rights to Due Process and to Remain Silent by Allowing the Prosecution to Introduce Testimony from the Staff at The Forensic Facility in Which the Trial Court Involuntarily Committed Him

This Court should find the rebuttal evidence violative of Este's constitutional rights.

That staff had access to Estes that no defense expert could ever come close to matching. The prosecution's use of this evidence unfairly tipped the scales of justice in its favor.

Estes contends there are compelling reasons for granting this Petition. Pursuant to Supreme Court Rule 10, this Court should consider review on a writ of certiorari if a United States court of appeals opinion has decided an important issue question of federal law in a way that conflicts with prior decisions of this Court. In the case sub judice, both the Ninth Circuit and the Nevada Supreme Court incorrectly determined that *Buchanan* and *Greenfield* allow for admission of testimony that would otherwise be impermissible once a defendant relies on an insanity defense.

For instance, the Nevada Supreme relied on the fact that, by placing his sanity at issue at trial, Estes's failure to fully cooperate with Lake's Crossing Staff by making incriminating statements was admissible at trial. *Greenfield* stands to the contrary. Further, Estes contends that, under the totality of the circumstances, the State of Nevada's use of Estes's Lake's Crossing competency evaluations, Estes's statements, and Estes' interest, or lack thereof, of legal information presented in a compelled legal instruction class all fall within the evidentiary proscription set forth in *Estelle v. Smith*, 451 U.S. 454 (1981).

What the District Attorney did here goes beyond the admission allowed in *Buchanan*. The DA called Lake's Crossing staff witnesses to comment on the observations and conclusions that were derived from Estes' involuntary stay at the facility. This was not a case concerning a jointly requested psychiatric report. The prosecution put on a substantial amount of evidence that was all derived from Estes's imprisonment in the facility.

These witnesses testified to not only clinical impressions but to subjective beliefs and opinions as to the viability of Estes' proposed affirmative defenses. For instance, Dr. Henson testified that Estes "attempt[ed] to present a history of mental illness to avoid the severity of the convictions." Social worker Coronella testified about Estes' interest during a legal process class about the insanity defense. This testimony runs far afield from the limited admissible testimony sanctioned in *Buchanan*.

The district court should have granted Estes's request for a writ of habeas corpus because the prosecution's use of this evidence violated Estes's Fifth and Fourteenth Amendment rights under the United States Constitution. The Ninth Circuit erred in myopically focusing on this Court's limited opinion *Buchanan v. Kentucky*, 483 U.S. 402 (1987).

Estes submits that he meets the requirements for review of his writ of certiorari and respectfully requests this Court exercise its jurisdiction to hear this interesting federal constitutional case.

CONCLUSION

For the aforementioned reasons, and in the interests of justice and fair play, the Petitioner Donald Glenn Estes respectfully requests that the Court grant this Petition for a Writ of Certiorari, reverse the decision of the court of appeals for the Ninth Circuit, and enter a decision clarifying the scope of the *Buchanan v. Kentucky* holding.

DATED this 19th Day of February 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

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Counsel for Petitioner **Estes**

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,180 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Dated this 19th 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 19th 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:

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

JASON F. CARR
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Counsel for Petitioner **Estes**

INDEX TO APPENDIX

APP. 001

NOT FOR PUBLICATION

FILED

NOV 21 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD GLENN ESTES, Petitioner-Appellant, v. RENEE BAKER, Warden and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-16624 D.C. No. 3:13-cv-00072-MMD-WGC MEMORANDUM*

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

Submitted November 19, 2018**

Before: TROTT, SILVERMAN, and TALLMAN, Circuit Judges

Nevada state prisoner Donald Glenn Estes appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. §§1291 and 2253. We review de novo the denial of a habeas

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

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

corpus petition, *see Fairbank v. Ayers*, 650 F.3d 1243, 1250 (9th Cir. 2011), and we affirm.

Estes contends that his Fifth and Fourteenth Amendment rights were violated when, after he presented an insanity defense, the trial court allowed the State to introduce rebuttal testimony from witnesses who observed him during his court-ordered competency evaluation. The district court properly denied habeas relief because the Nevada Supreme Court's rejection of his claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (holding that evidence obtained in the course of a pre-trial psychiatric evaluation can be introduced at trial to rebut the defendant's insanity defense, so long as the evidence does not include incriminating information regarding the facts of the crime).

AFFIRMED.[1]

[1] Counsel for the appellee is admonished to provide accurate page references on his Table of Cases and Authorities for the cases on which he relies. For example, Kansas v. Cheever is nowhere to be found on either page 15 or 20. This inaccuracy is not the only mistake.

APP. 003

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

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

DONALD GLENN ESTES,

Petitioner,

V.

RENEE BAKER, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:13-cv-00072-MMD-WGC

___ **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 the Clerk of the Court is directed to substitute Renee Baker for Robert LeGrand, on the docket for this case, as the respondent warden of the Lovelock Correctional Center.

IT IS FURTHER ORDERED AND ADJUDGED that the First Amended Petition for Writ of Habeas Corpus (ECF No. 21) is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the petitioner is granted a certificate of appealability with regard to Ground 1 of his first amended petition for writ of habeas corpus. Petitioner is denied a certificate of appealability in all other respects.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is hereby entered.

July 13, 2017

DEBRA K. KEMPI
Clerk

/s/ K. Walker
Deputy Clerk

APP. 004

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD GLENN ESTES, Petitioner, v. RENEE BAKER, *et al.*, Respondents.	Case No. 3:13-cv-00072-MMD-WGC ORDER

I. INTRODUCTION

This action is a petition for writ of habeas corpus by Donald Glenn Estes, a Nevada prisoner. The action is before the Court with respect to the merits of the claims in Estes' habeas petition. The Court will deny the petition.

II. BACKGROUND

In its opinion on Estes' direct appeal, the Nevada Supreme Court summarized the relevant background of Estes' case as follows:

> Appellant Donald Estes sexually assaulted a minor, B.C., in a desert area near Las Vegas. The State charged Estes with six counts of sexual assault of a minor under the age of 14 years, two counts of lewdness with a child under the age of 14 years, two counts of battery with intent to commit a crime, two counts of coercion, two counts of preventing or dissuading a person from testifying or producing evidence, and one count of first-degree kidnapping. Based upon preliminary findings that Estes was not competent to stand trial, the district court twice committed him to Lake's Crossing Center for Mentally Disordered Offenders. [Footnote: Lake's Crossing is operated by the Nevada Division of Mental Health and Development Services.] Relying upon evaluations provided by Lake's Crossing staff, the district court eventually found Estes competent to stand trial.

> Estes pleaded not guilty by reason of insanity and the case proceeded to trial. He called no experts and testified as the sole defense witness. In this, he recounted all of his mental health problems beginning as a young adult and claimed that medication (lithium) prescribed for diagnosed bipolar disorder caused him to abduct and assault B.C. He further admitted much of the charged misconduct, stating that if "B.C. said he did it," he probably did.
>
> In rebuttal, the State presented the testimony of three members of the Lake's Crossing staff: Elizabeth Neighbors, Ph.D., a forensic psychologist and facility director; Hale Henson, M.D., psychiatrist; and A.J. Coronella, a licensed clinical social worker. All three either observed or treated Estes during the evaluation process.
>
> Dr. Neighbors testified concerning psychological testing of Estes that revealed occasional malingering, *i.e.*, feigned mental illness. She also testified that neither she, nor members of Estes' treatment team, observed him in a psychotic state or viewed him as incompetent during his second commitment. Dr. Henson opined that Estes attempted to present a history of mental illness to avoid more severe prosecution, that Estes did not suffer from lithium poisoning, and that Estes desired to be medicated to support his claim that he had a disabling medical condition.
>
> Doctors Neighbors and Henson also testified to a reasonable degree of medical certainty that, under the *M'Naughten* standard, [footnote omitted] Estes knew right from wrong and suffered from no mental condition that would impair his judgment during the alleged incidents with B.C. More particularly, Dr. Neighbors stated that Estes' behavior as reported seemed deliberate and thoughtful. Both derived their opinions from police reports and statements to the police made by Estes and B.C.
>
> The social worker, A.J. Coronella, testified to Estes' interest in preparing an insanity defense, as revealed in a discussion with him during her "legal process" class at Lake's Crossing. She also recounted his comment to her, in an interview, that an affair between his wife and brother was the underlying reason for his divorce. The State elicited the latter statement in response to Estes' testimony that he and his wife divorced because of his mental illness.
>
> The jury convicted Estes on all counts. The district court imposed a series of concurrent and consecutive sentences totaling 40 years imprisonment and ordered Estes to register as a sex offender upon his eventual release. The court further awarded Estes 898 days' credit for time served in local custody before sentencing.

Estes v. State, 122 Nev. 1123, 1129-30, 146 P.3d 1114, 1118-19 (2006); (Exh. 47 (ECF No. 18-5) (Except where otherwise indicated, the Exhibits referred to in this order were filed by Estes, and are found in the record at ECF Nos. 14-19.).)

On appeal, in pertinent part relative to his petition in this case, Estes raised issues regarding the admission of testimony of the three Lake's Crossing employees, and

regarding the trial court's refusal to instruct the jury regarding involuntary intoxication. (*See* Appellant's Opening Brief, Exh. 41 (ECF No. 17-9).) The Nevada Supreme Court rejected Estes' claims with respect to those issues. *See Estes v. State*, 122 Nev. 1123, 146 P.3d 1114 (2006); (Exh. 47 (ECF No. 18-5).) Ruling on other issues, the Nevada Supreme Court reversed Estes' convictions on one count of battery with intent to commit a crime and two counts of lewdness with a child under the age of fourteen years, and remanded to the state district court, for, among other things, further consideration of the two counts of preventing or dissuading a person from testifying or producing evidence. (*See id*.) The Nevada Supreme Court denied Estes' petition for rehearing on March 1, 2007. (*See* Order Denying Rehearing, Exh. 52 (ECF No. 18-10).) The United States Supreme Court denied Estes' petition for a writ of certiorari on October 1, 2007. (*See* Notice of Denial of Petition for Writ of Certiorari, Exh. 56 (ECF No. 18-14).)

On remand, in the state district court, the court dismissed the two counts of preventing or dissuading a person from testifying or producing evidence, and Estes' sentences on those convictions were vacated. (*See* Second Amended Judgment of Conviction, Exh. 53 (ECF No. 18-11).)

On November 28, 2007, Estes filed a petition for writ of habeas corpus in the state district court. (*See* Petition for Writ of Habeas Corpus, Exh. 57 (ECF No. 18-15).) Counsel was appointed for Estes, and, with counsel, Estes filed supplemental briefing in support of his habeas petition. (*See* Order of Appointment, Exh. 61 (ECF No. 19); Supplemental Brief in Support of Petition for Writ of Habeas Corpus, Exh. 63 (ECF No. 19-2); Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus, Exh. 64 (ECF No. 19-3).) The state district court held an evidentiary hearing on April 7, 2011. (*See* Transcript of Evidentiary Hearing, Exh. 68 (ECF No. 19-8).) On June 14, 2011, the state district court denied Estes's petition in a written order. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 71 (ECF No. 19-11).) Estes appealed, and the Nevada Supreme Court affirmed on December 12, 2012. (*See* Order of Affirmance, Exh. 76 (ECF No. 19-16).)

Estes initiated this federal habeas corpus action on February 14, 2013, by filing a *pro se* habeas corpus petition (ECF No. 4). Counsel was appointed to represent Estes. (*See* Order entered April 11, 2013 (ECF No. 3); Notice of Appearance of Counsel (ECF No. 8).) With counsel, Estes filed an amended petition for writ of habeas corpus — the operative petition in the case — on November 12, 2013 (ECF No. 20).)

Respondents filed a motion to dismiss on January 15, 2014 (ECF No. 25), contending that certain of Estes' claims are unexhausted in state court. The Court denied the motion to dismiss. (*See* Order entered July 22, 2014 (ECF No. 28).) Respondents then filed an answer (ECF No. 29), and Estes filed a reply (ECF No. 34).

On May 30, 2017, the Court ordered respondents to expand the record, pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, by filing, as an Exhibit, a copy of the transcript of Estes' statement to the police, which was admitted into evidence at trial. (*See* Order entered May 30, 2017 (ECF No. 35).) Respondents complied with that order, by filing the transcript as an Exhibit on June 19, 2017 (ECF No. 36). Estes responded to that filing (ECF No. 37), stating that he has no objection to the Court's consideration of the Exhibit, but stating that his birthdate and Social Security number should be redacted from the Exhibit. On June 21, 2017, the Court ordered the June 19, 2017, filing sealed, and ordered respondents to file a redacted version of the Exhibit. (*See* Order entered June 21, 2017 (ECF No. 38).) On June 22, 2017, respondents filed the Exhibit with Estes' birthdate and Social Security number redacted out (ECF No. 39).

