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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOAQUIN HERNANDEZ-ALAYA, Petitioner-Appellant, v. RENEE BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 20-15472 D.C. No. 3:13-cv-00134-MMD-WGC District of Nevada, Reno ORDER

Before: W. FLETCHER and R. NELSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JOAQUIN HERNANDEZ-AYALA, Petitioner, v. RENEE BAKER, *et al.*, Respondents.	Case No. 3:13-cv-00134-MMD-WGC ORDER

I. SUMMARY

Petitioner Joaquin Hernandez-Ayala filed a petition for writ of habeas corpus ("Petition") under 28 U.S.C. § 2254. (ECF No. 11.) This matter is before the Court for adjudication of the merits of the Petition. For the reasons discussed below, the Court denies the Petition, denies a certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

II. BACKGROUND

Petitioner's convictions are the result of events that occurred in Clark County, Nevada on or between January 14, 2006 and August 27, 2006. (ECF Nos. 12-9 at 2, 13-3 at 2.) J.F., Petitioner's stepdaughter, testified that when she was five years old, Petitioner touched her on the inside of her vagina with his middle finger while her mother was at work. (ECF No. 12-17 at 99–100, 108–110, 114.) Previously, J.F. told law enforcement that Petitioner "touched . . . her private areas . . . a lot" and had touched her "[o]n her buttocks." (ECF No. 12-22 at 56–57, 59–60, 64.) Additionally, J.F.'s aunt testified that J.F.'s brother, G.F., who was four at the time, told her that Petitioner rubbed G.F.'s penis. (ECF No. 12-17 at 123–24.)

Following a jury trial, Petitioner was found guilty of one count of sexual assault

with a minor under fourteen years of age regarding J.F. and one count of lewdness with a child under fourteen years of age regarding J.F. (ECF No. 13-2 at 2–3.) Petitioner was sentenced to life with the possibility of parole after twenty years for the sexual assault count and life with the possibility of parole after ten years for the lewdness count, to run concurrent to the sexual assault count. (*Id.*) Petitioner appealed, and the Nevada Supreme Court affirmed on August 5, 2009. (ECF No. 13-22.) Remittitur issued on September 1, 2009. (ECF No. 13-24.)

Petitioner filed a state habeas petition on April 6, 2010. (ECF No. 13-28.) The state district court denied the petition on September 8, 2010. (ECF No. 13-34.) Petitioner appealed, and the Nevada Supreme Court reversed and remanded for the appointment of counsel to assist Petitioner in his post-conviction proceedings. (ECF No. 13-36.) Petitioner filed a counseled, supplemental petition on June 2, 2011. (ECF No. 14-2.) The state district court denied the supplemental petition on October 10, 2011. (ECF No. 14-7.) Petitioner appealed, and the Nevada Supreme Court affirmed on February 13, 2013. (ECF No. 14-22.) Remittitur issued on March 12, 2013. (ECF No. 14-23.)

Petitioner's federal habeas petition was filed on May 15, 2013. (ECF No. 5.) Petitioner filed a counseled, amended petition on October 9, 2013. (ECF No. 11.) Respondents moved to dismiss the amended petition. (ECF No. 18.) Petitioner responded to the motion and moved for a stay and abeyance. (ECF Nos. 25, 26.) This Court determined that Grounds Five, Six, Seven, and Nine were unexhausted and granted the motion to stay pending exhaustion. (ECF No. 35 at 4.)

Petitioner filed a second state habeas petition on February 26, 2015. (ECF No. 37-1.) The state district court denied the petition on July 27, 2015. (ECF No. 37-5.) The Nevada Court of Appeals