III. SUBSTITUTION OF RESPONDENT WARDEN

The Court observes that Robert LeGrand, the named respondent warden, is no longer the warden of Lovelock Correctional Center, the prison where Estes is incarcerated. Renee Baker is now the warden. Therefore, pursuant to Federal Rule of Civil Procedure 25(d), the Court will direct the Clerk of the Court to substitute Renee Baker for Robert LeGrand as the respondent warden on the docket for this case.

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IV. DISCUSSION

A. Standard of Review

28 U.S.C. § 2254(d) sets forth the 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).

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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, 101 (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*. at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing 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)).

B. Ground 1

In Ground 1 of his amended habeas petition, Estes claims that his federal constitutional rights were violated because, following his commitment to Lake's Crossing, a state mental health facility, and after he was found competent to proceed to trial, the prosecution was allowed, in its rebuttal case at trial, to use information gathered during Estes' commitment to refute his claim that he was legally insane when he committed the crimes in this case. (*See* First Amended Petition (ECF No. 21) at 17-19.) Estes' claim concerns the testimony of Elizabeth Neighbors, Ph.D. (Transcript of Trial, March 12, 2004, Exh. 33 at 6-78 (ECF No. 17, pp. 3-21)), Adrianne J. Coronella (*Id*. at 78-103 (ECF No. 17 at 21-27)), and Howard Hale Henson, M.D. (*Id*. at 103-45 (ECF No. 17 at 27-38)).

Estes asserted this claim on his direct appeal. (*See* Appellant's Opening Brief, Exh. 41 at 15-23 (ECF No. 17-9 at 25-33). In its ruling on this claim, the Nevada Supreme Court reviewed the applicable Nevada and federal case law, and, relying primarily on *Buchanan v. Kentucky*, 483 U.S. 402 (1987), rejected Estes' claim that his constitutional rights were violated. *See Estes*, 122 Nev. at 1131-36, 146 P.3d at 1119-23. The Nevada Supreme Court ruled that "when the defendant places his sanity or mental capacity at issue, a defendant's right to protection under the Fifth and Fourteenth Amendments from the disclosure of confidential communications made during a court-ordered psychiatric

evaluation relates only to the incriminating communications themselves." *Estes*, 122 Nev. at 1133, 146 P.3d at 1121. The Nevada Supreme Court went on: "[I]f the defendant seeks to introduce the evaluation or portions of it in support of a defense implicating his or her mental state, the prosecution may also rely upon the evaluation for the limited purpose of rebuttal." *Estes*, 122 Nev. at 1133-34, 146 P.3d at 1121. Turning to the specific testimony at issue, the Nevada Supreme Court ruled, as follows, regarding Coronella's testimony:

> Ms. Coronella testified to statements made by Estes during a "legal process" class she conducted at Lake's Crossing, in which he discussed his interest in preparing an insanity defense. She also testified to another statement he made in the course of an interview, that the reason for his divorce was that his wife had an affair with his brother. We find no error in connection with any of this testimony. First, we conclude that the discussion concerning the preparation of an insanity defense was properly admitted to rebut his claims of ongoing mental illness. Nothing in his statements was incriminatory or the product of an interrogation, and certainly, a statement is not "incriminatory" merely because it tends to show that the defendant is sane. Second, his statements during the evaluation concerning the cause of his divorce, his brother's affair with his wife, were admissible as to impeach his testimony at trial that his mental illness precipitated the end of his marriage. Again, none of this information was directly inculpatory or incriminating. Rather, it related to the validity of Estes' insanity defense.
>
> Estes also generally claims that Ms. Coronella improperly testified as to his sanity based upon their interactions at Lake's Crossing. We disagree. As stated, this testimony violates neither the Fifth nor the Fourteenth Amendments because Estes placed his sanity in issue and because the testimony does not describe any statements by Estes regarding the underlying crimes.

Estes, 122 Nev. at 1134-35, 146 P.3d at 1122 (footnotes omitted). With regard to the testimony of Neighbors and Henson, the Nevada Supreme Court ruled as follows:

> Relying upon [*Esquivel v. State*, 96 Nev. 777, 617 P.2d 587 (1980)] and [*Winiarz v. State*, 104 Nev. 43, 752 P.2d 761 (1988)], Estes similarly claims that the district court erred in allowing the testimony of Dr. Neighbors and Dr. Henson because they attacked Estes' credibility. In this, he challenges Dr. Neighbors' testimony that psychological testing indicated that Estes occasionally feigned mental illness, and that neither
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> she, nor members of her treatment team, observed Estes in a psychotic state. With respect to Dr. Henson, Estes takes issue with his testimony opining that, based on medical records, Estes did not suffer from lithium poisoning and that Estes had attempted to present a history of mental illness to avoid prosecution. Estes also claims error with Dr. Henson's testimony that Estes desired to be medicated to demonstrate that he had a disabling mental condition. We disagree. In *Esquivel* and *Winiarz*, while we

> discerned error in the use of the defendant's statements from a psychiatric interview to attack the defendant's credibility, the defendants in those cases, as noted, did not place their sanity at issue. And, again, the ruling in *Winiarz* did not relate precisely to the Fifth Amendment, but to the permissible scope of expert opinion. Finally, the testimony given by Drs. Henson and Neighbors was within their stated areas of expertise and did not reveal their confidential communications other than by inference.

Estes, 122 Nev. at 1135, 146 P.3d at 1122-23 (footnotes omitted). In a footnote, the Nevada Supreme Court added:

> We have considered and rejected Estes' claims that the State failed to provide notice of its rebuttal experts, that the State failed to properly qualify Dr. Neighbors as an expert, and that lack of notice to counsel of the psychiatric interviews violated his Sixth Amendment right to counsel. Counsel was fully aware of the commitment and the responsibilities of the staff at Lake's Crossing.

Estes, 122 Nev. at 1136 n. 37, 146 P.3d at 1123 n. 37.

At the conclusion of its opinion, the Nevada Supreme Court summarized its ruling on this issue as follows:

> When the prosecution seeks to use a court-ordered psychiatric evaluation to rebut an insanity defense the prosecution may not utilize the portions of the evaluation containing the defendant's statements that directly relate to culpability for the crimes charged, unless the defendant was first informed of his Fifth Amendment rights and has agreed to waive them. However, the prosecution may use other portions of the evaluation to rebut an insanity defense. In line with the above, we conclude that the prosecution did not violate Estes' rights in its use of information from Estes' court-ordered commitment.

Estes, 122 Nev. at 1145-46, 146 P.3d at 1129.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Supreme Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle*, 451 U.S. at 468. Subsequently, however, in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Supreme Court limited the rule of *Estelle*, holding that evidence obtained in the course of a pre-trial psychiatric evaluation may be introduced at trial to rebut the defendant's assertion of an insanity defense, so long as the evidence does not include incriminating information regarding the facts of the crime. *See Buchanan*, 483 U.S. at 424; *see also Kansas v.*

Cheever, 134 S.Ct. 596 (2013) (reaffirming rule announced in *Buchanan*); *Pawlyk v. Wood*, 248 F.3d 815, 827-28 (9th Cir. 2001) ("*Estelle* and *Buchanan* established, and placed counsel on notice, that when a defendant places his mental status at issue and presents favorable evidence from a psychiatric evaluation, he waives confidentiality as to evaluations unfavorable to his defense."), *cert. denied*, 534 U.S. 1085 (2002).

In this case, Estes put his mental state at issue by means of his own testimony, and he testified about his stays at Lake's Crossing in an apparent attempt to substantiate his defense based on his mental state at the time of the crimes. *See* Testimony of Donald Glenn Estes, Trial Transcript, March 11, 2004, Exh. 31, pp. 81-83 (ECF No. 16-2, p. 22)); *see also* Reply (ECF No. 34), pp. 24-25 (acknowledging that Estes testified about his stay at Lake's Crossing in attempt to support involuntary intoxication defense). In response, in its rebuttal case, the prosecution called Neighbors, Coronella and Henson to testify about Estes' mental state, as observed by them at Lake's Crossing. The testimony of Neighbors, Coronella and Henson did not involve the facts regarding Estes' underlying crimes; rather, their testimony involved Estes' interest in asserting a defense based on his mental state, and their observations and opinions regarding his mental state. While Estes did not introduce any expert testimony or other evidence beyond his own testimony to support his defense, his testimony raised the subject of his stays at Lake's Crossing and the question of his mental state at the time of the crimes. Under these circumstances, this Court does not find unreasonable the state supreme court's reading of *Estelle* and *Buchanan* to allow the State to respond by calling Lake's Crossing staff to testify as they did without violating Estes' constitutional rights.

Estes has failed to meet his burden of showing that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, the Court denies relief on Ground 1.

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C. Ground 2

In Ground 2, Estes claims that his constitutional rights were violated because the trial court declined to give a jury instruction regarding involuntary intoxication. (*See* First Amended Petition at 20-21.)

Estes asserted this claim on his direct appeal. (*See* Appellant's Opening Brief, Exh. 41 at 25-27 (ECF No. 17-9 at 35-37).) The Nevada Supreme Court ruled as follows:

> Estes claims that the district court violated his due process rights when it denied his request to issue jury instructions on involuntary intoxication. In this, the court found that Estes presented no competent evidence that he suffered from involuntarily induced lithium toxicity. Although a defendant in a criminal case is entitled to a jury instruction on his theory, no matter how weak or incredible it may be, and district courts have a duty to correct an inaccurate or incomplete theory-of-defense instruction, the instruction must be supported by some competent evidence in the record. Because Estes offered no evidence other than his irrelevant lay opinion that he suffered from lithium toxicity, and given that the only competent evidence on this issue, that given by Dr. Henson, was to the contrary, we discern no error in the court's refusal of the involuntary intoxication theory. But even if the district court erred in refusing the proffered instructions, we further conclude that any error is harmless beyond a reasonable doubt given the overwhelming state of the evidence against Estes.

Estes, 122 Nev. at 1138, 146 P.3d at 1124 (footnotes omitted).

Estes cites *Mathews v. United States*, 485 U.S. 58 (1988), for the proposition that he had a federal constitutional right, clearly established in Supreme Court precedent, to a jury instruction regarding his affirmative defense. In *Mathews*, the Supreme Court stated that "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63, citing *Stevenson v. United States*, 162 U.S. 313 (1896). However, *Mathews* went to the Supreme Court through a direct appeal from a judgment of conviction in a federal district court. In *Mathews*, the Supreme Court was acting solely within its supervisory role over criminal procedure in federal courts. *See id*. The *Mathews* Court did not apply any federal constitutional law. Estes does not cite to any Supreme Court precedent clearly establishing that a criminal defendant has a federal constitutional right to a jury instruction regarding his affirmative defense.

Moreover, even if the principle that Estes draws from *Mathews* were a basis, within the meaning of the AEDPA, for his federal habeas claim, Estes' claim would still fail. The Court does not find unreasonable the Nevada Supreme Court's ruling that Estes' self-serving lay opinion was insufficient for a reasonable jury to find that he was affected by involuntary lithium intoxication at the time of his crimes.

The Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence. The Court denies relief on Ground 2.

D. Ground 3A

In Ground 3A, Estes claims that his constitutional rights were violated as a result of ineffective assistance of his trial counsel, because his trial counsel "failed to obtain an expert and otherwise investigate and support Estes' defense theory and testimony that he suffered from mental illness…." (First Amended Petition at 21; *see also id*. at 21-22.)

Estes asserted this claim in his state habeas action. (*See* Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus, Exh. 64 at 3-7 (ECF No. 19-3 at 4-8).) After holding an evidentiary hearing focused primarily on this claim (*see* Transcript of Evidentiary Hearing, Exh. 68 (ECF No. 19-8)), the state district court denied the claim. (*See* Findings of Fact, Conclusions of Law and Order, Exh. 71 (ECF No. 19-11).) In its written order, the state district court ruled:

> Defendant's trial counsel, Christy Craig, testified at the hearing. Ms. Craig testified that she did have Defendant evaluated for competency on two different occasions. Craig testified that she did not look for a Not Guilty By Reason of Insanity ("NGRI") defense based on his past mental illness, because based on her discussions with Defendant, it was his strong belief that the lithium he was taking at the time of the crimes led to his psychotic episode that resulted in these charges. Craig testified that she would have used an expert such as Dr. Dodge Slagle if she planned to use a straight mental health defense, but in light of Defendant's desire to incorporate the effect of the lithium she did not do so. Craig was unable to find an expert to support the lithium theory of defense. Craig testified that she did not believe if another strategy was used the result of his case would have been different, because of the overwhelming evidence of his guilt and the bad interview he had with the police, which would contravene any assertion of insanity.

> Dr. Dodge Slagle testified at the hearing. Dr. Slagle is a psychiatrist that evaluated Defendant three times over the past ten years. Dr. Slagle testified that Defendant's actions at the time of the crime suggested that he had the capacity to appreciate the wrongfulness of his actions. Dr. Slagle testified that based on the facts and information available to him that he would not be able to testify that Defendant was likely Not Guilty By Reason of Insanity at the time of the crime.
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> * * *
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> Defendant's claim that trial counsel was ineffective for failing to call an expert witness to present an insanity defense is without merit, because in light of the evidence available, such an expert, such as Dr. Slagle, would not find Defendant Not Guilty by Reason of Insanity, nor would a jury have likely reached such a conclusion.

(Findings of Fact, Conclusions of Law and Order, Exh. 71 at 4-5 (ECF No. 19-11 at 5-6) (paragraph numbering omitted).)

On appeal, the Nevada Supreme Court affirmed, ruling as follows:

> [A]ppellant argues that his trial counsel was ineffective for failing to obtain experts to testify regarding appellant's mental health in support of the insanity defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that appellant was adamant that poisoning from prescription lithium caused him to be mentally impaired during the incident, but that mental illness did not cause him to commit the crimes. Counsel testified that she investigated potential experts to testify regarding lithium poisoning rendering someone legally insane, but was unable to find any expert willing to provide testimony of that nature. Further, a mental health expert who examined appellant following his conviction testified at the evidentiary hearing that he could not state that appellant was legally insane during the crime. Therefore, appellant fails to demonstrate a reasonable probability of a different outcome had counsel performed additional investigation into expert testimony. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). The district court concluded that counsel did not provide ineffective assistance regarding expert testimony and substantial evidence supports that decision. Therefore, we conclude that the district court did not err in denying this claim.

(Order of Affirmance, Exh. 76 at 2 (ECF No. 19-16 at 3) (footnote omitted).)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for 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.

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

Harrington, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th Cir. 2010) (acknowledging double deference required for state court adjudications of *Strickland* claims).

The state supreme court's resolution of this claim was reasonable. There was overwhelming evidence of Estes guilt, there was overwhelming evidence that Estes was not legally insane when he committed the crimes, and there is no showing by Estes that any expert testimony could have supported his insanity defense.

It is beyond any reasonable debate that Estes committed the crimes; there was overwhelming evidence: B.C.'s testimony (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 28-61 (ECF No. 16 at 8-17)); evidence that, after Estes returned B.C. to his parents, B.C. knew details regarding the remote location where Estes took him against

his will (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 52-53 (ECF No. 16 at 14-15); Testimony of Timothy Moniot, Trial Transcript, March 10, 2004, Exh. 29 at 198-202 (ECF No. 16 at 51-52); Testimony of Joel Kisner, Trial Transcript, March 11, 2004, Exh. 31 at. 24-25 (ECF No. 16-2 at 7-8)); evidence that, after Estes returned B.C. to his parents, B.C. knew the color of Estes' underwear (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 57-58 (ECF No. 16, at 16); Testimony of George Libbey, Trial Transcript, March 10, 2004, Exh. 29 at 80-81 (ECF No. 16 at 21-22)); evidence that, after Estes returned B.C. to his parents, B.C. knew that Estes had an uncircumcised penis (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 58-59 (ECF No. 16 at 16); Testimony of Timothy Moniot, Trial Transcript, March 10, 2004, Exh. 29 at 196-98 (ECF No. 16 at 50-51)); physical signs of sexual abuse observed on B.C.'s body by a doctor (Testimony of Dr. Theresa Vergara, Trial Transcript, March 10, 2004, Exh. 29 at 90-95 (ECF No. 16 at 24-25)); evidence that DNA from Estes' sperm was found on B.C.'s sweatshirt (Testimony of Thomas Wahl, Trial Transcript, March 10, 2004, Exh. 29 at 119-21 (ECF No. 16 at 31-32)); evidence that DNA from Estes' sperm, along with DNA that could have come from B.C.'s saliva, were found on a mouthwash bottle that Estes' forced B.C. to drink from after the sexual assault (Testimony of Thomas Wahl, Trial Transcript, March 10, 2004, Exh. 29 at 110-15 (ECF No. 16 at 29-30)); evidence that DNA from Estes' sperm, along with DNA that could have come from B.C.'s saliva, were found on Estes' underwear (Testimony of Thomas Wahl, Trial Transcript, March 10, 2004, Exh. 29 at 115-17 (ECF No. 16 at 30-31)); evidence that DNA from Estes' sperm, along with DNA that could have come from B.C.'s saliva, were found on Estes' penis (Testimony of Thomas Wahl, Trial Transcript, March 10, 2004, Exh. 29 at 117-19 (ECF No. 16 at 31)); evidence that the zipper on Estes' pants was undone when he got out of his vehicle at the motel when he returned B.C. to his parents (Testimony of Robert Ross Williams, Trial Transcript, March 10, 2004, Exh. 29 at 140-41 (ECF No. 16 at 36-37)); Estes' own testimony, in which he did not deny that B.C. was telling the truth

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(Testimony of Donald Glenn Estes, Trial Transcript, March 11, 2004, Exh. 31 at 78-93, 102-103 (ECF No. 16-2 at 21-25, 27)).

Furthermore, there was overwhelming evidence indicating that Estes was not legally insane — that he knew the nature, wrongfulness, and illegality of his actions (*see* Jury Instruction Regarding Legal Insanity, Instruction 17, Exh. 32 (ECF No. 16-3 at 22)): evidence that Estes took B.C. to a remote and secluded location to sexually assault him (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 36-44 (ECF No. 16 at 10-12)); B.C.'s testimony that Estes threatened to harm or kill him, as well as his mother and father, if he told anyone what Estes did to him (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 39, 42-44, 48, 59 (ECF No. 16 at 11-13, 16)); B.C.'s testimony that Estes told him that if he said what Estes told him to say about what had happened, Estes would give him money (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 44 (ECF No. 16 at 12)); B.C.'s testimony that Estes lied to him about where Estes was taking him (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 35-37 (ECF No. 16 at 10-11)); B.C.'s testimony that, at the second location where Estes sexually assaulted him, when a car would drive by, Estes would make him "get up so that they wouldn't think of anything" (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 45 (ECF No. 16 at. 13)); B.C.'s testimony that when Estes forced B.C. to perform fellatio, Estes forced B.C. to swallow his semen (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 43-44, 46 (ECF No. 16 at 12-13)); evidence that, after Estes forced B.C. to perform fellatio, Estes forced B.C. to use mouthwash (Testimony of B.C., Trial Transcript, March 10, 2004, Exh. 29 at 46-48 (ECF No. 16 at 13)); evidence that when Estes returned to the motel with B.C., Estes appearance was not unusual (except for his unzipped pants) and his speech was coherent (Testimony of Robert Ross Williams, Trial Transcript, March 10, 2004, Exh. 29 at 140-41, 144 (ECF No. 16 at 36-37); Testimony of Joel Kisner, Trial Transcript, March 11, 2004, Exh. 31, at 13-14 (ECF No. 16-2 at 5)); Estes' statement to the police, in which he denied having sexual contact with B.C. (Transcript of Statement, Respondents' Exh. 2 (ECF No. 39); *see also* Trial

Transcript, March 11, 2004, Exh. 31 at 30 (ECF No. 16-2 at 9) (audio recording of Estes' statement to the police played for the jury at trial)).

The record shows that Estes' trial counsel had no strong ground on which to defend him. Estes' trial counsel was aware that the evidence of Estes' guilt was overwhelming. (*See* Testimony of Christy Craig, Transcript of Evidentiary Hearing, Exh. 68 at 18-19 (ECF No. 19-8 at 19-20).) And, she knew, given the evidence regarding Estes' behavior during and after the crimes, and his statement to the police, that an insanity defense would be unsupportable. (*See id*. at 15-18, 31 (ECF No. 19-8 at 16-19, 32).) She had no reason to believe that she could find an expert to opine that Estes experienced a psychotic episode and was legally insane when he committed the crimes. (*See id*. at 30 (ECF No. 19-8 at 31.) In fact, she was concerned that, with respect to his mental health, Estes might have been malingering. (*See id*. at 11, 22, 26-27 (ECF No. 19-8 at 12, 23, 27-28).) Furthermore, Estes' trial counsel did in fact attempt to find an expert to substantiate Estes' belief that when he committed the crimes he was under the influence of lithium poisoning, but she could not find any expert who would support that theory. (*See id*. at 25 (ECF No. 19-8 at 26).) Estes' trial counsel testified that she believes that the result of Estes' trial would not have been different had she attempted further to find an expert to substantiate an insanity defense. (*See id*. at 31-32 (ECF No. 19-8 at 32-33).)

Moreover, and perhaps most importantly to the resolution of this claim, Estes has never presented any expert opinion that he was legally insane when he committed the crimes. Dr. Slagle, the expert that Estes presented at the state-court evidentiary hearing, did not express such an opinion. (*See* Testimony of Dr. Dodge Slagle, Transcript of Evidentiary Hearing, Exh. 68 at 35-52 (ECF No. 19-8 at 36-53).) Dr. Slagle testified that he believed that Estes was in a manic state when he committed the crimes in this case, but he could not say that Estes met the standard for legal insanity. (*See id*. at 43-44, 50 (ECF No. 19-8 at 44-45, 51).) Notably, Dr. Slagle concluded his testimony as follows:

> Q. Your basic opinion here is that Mr. Estes' actions at the time of the crime suggest that he had the capacity to appreciate the wrongfulness of his behavior. Is that correct?

APP. 020

> A. That's a part of my opinion, yes.
>
> Q. And that's – I mean, that doesn't really matter whether you – that opinion is based on facts that haven't changed from '01 to '03 to 2010.
>
> A. That's correct.
>
> Q. And so, you would be no more capable on a retrial to come in and basically testify on behalf of a not guilty by reason of insanity defense based upon the facts of this case, is that fair?
>
> A. Based on the facts and the information available to me I could not testify that he was likely not guilty by reason of insanity and – at the time of the alleged crime. That's correct.
>
> * * *
>
> THE COURT: Based on the information you have now, do you believe that [Estes] did not appreciate the nature and quality of his acts that day?
>
> THE WITNESS: Based on the information available to me from the reports of others as he says he's not able to remember it, such as going to a place where it's less likely that he would be discovered, out in the desert some place. Such as allegedly telling the young man not to tell anybody. You know, those sorts of things to me would be a suggestion that you had some awareness that what you were doing was wrongful. I — those are the things that would lend me to believe that he had some capacity there. Again the symptoms that I think were going on with him at the time would suggest that his judgment was impacted by those symptoms. But the fact that he could make those choices to me suggests that he had some capacity at that time.

(Testimony of Dr. Dodge Slagle, Transcript of Evidentiary Hearing, Exh. 68 at 49, 51-52 (ECF No. 19-8, pp. 50, 52-53).)

Nor did Dr. Schmidt, an expert retained by Estes, who died before the evidentiary hearing, express an opinion supporting an insanity defense. (*See* Neuropsychological Assessment Report of David L. Schmidt, Ph.D., Exh. 64A (ECF No. 19-4).)

In light of the evidence at trial, and the record of the state-court evidentiary hearing, in this Court's view, the Nevada Supreme Court reasonably rejected Estes' claim that his trial counsel was ineffective for failing to further investigate Estes' mental illness and to further attempt to obtain an expert to support an insanity defense based upon his mental illness. It is plain from the evidence that any further pursuit of such a defense would have been fruitless and would have had no impact on the outcome of Estes' trial.

The Nevada Supreme Court's ruling on this claim was not contrary to, or an unreasonable application of, *Strickland* or any other United States Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. The Court denies relief on Ground 3A.

E. Ground 3B

In Ground 3B, Estes claims that his constitutional rights were violated, as a result of ineffective assistance of his appellate counsel, because, on his direct appeal to the Nevada Supreme Court, his counsel did not argue that his rights under the Confrontation Clause of the Sixth Amendment were violated at trial as a result of admission of hearsay into evidence. (*See* First Amended Petition at 21-23.) Specifically, Estes challenges the trial court's admission of testimony of Officer Robert Williams, Dr. Theresa Vergara, and Tamara Norris. (*See id*. at 22.)

Estes originally included testimony of Officer Julie Hager within the scope of this claim (*see id*.), but abandoned that part of the claim in his reply. (*See* Reply (ECF No. 34) at 37 ("As such, Estes does not have a viable IAC direct appeal argument as to Officer Julie Hager and should not have included that subpart in his federal petition.").)

In his state habeas action, Estes claimed that his appellate counsel was ineffective for failing to raise an issue regarding hearsay testimony of Williams, Vergara and Norris. (*See* Supplemental Brief in Support of Petition for Writ of Habeas Corpus, Exh. 63 at 14-16 (ECF No. 19-2 at 15-17).) The state district court denied the claim (*see* Findings of Fact, Conclusions of Law and Order, Exh. 71 at 5 (ECF No. 19-11 at 6)), and, on appeal, the Nevada Supreme Court affirmed, ruling as follows:

> [A]ppellant argues that his appellate counsel was ineffective for failing to argue that admission of multiple out-of-court statements by the victim was improper. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel argued on appeal that one of the challenged statements was improperly admitted and this court rejected that argument. *Estes v. State*, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006). The other challenged statements were properly admitted by the district court under hearsay exceptions for excited utterances and medical examinations. *See* NRS 51.095; NRS 51.115. Therefore, any challenge on direct appeal to admission of those statements would have been futile. *See Ennis v. State*,

> 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); *see also Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). Further, given the overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel raised additional challenges to admission of these out-of-court statements. Therefore, the district court did not err in denying this claim.

(Order of Affirmance, Exh. 76 at 5 (ECF No. 19-16 at 6).)

This claim is meritless. To the extent that Estes claims that his appellate counsel should have argued that the admission of the testimony of Williams, Vergara and Norris violated his rights under the Confrontation Clause, such an argument would plainly have failed because B.C. and Hager, the individuals who made the out-of-court statements at issue, testified at trial. *See Davis v. Washington*, 547 U.S. 813, 823-24 (2006); *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination."); *see also Crawford*, 541 U.S. at 59 n.9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). And, to the extent that Estes claims that his appellate counsel should have argued that testimony of Williams, Vergara and Norris was inadmissible hearsay under state law, the Nevada Supreme Court's rejection of that claim, on state-law grounds, is authoritative and binding in this federal habeas corpus action. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus.").

The Nevada Supreme Court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United

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States Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence. The Court denies relief on Ground 3B.

V. CERTIFICATE OF APPEALABILITY

The standard for issuance of a certificate of appealability is governed by 28 U.S.C. § 2253(c). The Supreme Court has interpreted section 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). Applying this standard, the Court finds that a certificate of appealability is warranted with regard to Ground 1 of Estes' amended petition.

VI. CONCLUSION

It is therefore ordered that, pursuant to Federal Rule of Civil Procedure 25(d), the Clerk of the Court is directed to substitute Renee Baker for Robert LeGrand, on the docket for this case, as the respondent warden of the Lovelock Correctional Center.

It is further ordered that the First Amended Petition for Writ of Habeas Corpus (ECF No. 21) is denied.

It is further ordered that the petitioner is granted a certificate of appealability with regard to Ground 1 of his first amended petition for writ of habeas corpus. Petitioner is denied a certificate of appealability in all other respects.

It is further ordered that the Clerk of the Court is to enter judgment accordingly.

DATED THIS 13th day of July 2017.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

APP. 024

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DONALD GLENN ESTES, Petitioner, v. LaGRANDE, et al., Respondents.	Case No. 3:13-cv-00072-MMD-WGC ORDER

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner represented by counsel. Before the Court is respondents' motion to dismiss the first amended petition.

I. PROCEDURAL HISTORY

Petitioner was convicted, pursuant to a jury trial, of the following: (1) two counts of preventing and dissuading a person from testifying or producing evidence; (2) one count of first-degree kidnapping; (3) two counts of battery with intent to commit a crime; (4) six counts of sexual assault of a minor under fourteen years of age; (5) two counts of coercion; and (6) two counts of lewdness with a child under the age of fourteen. (Exh. 34.) Petitioner was sentenced to forty years to life in prison. (Exh. 39.[1])

Petitioner filed a direct appeal. (Exh. 40.) Petitioner's opening brief was filed on September 13, 2005. (Exh. 41.) On November 20, 2006, the Nevada Supreme Court

[1]The exhibits referenced in this order are found in the Court's record at dkt. nos. 14-19.

published an en banc opinion, affirming in part, reversing in part, and remanding in part. (Exh. 47; *Estes v. State*, 146 P.3d 1114 (Nev. 2006).) The Nevada Supreme Court's opinion addressed the issue of allowing compelled defendant psychiatric treatment disclosures and clinical observations to be used by the prosecution at trial to establish defendant's guilt or otherwise combat an affirmative defense of insanity. *Estes*, 146 P.3d at 1120-39. The opinion finds against petitioner on this assignment of error and rejected several other claims. The court remanded the matter for dismissal of Count 4 (battery with intent to commit sexual assault), Count 12 (lewdness with a minor), and Count 13 (lewdness with a minor), and to vacate the attendant sentences. *Id.* at 1145. The Court further remanded the matter for further proceedings on the two dissuading of a witness counts. *Id.* The case was also remanded to have the judgment of conviction reflect that petitioner was convicted pursuant to a jury trial (instead of a guilty plea) and to correct the number of days credit for time served, if necessary. *Id.* Petitioner filed a petition for rehearing, which the Nevada Supreme Court denied by order filed December 28, 2006. (Exh. 52.) Remittitur was issued on March 29, 2007. (Exh. 54.) Petitioner sought a writ of *certiorari*, which was denied by the United States Supreme Court. (Exh. 56.)

On December 20, 2006, the state district court conducted a hearing implementing the order of the Nevada Supreme Court, dismissing Counts 4, 12, and 14 for lack of sufficiency of the evidence. The state district court also dismissed Counts 1 and 15, the dissuading a witness counts. (Exh. 1, State Court Minutes.) The state district court filed an amended judgment of conviction on January 12, 2007. (Exh. 51.) The state district court later filed a final second amended judgment of conviction, correcting credit for time served, on March 23, 2007. (Exh. 53.)

On November 28, 2007, petitioner, acting in *pro per*, filed a post-conviction habeas petition and accompanying memorandum of points and authorities in the state district court. (Exhs. 57 & 58.) The state district court appointed counsel to represent petitioner in the post-conviction proceedings. (Exh. 61.) On August 17, 2009, petitioner's

attorney filed a supplemental brief in support of the post-conviction habeas petition. (Exh. 63.) On September 17, 2009, petitioner's attorney filed a second supplemental brief in support of the post-conviction habeas petition. (Exh. 64.)

On April 7, 2011, the state district court conducted an evidentiary hearing on the post-conviction petition and supplements. (Exh. 68.) The state district court entered findings of fact, conclusions of law, and order denying the post-conviction habeas petition on June 14, 2011. (Exh. 71.)

Petitioner appealed the denial of his post-conviction state habeas petition. (Exh. 69.) On December 22, 2011, petitioner filed his opening brief on appeal. (Exh. 73.) On December 12, 2012, the Nevada Supreme Court entered an order affirming the state district court's denial of the post-conviction habeas petition. (Exh. 76.) Remittitur issued on January 8, 2013. (Exh. 77.)

Petitioner dispatched his federal habeas petition to this Court on December 23, 2012. (Dkt. no. 1-1, at p. 1.) By order filed April 11, 2013, this Court appointed the Federal Public Defender to represent petitioner in this federal habeas corpus proceeding. (Dkt. no. 3.) The Office of the Federal Public Defender entered an appearance on behalf of petitioner on April 19, 2013. (Dkt. no. 7.) On June 6, 2013, this Court issued a scheduling order, directing the filing of an amended petition and a response to the same. (Dkt. no. 9.) The Court granted petitioner's motion for an extension of time in which to file an amended petition. (Dkt. no. 12.) Through counsel, petitioner filed a first amended petition on November 12, 2013. (Dkt. no. 20.) The first amended petition contains three grounds for relief, as follows:

> Ground 1: The United States Constitutional rights to due process, the protection against self-incrimination, and the right to the assistance of counsel are violated when defendant is committed by court order to the state mental health facility and after he is found competent to proceed to trial and the prosecutor is allowed to use all the information gathered during this commitment to refute the basis for a plea of not guilty by reason of insanity and his defense to involuntary intoxication.
>
> Ground 2: Petitioner Estes' United States Constitutional rights to due process and the right to present a defense were denied when the court refused to give an involuntary intoxication jury instruction.

> Ground 3: Trial and appeal counsel for Estes failed to provide constitutionally adequate performance in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when:
>
> > A. Trial counsel failed to obtain an expert and otherwise investigate and support Estes' defense theory and testimony that he suffered from mental illness in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and
> >
> > B. Nevada direct appeal counsel failed to raise on appeal that the trial court's admission of several instances of hearsay and testimony statements in violation of the Confrontation Clause of the Sixth Amendment to the Constitution.

First Amended Petition, at dkt. no. 20.

Respondents have filed a motion to dismiss the first amended petition, arguing that Grounds 1 and 2 are unexhausted. (Dkt. no. 25.) Petitioner has filed a response in opposition to the motion to dismiss. (Dkt. no. 26.) Respondents have filed a reply. (Dkt. no. 27.)

II. DISCUSSION

A. Exhaustion Standard

A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999); *see also Duncan v. Henry,* 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore,* 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey,* 653 F.2d 374, 376 (9th Cir. 1981).

A habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To satisfy exhaustion, each of petitioner's claims must have been previously presented to the

Nevada Supreme Court, with references to a specific constitutional guarantee, as well as a statement of facts that entitle petitioner to relief. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2002). The federal constitutional implications of a claim, not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (*citing Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must be "alerted to the fact that the prisoner [is] asserting claims under the United States Constitution" and given the opportunity to correct alleged violations of the prisoner's federal rights. *Duncan v. Henry,* 513 U.S. 364, 365 (1995); s*ee Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Jiminez v. Rice,* 276 F.3d 478, 481 (9th Cir. 2001) (*quoting Rose v. Lundy,* 455 U.S. 509, 520 (1982)).

A claim is not exhausted unless the petitioner has presented to the state court the same operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. Of Corrections,* 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the petitioner presents to the federal court facts or evidence which place the claim in a significantly different posture than it was in the state courts, or where different facts are presented at the federal level to support the same theory. *See Nevius v. Sumner,* 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v. Sumner,* 688 F.2d 1294, 1295 (9th Cir. 1982). However, a federal habeas petition may present new, additional, or supplemental facts that were not considered in the state court, so long as the evidence does not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *see also Lopez v. Schiro*, 491 F.3d 1029, 1040 (9th Cir. 2007); *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999).

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B. Ground 1

Respondents argue that Ground 1 of the federal amended petition includes unexhausted factual allegations. Ground 1 of the federal amended petition alleges that: "The United States constitutional rights to due process, the protection against self-incrimination, and the right to the assistance of counsel were violated when a defendant is committed by court order to the state mental health facility and after he is found competent to proceed to trial and the prosecutor is allowed to use all the information gathered during this commitment to refute the basis for a plea of not guilty by reason of insanity and his defense of involuntary intoxication." (Amended Petition, at p. 17.) Petitioner was twice committed to the Lake's Crossing facility for treatment and to restore competency so that prosecutions against him may proceed. At trial, the State called as witnesses Dr. Elizabeth Neighbors (psychologist), Dr. Henson (psychiatrist), and A.J. Coronella (social worker), all of whom were involved in petitioner's mental health treatment at the Lake's Crossing facility. Petitioner alleges that these witnesses were called by the prosecution not only for their clinical impressions, but regarding their beliefs and opinions regarding the viability of petitioner's proposed affirmative defenses, including petitioner's use of the insanity defense. Petitioner asserts that allowing the testimony of those three witnesses deprived him of due process, the right against self-incrimination, and the right to the assistance of counsel. Petitioner alleges that the Nevada Supreme Court's determination that the testimony of Neighbors, Henson, and Coronella did not violate his constitutional rights so as to warrant reversal was an unreasonable application of clearly established federal law as determined by the United States Supreme Court. (Amended Petition, at pp. 17-21.)

Respondents contend that in Ground 1 of the federal amended petition, petitioner places more emphasis on the admission of a clinical social worker's testimony about petitioner showing interest in the insanity defense during a legal process class at the Lake's Crossing facility. While respondents acknowledge that petitioner challenged the admissibility of the social worker's testimony in state court, they contend that the

opening brief to the Nevada Supreme Court focused mostly on the admissibility of psychologist and psychiatrist that evaluated petitioner for competency to stand trial. Respondents further contend that petitioner "only mentioned" the right to counsel in the opening brief by stating that the State is required to provide notice of any psychiatric examinations after a defendant is charged, causing the Sixth Amendment right to counsel to attach.

This Court has reviewed the relevant state court pleadings, including petitioner's opening brief on direct appeal to the Nevada Supreme Court. In the opening brief on direct appeal, petitioner presented his claim that Dr. Neighbors, Dr. Henson, and social worker Coronella were called by the prosecution not only as to their clinical impressions, but as to their beliefs and opinions regarding the viability of petitioner's proposed affirmative defenses, including petitioner's use of the insanity defense. (Exh. 41, at p. 15.) In the opening brief to the Nevada Supreme Court, petitioner asserted that allowing the testimony of those three witnesses deprived him of due process, the right against self-incrimination, and the right to the assistance of counsel. (*Id.*, at pp. 15-25.)

The Court rejects respondents' argument that the federal petition must exactly mirror the brief that petitioner presented to the Nevada Supreme Court. There need not be an "exact correlation between the pleadings in both federal and state court." *Rice v. Wood*, 44 F.3d 1396, 1403 (9th Cir. 1995), *vacated in part on other grounds by rehearing en banc*, 77 F.3d 1138 (9th Cir. 1996). Requiring a federal petition to exactly mirror a state petition is simply "not the law." *Id.* (*citing Vasquez v. Hillery*, 474 U.S. at 257-58). Respondents' contention that petitioner did not make specific allegations to the Nevada Supreme Court regarding the social worker's testimony and its impact on petitioner' right to counsel and a fair trial is belied by the record. (*See* Exh. 41.) Moreover, to the extent that respondents argue that petitioner's federal petition contains factual specifics that were not presented to the Nevada Supreme Court, "[a] federal habeas petition may present new, additional, or supplemental facts that were not considered in the state court, so long as the evidence does not "fundamentally alter the

legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. at 260. Ground 1 of the federal amended petition does not contain additional facts that fundamentally alter the legal claims presented to the Nevada Supreme Court. Petitioner made substantially the same arguments in his Nevada Supreme Court briefing on direct appeal that he now makes in Ground 1 of the federal amended petition. Petitioner fairly presented the claims alleged in Ground 1 of the federal petition to the Nevada Supreme Court on direct appeal. The Court finds that Ground 1 of the federal amended petition is exhausted.

C. Ground 2

Petitioner entitles Ground 2 of the federal amended petition as follows: "Petitioner Estes' United States Constitutional rights to due process and the right to present a defense were denied when the court refused to give an involuntary intoxication jury instruction." (Amended Petition, at p. 20.) Petitioner alleges that, at trial, he testified that he was suffering from lithium poisoning due to his mental health treatment prescriptions. Petitioner alleges that in support of his theory of a delusional break due to acute lithium poisoning, he submitted a jury instruction on involuntary intoxication, but the trial court refused to give such an instruction. (Amended Petition, at pp. 20-21.)

Respondents argue that petitioner failed to properly federalize this claim when presenting it to the Nevada Supreme Court. In the opening brief on appeal to the Nevada Supreme Court, petitioner cited the Due Process Clause of the United States Constitution, and explicitly stated that the trial court's denial of an involuntary intoxication theory of defense instruction denied him due process and the right to present a defense. (Exh. 41, at pp. 25-27.) Respondents appear to argue that petitioner must cite the relevant federal constitutional provision and violation, the theory for the violation, and also cite federal case law directly on point in order to properly federalize a claim in state court. This is not required to properly federalize a claim for exhaustion purposes. "In order to alert the state court, a petitioner must make reference to provisions of the federal Constitution *or* must cite either federal or state case law that

engages in a federal constitutional analysis." *Fields v. Waddington*, 401 F.3d 1018, 1021-22 (9th Cir. 2005) (emphasis added); *see also Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (petitioner must make the federal basis of the claim explicit either by referencing specific provisions of the federal constitution or statutes, *or* by citing to federal case law). In his opening brief to the Nevada Supreme Court, petitioner cited to the relevant provisions of the federal constitution for which he claims violations. (Exh. 41, at pp. 25-27.) Petitioner's claims in Ground 2 of the federal amended petition were properly federalized in state courts.

Respondents also argue that petitioner mentioned the ineffective assistance of counsel claim in Ground 2 of the federal amended petition, rendering Ground 2 unexhausted. Petitioner alleges in the final paragraph of Ground 2 that, "to the extent there was an insufficient evidentiary basis for the defense [of involuntary intoxication], it was because of ineffective assistance of trial counsel." (Amended Petition, at p. 21.) The Court notes that Ground 3 of the amended petition includes the allegation that trial counsel failed to obtain an expert to support petitioner's theory of mental impairment, and appellate counsel failed to raise the issue on direct appeal. (Amended Petition, at pp. 21-23.) Respondents do not challenge the exhaustion of Ground 3. The Court finds that petitioner's mere mention of ineffective assistance of counsel in Ground 2 of the amended petition does not render Ground 2 unexhausted. Petitioner fairly presented the claims alleged in Ground 2 of the federal petition to the Nevada Supreme Court. (*See* Exh. 41, at pp. 25-27.) The Court finds that Ground 2 of the federal amended petition is exhausted.

III. CONCLUSION

It is therefore ordered that respondents' motion to dismiss (dkt. no. 25) Grounds 1 and 2 of the amended petition for lack of exhaustion is denied.

It is further ordered that respondents shall file and serve an answer to the amended petition within thirty (30) days from the entry of this order. The answer shall

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include substantive arguments on the merits as to each ground of the amended petition. No further motions to dismiss will be entertained.

It is further ordered that petitioner shall file and serve a reply to the answer, within thirty (30) days after being served with the answer.

It further is ordered that any further exhibits filed by the parties shall be filed with a separate index of exhibits identifying the exhibits by number or letter. The CM/ECF attachments that are filed further shall be identified by the number or numbers (or letter or letters) of the exhibits in the attachment. The hard copy of any additional exhibits shall be forwarded — for this case — to the staff attorneys in Reno, Nevada.

DATED THIS 22nd day of July 2014.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ESTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58193

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

On appeal from the denial of his November 28, 2007, petition, appellant argues that the district court erred in denying his 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, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel 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 argues that his trial counsel was ineffective for failing to obtain experts to testify regarding appellant's mental health in support of the insanity defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that appellant was adamant that poisoning from prescription lithium caused him to be mentally impaired during the incident, but that mental illness did not cause him to commit the crimes. Counsel testified that she investigated potential experts to testify regarding lithium poisoning rendering someone legally insane, but was unable to find any expert willing to provide testimony of that nature. Further, a mental health expert who examined appellant following his conviction testified at the evidentiary hearing that he could not state that appellant was legally insane during the crime. Therefore, appellant fails to demonstrate a reasonable probability of a different outcome had counsel performed additional investigation into expert testimony. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). The district court concluded that counsel did not provide ineffective assistance regarding expert testimony and substantial evidence supports that decision. Therefore, we conclude that the district court did not err in denying this claim.[1]

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[1]The State argues that appellant conceded that he failed to demonstrate trial counsel was ineffective for failing to investigate expert witnesses before the district court and therefore, waived his opportunity to seek appellate review of this claim. Our review of the record reveals that this issue was not withdrawn and that appellant did not concede he had

continued on next page . . .

Second, appellant argues trial counsel was ineffective for failing to object to admission of appellant's statements to the victim that he was in a Mexican gang and on probation, as appellant asserts they were inadmissible prior bad acts. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, evidence was produced that appellant told the victim he was in a Mexican gang, on probation, possessed firearms, and that the victim or the victim's family would suffer harm if the victim told others of the sexual assault. These statements were properly admitted as they were evidence of appellant's commission of the charged crime of preventing or dissuading a person from testifying or producing evidence. These statements were also inextricably intertwined with the sexual assault, lewdness, and kidnapping charges, and therefore, were necessary to complete the story of the crime. See State v. Shade, 111 Nev. 887, 894-95, 900 P.2d 327, 331 (1995). Further, trial counsel informed the district court that she did not wish further instruction to the jury regarding appellant's probation statements as she did not want those statements to be highlighted. This was a tactical decision and, as such, is "virtually unchallengeable absent extraordinary circumstances," Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant did not demonstrate. In addition, there was overwhelming evidence of appellant's guilt, and therefore, appellant fails to demonstrate a reasonable probability of a different outcome at trial

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. . . continued

failed to demonstrate that trial counsel was ineffective. Therefore, this issue was properly preserved for appeal.

had counsel argued that the Mexican gang and probation statements were inadmissible prior bad acts. Therefore, the district court did not err in denying this claim.[2]

Next, appellant argues that the district court erred in denying his 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 argues that his appellate counsel was ineffective for failing to challenge admission of appellant's statements that he was in a Mexican gang and on probation as improper prior bad acts. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. As discussed previously, appellant's statements regarding involvement in a Mexican gang and serving a term of probation were properly admitted as evidence of preventing or dissuading a person from testifying or producing evidence and as necessary to tell the story of

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[2]The State argues that this claim should be rejected because appellant did not provide an adequate record for this court to review this claim. We disagree. Appellant provided a sufficient record.

the sexual assault, lewdness, and kidnapping charges. Appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel argued those statements were inadmissible as prior bad acts as there was overwhelming evidence of his guilt. Therefore, the district court did not err in denying this claim.

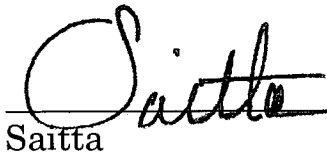
Second, appellant argues that his appellate counsel was ineffective for failing to argue that admission of multiple out-of-court statements by the victim was improper. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel argued on appeal that one of the challenged statements was improperly admitted and this court rejected that argument. Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006). The other challenged statements were properly admitted by the district court under hearsay exceptions for excited utterances and medical examinations. See NRS 51.095; NRS 51.115. Therefore, any challenge on direct appeal to admission of those statements would have been futile. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); see also Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). Further, given the overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable likelihood of success on appeal had counsel raised additional challenges to admission of these out-of-court statements. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that the cumulative effect of trial and appellate counsel's errors amounts to ineffective assistance of counsel. Appellant fails to demonstrate that trial or appellate counsel provided deficient performance or that he was prejudiced for any of the above claims. Thus, appellant fails to demonstrate cumulative error amounting

to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Having considered appellant's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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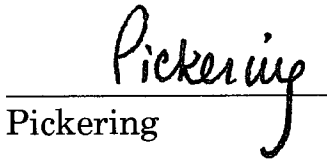
Saitta



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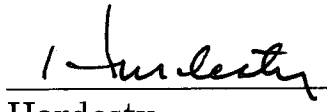

_____, J.
Hardesty

cc: Hon. Elissa F. Cadish, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

ORIGINAL

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JOCP

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Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONALD GLENN ESTES,
#1509441

Defendant.

Case No: C180728

Dept No: VIII

AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)

The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 & 15 - PREVENTING OR DISSUADING PERSON FROM TESTIFYING OR PRODUCING EVIDENCE (Felony - Category D); COUNT 2 - FIRST DEGREE KIDNAPING (Felony - Category A); COUNT 3 & 4 - BATTERY WITH INTENT TO COMMIT A CRIME (Felony - Category B); COUNT 5, 6, 7, 8, 9 & 10 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Felony - Category A); COUNT 11 & 14 - COERCION (Felony - Category B); COUNT 12 & 13 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony - Category A), in violation of NRS 199.230; 200.310, 200.320; 200.400; 200.364, 200.366; 207.190; 201.230, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime(s) of COUNT 1 & 15 - PREVENTING OR DISSUADING PERSON FROM TESTIFYING OR PRODUCING EVIDENCE (Felony - Category D); COUNT 2 - FIRST DEGREE KIDNAPING (Felony - Category A); COUNT 3 & 4 - BATTERY WITH INTENT TO COMMIT A CRIME (Felony - Category B); COUNT 5, 6, 7, 8, 9 & 10 -

SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Felony - Category A); COUNT 11 & 14 - COERCION (Felony - Category B); COUNT 12 & 13 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony - Category A); and thereafter on the 13th day of May, 2004, the Defendant was present in Court for sentencing with his counsel, CHRISTY CRAIG, Deputy Public Defender, and good cause appearing therefore,

THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, the $150 DNA Analysis fee and $2,024.55 RESTITUTION, the Defendant is sentenced as follows: COUNT 1 to a MAXIMUM term of FORTY-EIGHT (48) MONTHS with a MINIMUM parole eligibility of NINETEEN (19) MONTHS in the Nevada Department of Corrections (NDC); COUNT 2 to LIFE with parole eligibility after FIVE (5) YEARS; COUNT 3 to a MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72)MONTHS; COUNT 4 to a MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS; COUNT 5 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 6 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 7 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 8 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 9 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 10 to LIFE with parole eligibility

after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 11 to a MAXIMUM term of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of TWENTY-EIGHT (28) MONTHS; COUNT 12 to LIFE with parole eligibility after TEN (10) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 13 to LIFE with parole eligibility after TEN (10) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 14 to a MAXIMUM term of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of TWENTY-EIGHT (28) MONTHS; and COUNT 15 to a MAXIMUM term of FORTY-EIGHT (48) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS. COUNTS 1-9 and 11-12 to run CONCURRENT to each other; COUNTS 10 and 13-15 to run CONCURRENT to each other and CONSECUTIVE to COUNTS 1-9; 11-12. Deft to register as a sex offender within 48 hours. Deft to submit to a test to determine genetic markers and pay $150.00 testing fee. Deft. to receive 898 DAYS credit time served.

PURSUANT to defendant's appeal, this case was remanded by the Supreme Court for dismissal of Count 4 – Battery with Intent to Commit Sexual Assault, Counts 12 and 13 – Lewdness with a Minor Under the Age of 14 and for vacation of the attendant sentences. Remanded for further proceedings on Counts 1 and 15 – Dissuading a Witness.

THE COURT ORDERED on the 20th day of December, 2006, Counts 1, 4, 12, 13 and 15 are dismissed and those attendant sentences vacated. Further, the number of days credit for time served is corrected to 89 days.

DATED this 11 day of January, 2007.

DISTRICT JUDGE

mmw/SVU

APP. 043

122 Nev., Advance Opinion 96

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ESTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43468

FILED

NOV 30 2006

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

Appeal from a judgment of conviction, upon jury verdict, of two counts of preventing or dissuading a person from testifying or producing evidence, one count of first-degree kidnapping, two counts of battery with intent to commit a crime, six counts of sexual assault of a minor under 14, two counts of coercion, and two counts of lewdness with a child under 14. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Affirmed in part, reversed in part and remanded with instructions.

Philip J. Kohn, Public Defender, and Christy L. Craig and Sharon G. Dickinson, Deputy Public Defenders, Clark County,
for Appellant.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and Bill A. Berrett and James Tufteland, Chief Deputy District Attorneys, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

06-24478

OPINION

By the Court, MAUPIN, J.:

In this opinion, we consider, inter alia, the admissibility of evidence gathered while a defendant is committed to a mental institution for purposes of evaluating and restoring competency to stand trial. For the reasons stated infra, we affirm all but five of the convictions entered below and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant Donald Estes sexually assaulted a minor, B.C., in a desert area near Las Vegas. The State charged Estes with six counts of sexual assault of a minor under the age of 14 years, two counts of lewdness with a child under the age of 14 years, two counts of battery with intent to commit a crime, two counts of coercion, two counts of preventing or dissuading a person from testifying or producing evidence, and one count of first-degree kidnapping. Based upon preliminary findings that Estes was not competent to stand trial, the district court twice committed him to the Lake's Crossing Center for Mentally Disordered Offenders.[1] Relying upon evaluations provided by Lake's Crossing staff, the district court eventually found Estes competent to stand trial.

Estes pleaded not guilty by reason of insanity and the case proceeded to trial. He called no experts and testified as the sole defense witness. In this, he recounted all of his mental health

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[1]Lake's Crossing is operated by the Nevada Division of Mental Health and Development Services.

problems beginning as a young adult and claimed that medication (lithium) prescribed for diagnosed bipolar disorder caused him to abduct and assault B.C. He further admitted much of the charged misconduct, stating that if "B.C. said he did it," he probably did.

In rebuttal, the State presented the testimony of three members of the Lake's Crossing staff: Elizabeth Neighbors, Ph.D., a forensic psychologist and facility director; Hale Henson, M.D., psychiatrist; and A.J. Coronella, a licensed clinical social worker. All three either observed or treated Estes during the evaluation process.

Dr. Neighbors testified concerning psychological testing of Estes that revealed occasional malingering, i.e., feigned mental illness. She also testified that neither she, nor members of Estes' treatment team, observed him in a psychotic state or viewed him as incompetent during his second commitment. Dr. Henson opined that Estes attempted to present a history of mental illness to avoid more severe prosecution, that Estes did not suffer from lithium poisoning, and that Estes desired to be medicated to support his claim that he had a disabling medical condition.

Doctors Neighbors and Henson also testified to a reasonable degree of medical certainty that, under the M'Naghten standard,[2] Estes knew right from wrong and suffered from no mental

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[2]The seminal common-law case from England articulating standards for insanity as a defense to criminal misconduct is M'Naghten's Case, 8 Eng. Rep. 718, 10 Cl. & Fin. 200, 209 (1843). See Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001) (generally adopting the M'Naghten construct for when an accused may successfully assert an insanity defense).

condition that would impair his judgment during the alleged incidents with B.C. More particularly, Dr. Neighbors stated that Estes' behavior as reported seemed deliberate and thoughtful. Both derived their opinions from police reports and statements to the police made by Estes and B.C.

The social worker, A.J. Coronella, testified to Estes' interest in preparing an insanity defense, as revealed in a discussion with him during her "legal process" class at Lake's Crossing. She also recounted his comment to her, in an interview, that an affair between his wife and brother was the underlying reason for his divorce. The State elicited the latter statement in response to Estes' testimony that he and his wife divorced because of his mental illness.

The jury convicted Estes on all counts. The district court imposed a series of concurrent and consecutive sentences totaling 40 years imprisonment and ordered Estes to register as a sex offender upon his eventual release. The court further awarded Estes 898 days' credit for time served in local custody before sentencing.

On appeal, Estes assigns numerous trial errors, the most significant being the State's use in rebuttal of testimony from Lake's Crossing staff members who observed and interacted with Estes during his court-ordered commitments. He asserts additional claims of error in connection with the State's portrayal of him as a liar during closing argument based upon the Lake's Crossing evidence, the district court's denial of his proffered involuntary intoxication instructions, use of an incorrect jury instruction concerning his insanity defense, admission of hearsay evidence and a photograph of B.C., admission of video testimony given by B.C.'s deceased father, admission of an

audiotape and transcript of Estes' voluntary statement to police, and the court's failure to merge a count of battery with intent to commit a crime with one of the sexual assault counts. Finally, he asserts that the State failed to provide substantial evidence supporting the following charges: dissuading a witness, battery with intent to commit a crime, and lewdness with a minor. Estes further claims that cumulative error requires reversal of all of the convictions.

DISCUSSION

Use of evidence from court-ordered commitments

Estes claims that the State's presentation of the three Lake's Crossing witnesses requires reversal based upon due process, Fifth Amendment and public policy considerations; improper admission of opinion evidence regarding Estes' sanity at the time of the incident; privilege; failure to properly qualify the experts; and failure to provide notice of psychiatric examinations to his counsel in violation of the Sixth Amendment. Estes also argues that use of confidential information generated from his commitments during the State's closing argument constituted prejudicial error because it addressed the ultimate issue in the case. As a preliminary matter, we note that Estes failed to object on any of these grounds below; therefore, we will assess his claims under plain error review.[3]

[3]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (under plain error review, this court examines whether an "error" occurred, whether it was "plain" or clear, and whether it affected the defendant's substantial rights).

In resolving these claims, we must first clarify our jurisprudence concerning the use of such evidence as stated in Esquivel v. State,[4] McKenna v. State,[5] Brown v. State,[6] Winiarz v. State[7] and DePasquale v. State.[8]

In Esquivel, we reversed a conviction based upon the State's use of statements made during a court-ordered mental examination to impeach a defendant's denial of the charges against him.[9] In this, we reasoned that a defendant who is subject to an examination by a court-appointed physician "should feel free in such a clinical climate to discuss all the facts relevant to the examination without the guarded fear that the statements may be later used against him."[10] In McKenna, this court again determined that due process and fair play prohibit the use of the confidential content of a court-ordered psychiatric evaluation to secure a conviction.[11] We noted that the purpose of obtaining such an evaluation would be defeated if

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[4]96 Nev. 777, 617 P.2d 587 (1980).

[5]98 Nev. 38, 639 P.2d 557 (1982).

[6]113 Nev. 275, 287-90, 934 P.2d 235, 243-45 (1997).

[7]104 Nev. 43, 752 P.2d 761 (1988).

[8]106 Nev. 843, 803 P.2d 218 (1990).

[9]96 Nev. at 778, 617 P.2d at 587.

[10]Id.

[11]98 Nev. at 39, 639 P.2d at 558.

the defendant knew that his statements could be used against him.[12] Going further, we embraced the federal court's statement in Collins v. Auger[13] that

> it is fundamentally unfair to use [a] defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt. It is immaterial in this regard whether the court ordered examination was at the request of defendant or the prosecution or whether it was to determine his capacity to aid in his own defense or his mental condition at the time of the crime.[14]

Applying Esquivel and Collins, we reversed McKenna's conviction because the admission of his statements made during a court-ordered psychiatric examination constituted the heart of the prosecution's case-in-chief.[15] Finally, in Brown, we held that use at a sentencing hearing of a defendant's unwarned statements[16] in connection with a court-ordered examination, along with the use of the report based upon the statements, violated the Fifth Amendment.[17]

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[12]Id.

[13]428 F. Supp. 1079 (S.D. Iowa 1977).

[14]Id. at 1082; see also Estelle v. Smith, 451 U.S. 454 (1981).

[15]McKenna, 98 Nev. at 40, 639 P.2d at 558-59.

[16]See Miranda v. Arizona, 384 U.S. 436 (1966).

[17]113 Nev. at 289-90, 934 P.2d at 244. In this, we relied upon Estelle v. Smith, which prohibits the use of such evidence at the penalty phase of a murder trial where no competent waiver of Fifth Amendment rights was effected. 451 U.S. at 468-69.

In Winiarz, we reversed a first-degree murder conviction based upon testimony elicited from a court-appointed psychiatrist retained to assess the defendant's "sanity" at the time of the alleged criminal misconduct and her competency to stand trial.[18] Although the defendant in Winiarz ultimately claimed that the homicide in question was accidental and never asserted that she lacked cognitive ability at any relevant time, defense counsel at trial inadvertently raised the question of her capability to premeditate when examining a defense expert. In rebuttal, the State called the psychiatrist who essentially testified that the defendant was a "cold-blooded" murderer, describing her in such terms as "lying," "faking" and "feigning," and as possessing a histrionic and "dis-social" personality.[19] We held that "[s]uch a usurpation of the jury function" to assess credibility mandated reversal.[20] Although we cited Esquivel and McKenna in Winiarz, we did not reverse on Fifth Amendment grounds. Rather, we concluded that the evaluator's testimony severely transcended the boundaries of permissible expert testimony.[21]

Of critical importance in Esquivel, McKenna and Winiarz is the common fact that none of the defendants in those matters placed their sanity at the time of the alleged criminal misconduct at issue. We did, however, address that situation by way of obiter dictum in

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[18]104 Nev. 43, 752 P.2d 761.

[19]Id. at 49, 752 P.2d at 765.

[20]Id. at 51, 752 P.2d at 766.

[21]Id.

DePasquale. In that case, we noted that use of a psychiatric examination for the limited purpose of rebutting an insanity defense does not implicate the Fifth Amendment.[22] In this, we relied upon Buchanan v. Kentucky, in which the United States Supreme Court permitted the State's use of a psychiatric evaluation when the petitioner had requested the evaluation and relied upon portions of it to establish his defense of extreme emotional disturbance.[23] The Court emphasized that the evaluation only contained the psychiatrist's general observations regarding the petitioner's mental state, and concomitantly lacked a description of any statements by the petitioner as to the crimes charged.[24] From this, the Court concluded that the evaluation could be used for the limited purpose of rebutting the petitioner's defense without violating the Fifth Amendment.[25]

In short, when the defendant places his sanity or mental capacity at issue, a defendant's right to protection under the Fifth and

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[22]106 Nev. 843, 847, 803 P.2d 218, 220 (1990). The statements admitted in DePasquale were spontaneously made at a mental health facility to a detention center guard between examinations. The health care professionals were not present. Under the circumstances presented, we concluded that the statements were not the product of an interrogation for Fifth Amendment purposes. Also, the statements did not relate to the charges, but to how the defendant felt he had to handle his interaction with evaluators. DePasquale, 106 Nev. at 846-47, 803 P.2d at 220.

[23]483 U.S. 402, 423 (1987).

[24]Id.

[25]Id. at 423-24.

Fourteenth Amendments from the disclosure of confidential communications made during a court-ordered psychiatric evaluation relates only to the incriminating communications themselves. Thus, reading Esquivel, McKenna, Brown, Winiarz, DePasquale and Buchanan together, a defendant is generally entitled to protection from admission of un-Mirandized incriminating statements made to health care professionals in the context of a court-ordered evaluation or examination. But, if the defendant seeks to introduce the evaluation or portions of it in support of a defense implicating his or her mental state, the prosecution may also rely upon the evaluation for the limited purpose of rebuttal.[26]

We now turn to the evidence challenged within the framework of this appeal.

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[26]Interviews during psychiatric evaluations are custodial and statements made by the defendant are entitled to Fifth Amendment protection. This is acknowledged in Estelle v. Smith, 451 U.S. 454 (1981), where the Court found such a violation in the absence of a free, voluntary and competent waiver of the rights against self-incrimination per Miranda. This notwithstanding, it would be counter to the purpose of these examinations to either encourage or mandate the administration of Miranda warnings by health care personnel. Thus, the right to the protection applies if Miranda warnings are not given. But, when the defendant relies upon the examination in aid of an insanity defense, other evidence concerning the evaluation becomes relevant and admissible. This notion is confirmed via obiter dictum in Estelle. Id. at 465.

Testimony by Ms. A.J. Coronella

Ms. Coronella testified to statements made by Estes during a "legal process" class[27] she conducted at Lake's Crossing, in which he discussed his interest in preparing an insanity defense. She also testified to another statement he made in the course of an interview, that the reason for his divorce was that his wife had an affair with his brother. We find no error in connection with any of this testimony. First, we conclude that the discussion concerning the preparation of an insanity defense was properly admitted to rebut his claims of ongoing mental illness. Nothing in his statements was incriminatory or the product of an interrogation,[28] and certainly, a statement is not "incriminatory" merely because it tends to show that the defendant is sane.[29] Second, his statements during the evaluation concerning the cause of his divorce, his brother's affair with his wife, were admissible as to impeach his testimony at trial that his mental illness precipitated the end of his marriage. Again, none of this information was directly

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[27]Estes correctly describes Lake's Crossing as a facility whose goal is to assist accused persons to gain legal competency so that prosecutions against them may go forward. The legal process classes referred to by Ms. Coronella are designed to prepare these defendants to be able to assist counsel at trial.

[28]See DePasquale, 106 Nev. at 847, 803 P.2d at 220.

[29]See Haynes v. State, 103 Nev. 309, 318, 739 P.2d 497, 503 (1987).

inculpatory or incriminating.[30] Rather, it related to the validity of Estes' insanity defense.

Estes also generally claims that Ms. Coronella improperly testified as to his sanity based upon their interactions at Lake's Crossing. We disagree. As stated, this testimony violates neither the Fifth nor the Fourteenth Amendments because Estes placed his sanity in issue and because the testimony does not describe any statements by Estes regarding the underlying crimes.

Testimony by Dr. Neighbors and Dr. Henson

Relying upon Esquivel and Winiarz, Estes similarly claims that the district court erred in allowing the testimony of Dr. Neighbors and Dr. Henson because they attacked Estes' credibility. In this, he challenges Dr. Neighbors' testimony that psychological testing indicated that Estes occasionally feigned mental illness, and that neither she, nor members of her treatment team, observed Estes in a psychotic state. With respect to Dr. Henson, Estes takes issue with his testimony opining that, based on medical records, Estes did not suffer from lithium poisoning and that Estes had attempted to present a history of mental illness to avoid prosecution. Estes also claims error with Dr. Henson's testimony that Estes desired to be medicated to

[30]It seems inconsistent that un-Mirandized custodial statements to the police may be used to impeach the declarant and un-Mirandized statements to mental health professionals in the context of a court-ordered examination may not be so used under Esquivel. However, differing considerations compel this result, i.e., the need for free and unguarded communication between the patient and physician.

demonstrate that he had a disabling mental condition.[31] We disagree. In Esquivel and Winiarz, while we discerned error in the use of the defendant's statements from a psychiatric interview to attack the defendant's credibility, the defendants in those cases, as noted, did not place their sanity at issue. And, again, the ruling in Winiarz did not relate precisely to the Fifth Amendment, but to the permissible scope of expert opinion. Finally, the testimony given by Drs. Henson and Neighbors was within their stated areas of expertise and did not reveal their confidential communications other than by inference.[32]

Estes also takes issue with Dr. Neighbors' and Dr. Henson's testimony that Estes knew right from wrong and suffered no mental condition that would impair his judgment during the incident. In this, Estes claims that they applied an incorrect standard for insanity in their testimony that requires reversal. In Finger v. State, we stressed that "[t]o qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the

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[31]Estes further claims that the State improperly introduced testimony by Drs. Neighbors and Henson in drawing a connection between Estes' use—and disuse—of medication and his feigning of mental illness. In this, he relies upon Sell v. United States, 539 U.S. 166, 178-81 (2003), in which the United States Supreme Court held that a defendant has a right to refuse medication. We reject this attenuated contention because the State may use such evidence to rebut Estes' defense of insanity. See Buchanan, 483 U.S. at 423.

[32]See NRS 50.275. Estes claims that Ms. Coronella, Dr. Neighbors, and Dr. Henson violated his privileges against the disclosure of confidential information generated as a result of the court-ordered doctor-patient and psychologist-patient relationship. We disagree. See NRS 49.245; NRS 49.235(2).

nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act."[33] In short, "[t]he ability to understand right from wrong under M'Naghten is directly linked to the nature of the defendant's delusional state."[34] We conclude that any error in this connection was harmless beyond a reasonable doubt.[35] First, while these witnesses recited an incomplete standard for insanity in their testimony, the district court admonished jurors that it would advise them of the proper insanity standard. Second, Estes provided no competent evidence that lithium poisoning induced a delusional state under Finger.

In summary, the testimony offered by Drs. Neighbors and Henson did not relay statements by Estes as to the crimes for which he was charged. As a general matter, their testimony primarily related to their general observations of his mental state, which is permissible under Buchanan to rebut an insanity defense. However, Neighbors also stated that Estes' behavior during the underlying incident struck her as deliberate and thoughtful, which violates the rule in Winiarz prohibiting psychiatric testimony that a defendant had the mental state constituting an element of the crime charged.[36] Although we

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[33]117 Nev. 548, 576, 27 P.3d 66, 85 (2001).

[34]Id. at 577, 27 P.3d at 85.

[35]See Chapman v. California, 386 U.S. 18, 24 (1967).

[36]104 Nev. at 51, 752 P.2d at 766. The rule in Winiarz was based upon an embrace of Federal Rule of Evidence 704(b), which prohibits expert witnesses from stating an "opinion or inference as to whether the defendant did or did not have the mental state or condition

continued on next page . . .

cannot conclude that this error warrants reversal, we caution the prosecution to refrain from introduction of such testimony in the future.[37]

Portrayal of Estes as a liar in closing argument

Estes claims error with respect to several statements made by the State in its closing argument based upon the Lake's Crossing evidence. We note as a preliminary matter that Estes failed to object to any of the disputed commentary below; therefore, we will review his contentions for plain error.

The first comment with which Estes takes issue is the following:

. . . continued

constituting an element of the crime charged or a defense thereto." This rule has been criticized as creating inappropriate tension with the rules of evidence allowing the admission of expert testimony on ultimate issues to be decided by the finder of fact. See David Cohen, Note, Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b), 40 U. Fla. L. Rev. 541, 548 (1988) (examining inconsistent applications of Rule 704(b)); Anne Lawson Braswell, Note, Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense, 72 Cornell L. Rev. 620, 627 (1987) (questioning the purposes of Rule 704(b)); cf. NRS 50.295 (permitting expert testimony on ultimate issues).

[37]We have considered and rejected Estes' claims that the State failed to provide notice of its rebuttal experts, that the State failed to properly qualify Dr. Neighbors as an expert, and that lack of notice to counsel of the psychiatric interviews violated his Sixth Amendment right to counsel. Counsel was fully aware of the commitment and the responsibilities of the staff at Lake's Crossing.

> No . . . it wasn't ten years ago that he was setting this defense; it was four or five weeks after he got caught when he sat around and thought about it, and it was then that he began developing it.

We discern no error in this argument because it legitimately questions the validity of Estes' insanity defense.

Estes takes further issue with the State's argument that "[h]e lied because he knew the difference between right and wrong." The State, however, made this statement within the context of its argument that

> [h]e remembers talking to Detective Kisner. He acknowledged that he lied to Detective Kisner because he was scared and confused at the time of his statement. . . . He knew exactly what he was accused of, he knew exactly what he did, and he knew exactly what he was going to try to say to get out of it.

As Estes admitted that he had lied to Detective Kisner, these arguments find sufficient basis in the record and do not constitute error.

Estes also claims error with the following commentary:

> He prepared for his insanity defense. "You got to do what you got to do."[38]
>
> . . . .
>
> We all want to believe desperately that people have to be sick to do these horrific things to kids. Evil, prey, rotten, maybe, and maybe by

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[38]The prosecutor likely derived this quote from Ms. Coronella's testimony regarding Estes' comments to her in relation to preparation of his insanity defense.

> certain standards is sick, but he is not legally insane, and he must be held accountable for what he did to that child.

We discern no error with this argument; it properly urges the jury to arrive at the result sought by the State.

Involuntary intoxication instruction

Estes claims that the district court violated his due process rights when it denied his request to issue jury instructions on involuntary intoxication. In this, the court found that Estes presented no competent evidence that he suffered from involuntarily induced lithium toxicity. Although a defendant in a criminal case is entitled to a jury instruction on his theory, no matter how weak or incredible it may be,[39] and district courts have a duty to correct an inaccurate or incomplete theory-of-defense instruction,[40] the instruction must be supported by some competent evidence in the record.[41] Because Estes offered no evidence other than his irrelevant lay opinion that he suffered from lithium toxicity,[42] and given that the only competent evidence on this issue, that given by Dr. Henson, was to the contrary,

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[39]Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002).

[40]Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 597-98 (2005).

[41]See Wickliffe v. Sunrise Hospital, 104 Nev. 777, 782, 766 P.2d 1322, 1325-26 (1988) (noting that each party is "'entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence'" (emphasis added) (quoting Rocky Mt. Produce v. Johnson, 78 Nev. 44, 52, 369 P.2d 198, 202 (1962))).

[42]See NRS 50.265.

we discern no error in the court's refusal of the involuntary intoxication theory. But even if the district court erred in refusing the proffered instructions, we further conclude that any error is harmless beyond a reasonable doubt given the overwhelming state of the evidence against Estes.[43]

Jury instruction on insanity

Estes asserts that the district court erred in giving an instruction on insanity that failed to specify that the jury was to consider his mental state during the commission of the offenses, not before or after. The instruction given stated:

> To qualify as being legally insane, a defendant must be in a delusional state such that:
>
> (1) he cannot know or understand the nature and capacity of his act, or
>
> (2) his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law.

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[43]See Chapman v. California, 386 U.S. 18, 24 (1967). Thomas Wahl analyzed DNA evidence collected from several items connected to the incident. Wahl's analysis revealed that the mouthpiece of a mouthwash bottle contained Estes' sperm and DNA attributable to B.C. Wahl also tested DNA evidence from Estes' boxer shorts and penis, both of which contained Estes' sperm and typing data consistent with a mixture of DNA from Estes and B.C. Wahl's analysis of B.C.'s sweatshirt sleeve indicated a mixture of DNA consistent with Estes' and B.C.'s DNA types, as well as the presence of Estes' sperm. From this testimony, we conclude that the DNA evidence implicating Estes in the sexual assault was overwhelming.

Estes argues that this instruction is insufficient under Miller v. State, in which this court stated that if a defendant presents evidence of insanity during the time coinciding with the offense, the defendant is "entitled to a correct and complete instruction that insanity on a temporary basis can be a defense to the crime."[44]

We conclude that the lack of specification regarding the time period the jury was to consider in evaluating the insanity defense was not erroneous because the text of the instruction leaves the clear inference that the delusional state must exist at the time of the offense charged.

Cumulative error

Estes claims cumulative error merits reversal of all of the convictions entered against him.[45] Beyond the claims of error addressed above, he challenges on hearsay grounds the admission of B.C.'s medical records, police testimony as to B.C.'s statements, and Dr. Neighbors' testimony regarding the opinions of other Lake's

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[44]112 Nev. 168, 174, 911 P.2d 1183, 1187 (1996). We note that Estes has mischaracterized the instruction given in Miller as having failed to explain that the relevant time period or duration for a temporary delusional state was during the commission of the alleged crime. The M'Naghten instruction in Miller properly did so, but the court's other erroneous statements that there was no such thing as a "temporary insanity" defense, along with similar erroneous statements by the prosecution, undercut the instruction.

[45]See DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 114 (2000) (stating that cumulative effect of errors at trial denied defendant a fair trial).

Crossing doctors concerning Estes' competency. On prejudice grounds, Estes takes issue with the introduction of the videotape of B.C.'s father's preliminary hearing testimony and the duplicative admission of audiotaped and transcribed versions of Estes' statement to police. On relevance grounds, Estes also claims error with showing the jury a photograph of B.C. taken at the preliminary hearing in justice court.

Admission of B.C.'s medical records

Estes claims that a portion of B.C.'s medical records constituted inadmissible hearsay. He relies upon the United States Supreme Court decision in Crawford v. Washington,[46] and our recent decisions in City of Las Vegas v. Walsh[47] and Flores v. State,[48] for the proposition that records containing testimonial hearsay are inadmissible unless such statements are first redacted. Because B.C.

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[46]541 U.S. 36, 68 (2004).

[47]120 Nev. 392, 399, 91 P.3d 591, 595 (2004) (holding that a health care professional's affidavit prepared pursuant to NRS 50.315(4) is admissible only if (1) the health care professional is unavailable to testify at trial, and (2) the defendant had a prior opportunity to cross-examine the health care professional regarding the affidavit). This court withdrew and reissued this opinion. See City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005), cert. denied, 126 S. Ct. 1786 (2006).

[48]121 Nev. 706, 714, 120 P.3d 1170, 1175 (2005) (stating that if the statement of an unavailable witness is "testimonial" in nature, the Confrontation Clause requires a prior opportunity for cross-examination concerning the statement for it to be admissible (citing Crawford, 541 U.S. at 68)).

testified at trial, we reject Estes' claims of error under Crawford, Walsh and Flores on this issue.[49]

Police testimony regarding B.C.'s statements

Estes claims that the district court erred in allowing Officer Julie Hager to testify regarding B.C.'s hearsay statements to her because the State had not asked B.C. about them during his testimony. Estes apparently takes issue with B.C.'s statements that Estes told B.C. he was taking B.C. to his girlfriend's residence; that Estes threatened to kill B.C.'s family if B.C. said anything; that Estes touched B.C. in his private area; and that Estes urinated in his mouth. Estes timely objected on hearsay grounds, and the prosecution responded that it offered this testimony to demonstrate the reason for arrest. After a sidebar conference, the district court overruled Estes' objection. In essence, Estes claims that the admission of this hearsay violates Crawford and Flores.

We reject Estes' claims of error on this issue. As Estes obtained the police report during discovery, he had the opportunity to cross-examine B.C. on the report's contents, including B.C.'s statements to Officer Hager regarding the assault.[50] That opportunity negates any problem under either Crawford or Flores.

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[49]See Crawford, 541 U.S. at 60 n.9 (stating that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements").

[50]See id.

Dr. Neighbors' testimony as to the opinions of nontestifying doctors

Estes takes issue with Dr. Neighbors' testimony as to the opinions of other Lake's Crossing doctors who did not testify and voiced an opinion on behalf of all of them. In particular, Estes notes that Dr. Neighbors testified to the collective opinion of the other doctors that Estes was competent during his second commitment.

We conclude that Dr. Neighbors' testimony as to the opinions of other doctors was likely erroneous, in that such testimony constituted inadmissible hearsay.[51] NRS 50.285, however, allows experts to base their opinions on facts or data that are otherwise inadmissible, if such information is of a type reasonably relied upon by experts in that field. Thus, Dr. Neighbors' reasonable reliance upon the opinions of her colleagues in forming her own diagnosis was marginally appropriate.

Photograph of B.C.

Estes asserts that the State's introduction of a photograph of B.C. taken at the preliminary hearing was irrelevant[52] and that its probative value was substantially outweighed by its unfair prejudicial

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[51]See NRS 51.035 (defining hearsay generally as a statement offered into evidence to prove the truth of the matter asserted); NRS 51.065 (stating that hearsay is inadmissible except as otherwise provided).

[52]See NRS 48.015 (defining "relevant evidence" as evidence having any tendency to render the existence of any fact of consequence more or less probable than without the evidence); NRS 48.025(2) (stating that irrelevant evidence is inadmissible).

effect.[53] While the probative value of the evidence seems marginal and is unrelated to the elements of any of the charges, the introduction was harmless beyond a reasonable doubt, given the overwhelming evidence presented by the State against Estes.

Video of preliminary hearing testimony

Estes argues that introduction of a video depicting the father's preliminary hearing testimony was irrelevant and overly prejudicial. More particularly, Estes claims that the State introduced the video to evoke the jury's sympathies towards a distraught father who is now deceased. Estes alternatively asserts that the State could have read portions of the preliminary hearing transcript, rather than permitting the jury to view the tape.

We conclude that any potential prejudice stemming from the introduction of this evidence failed to outweigh the probative value of this testimony. The testimony was relevant to the kidnapping charge because it demonstrated the scope of B.C.'s father's consent regarding Estes' transportation of B.C. Due to the relevance of this testimony and the discretion accorded to district court decisions on issues of admissibility,[54] the State was not restricted to the mere

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[53]See NRS 48.035(1) (stating that even relevant evidence is inadmissible if its probative value is substantially outweighed by the potential for unfair prejudice, confusion of the issues, or misleading the jury).

[54]See Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000).

introduction of portions of the preliminary hearing transcript, as opposed to the videotape.[55]

Audiotape and transcript of Estes' statement to police

Estes asserts that admission of both an audiotape and the written transcript of his statement to police concerning the events in question placed undue emphasis on his pretrial admissions. He further claims that the district court failed to assess the prejudicial effect of permitting the jury to take certain items of evidence into the deliberation room with them.

We reject these separate contentions. Given the body of evidence introduced against Estes, there is no indication that the duplicative introduction of his police statements compels reversal. Further, NRS 175.441(1) provides that the jury, upon retiring for deliberation, may take with them all items introduced into evidence, "except depositions or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession." Given the district court's broad discretion on issues of admissibility,[56] we discern no error in either regard.

In light of the above, we conclude that cumulative error did not adversely affect the fairness of the trial on the totality of charges.

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[55]Estes does not otherwise take issue with the use of the preliminary hearing testimony.

[56]See Petty, 116 Nev. 321, 997 P.2d 800.

The claimed errors listed as additional and cumulative were relatively minor and, as stated above, overwhelming evidence inculpated Estes in the crimes alleged.

Errors claimed with respect to individual charges

Merger

Estes claims that count three, battery with intent to commit a crime (sexual assault) based on Estes' pulling of B.C.'s hair, merges with the sexual assault count premised on oral copulation. In support of this argument, Estes asserts the following: (1) B.C.'s testimony regarding the hair pulling during oral copulation goes to the "lack of consent" element of the sexual assault charge, and (2) the State is constitutionally prohibited from charging a person for the same crime twice. Estes also argues that the elements necessary to prove battery are contained within the elements necessary to prove sexual assault, and therefore battery is a lesser-included offense of sexual assault.

NRS 200.400(1) provides that "'battery' means any willful and unlawful use of force or violence upon the person of another."

NRS 200.366(1) defines sexual assault in the following manner:

> A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

Nevada utilizes the Blockburger test to determine whether separate offenses exist for double jeopardy purposes.[57] Under this test, two offenses are separate if each offense requires proof of a fact that the other does not.[58] Under Blockburger, it is impermissible for a defendant to suffer conviction for both greater- and lesser-included offenses.[59] To determine the existence of a lesser-included offense, this court looks to "whether the offense in question 'cannot be committed without committing the lesser offense.'"[60]

We discern no error in maintaining the separate charges of sexual assault and battery with intent to commit a crime. Battery requires physical force or violence. Sexual assault does not require physical force or violence as an element.[61] Additionally, the two charges in this case were directed at different acts. Therefore, under these circumstances, no merger of charges was necessary.

Substantial evidence

Estes claims that the State failed to prove beyond a reasonable doubt the following: (1) two counts of dissuading a witness,

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[57]Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001); McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997).

[58]Blockburger v. United States, 284 U.S. 299, 304 (1932).

[59]Barton, 117 Nev. at 692, 30 P.3d at 1107; McIntosh, 113 Nev. at 225, 932 P.2d at 1073.

[60]McIntosh, 113 Nev. at 226, 932 P.2d at 1073 (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

[61]McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992).

(2) one count of battery with intent to commit a crime, and (3) two counts of lewdness with a minor.

"In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence."[62] After viewing the evidence in the light most favorable to the prosecution, this court considers whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[63] Where there is conflicting testimony, the jury determines its weight and credibility.[64]

Two counts of dissuading a witness

The State premised the first dissuading count upon the allegation that Estes threatened to kill B.C.'s mother and father if B.C. reported the incidents. It premised the second dissuading count upon Estes' offer of money to B.C. to not report him. The criminal information below based these charges upon NRS 199.230, which provides in pertinent part:

> A person who, by persuasion, force, threat, intimidation, deception or otherwise, and with the intent to obstruct the course of justice, prevents or attempts to prevent another person from appearing before any court, or person authorized to subpoena witnesses, as a witness

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[62]Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

[63]Id. at 79-80, 40 P.3d at 421.

[64]Id. at 79, 40 P.3d at 421.

> in any action, investigation or other official proceeding, or causes or induces another person to absent himself from such a proceeding or evade the process which requires him to appear as a witness to testify or produce a record, document or other object, shall be punished . . . .

Estes claims that because B.C. was not under subpoena to testify or yet a potential witness at the time of the alleged threats, the State failed to meet its burden on these counts. Estes further claims that it was error to utilize a jury instruction in support of the dissuading charge based on NRS 199.305,[65] rather than NRS 199.230, because

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[65]NRS 199.305(1) provides the following:

> A person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime, a person acting on his behalf or a witness from:
>
> (a) Reporting a crime or possible crime to a:
>
> (1) Judge;
>
> (2) Peace officer;
>
> (3) Parole or probation officer;
>
> (4) Prosecuting attorney;
>
> (5) Warden or other employee at an institution of the Department of Corrections; or
>
> (6) Superintendent or other employee at a juvenile correctional institution;
>
> (b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or

continued on next page . . .

NRS 199.305 was not relied upon in the original charging document. The jury instruction premised on NRS 199.305 provided as follows:

> Every person, who by intimidating, threatening, dissuading prevents or attempts to prevent a victim or witness from reporting a crime or commencing prosecution, is guilty of preventing or dissuading witness or victim from reporting crime or commencing prosecution.

We agree with Estes' contentions on this issue. In short, the State ultimately proffered a jury instruction on this issue based on a statute other than that utilized in the charging document.

Battery with intent to commit a crime

Estes claims that the State failed to prove count four, battery with intent to commit sexual assault by grabbing B.C.'s throat. Estes notes that B.C. did not testify that Estes grabbed his throat. The State concedes that B.C. did not testify as to this particular act. We therefore reverse the conviction as to this count.

. . . *continued*

> (c) Causing the arrest of a person in connection with a crime,
>
> or who hinders or delays such a victim, agent or witness in his effort to carry out any of those actions is guilty of a category D felony and shall be punished as provided in NRS 193.130.

Lewdness with a minor

Estes claims that the State failed to prove counts 12 and 13 alleging lewdness with a minor. The basis for count 12 was rubbing B.C.'s genital area, and the basis for count 13 was rubbing B.C.'s buttocks. Estes claims that B.C. never specifically testified that Estes rubbed these particular areas and points to his own testimony denying these acts occurred. We agree that the evidence failed to establish these charges and therefore reverse the convictions as to these counts.

CONCLUSION

When the prosecution seeks to use a court-ordered psychiatric evaluation to rebut an insanity defense, the prosecution may not utilize the portions of the evaluation containing the defendant's statements that directly relate to culpability for the crimes charged, unless the defendant was first informed of his Fifth Amendment rights and has agreed to waive them. However, the prosecution may use other portions of the evaluation to rebut an insanity defense. In line with the above, we conclude that the prosecution did not violate Estes' rights in its use of information from Estes' court-ordered commitment.

Despite our determinations of error regarding Dr. Neighbors' testimony addressing the impressions of two nontestifying doctors and the admission of B.C.'s photograph, we conclude that the overwhelming evidence against Estes militates against reversal. However, we remand for dismissal of count 4, battery with intent to commit sexual assault, count 12, lewdness with a minor, and count 13, lewdness with a minor, and for vacation of the attendant sentences. We also remand this case for further

proceedings on the two dissuading of a witness counts and to have the judgment of conviction reflect that Estes was convicted pursuant to a jury trial and not a guilty plea,[66] and to correct the number of days credit for time served, if necessary.[67]

_____, J.
Maupin

We concur:

_____, C.J.
Rose

_____, J.
Becker

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

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[66]See Zabeti v. State, 120 Nev. 530, 537, 96 P.3d 773, 777 (2004) (remanding for the limited purpose of correcting a judgment of conviction, which incorrectly reflected that the defendant was convicted pursuant to guilty plea, when he was in fact convicted pursuant to jury verdict).

[67]The sentencing transcript indicates that the district court granted Estes 89 days' credit, but the judgment of conviction granted 898 days' credit.

ORIGINAL

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
DONALD GLENN ESTES,
#1509441
Defendant.

Case No: C180728
Dept No: VIII

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of COUNT 1 & 15 - PREVENTING OR DISSUADING PERSON FROM TESTIFYING OR PRODUCING EVIDENCE (Felony – Category D); COUNT 2 - FIRST DEGREE KIDNAPING (Felony – Category A); COUNT 3 & 4 - BATTERY WITH INTENT TO COMMIT A CRIME (Felony – Category B); COUNT 5, 6, 7, 8, 9 & 10 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Felony – Category A); COUNT 11 & 14 - COERCION (Felony – Category B); COUNT 12 & 13 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony – Category A), in violation of NRS 199.230; 200.310, 200.320; 200.400; 200.364, 200.366; 207.190; 201.230; thereafter, on the ~~13th~~ 12th day of May, 2004, the Defendant was present in court for sentencing with his counsel, CHRISTY CRAIG, Deputy Public Defender, and good cause appearing,

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CK

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee, the $150 DNA Analysis fee and $2,024.55 RESTITUTION, the Defendant is sentenced as follows: COUNT 1 to a MAXIMUM term of FORTY-EIGHT (48) MONTHS with a MINIMUM parole eligibility of NINETEEN (19) MONTHS in the Nevada Department of Corrections (NDC); COUNT 2 to LIFE with parole eligibility after FIVE (5) YEARS; COUNT 3 to a MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72)MONTHS; COUNT 4 to a MAXIMUM term of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS; COUNT 5 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 6 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 7 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 8 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 9 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 10 to LIFE with parole eligibility after TWENTY (20) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 11 to a MAXIMUM term of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of TWENTY-EIGHT (28) MONTHS; COUNT 12 to LIFE with parole eligibility after TEN (10) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 13

to LIFE with parole eligibility after TEN (10) YEARS, and to LIFETIME SUPERVISION commencing upon completion of any grant of probation, term of imprisonment or period of release on parole; COUNT 14 to a MAXIMUM term of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of TWENTY-EIGHT (28) MONTHS; and COUNT 15 to a MAXIMUM term of FORTY-EIGHT (48) MONTHS with a MINIMUM parole eligibility of TWELVE (12) MONTHS. COUNTS 1-9 and 11-12 to run CONCURRENT to each other; COUNTS 10 and 13-15 to run CONCURRENT to each other and CONSECUTIVE to COUNTS 1-9; 11-12. Deft to register as a sex offender within 48 hours. Deft to submit to a test to determine genetic markers and pay $150.00 testing fee. Deft. to receive 898 DAYS credit time served.

DATED this 20 day of May, 2004.

DISTRICT JUDGE

mmw/SVU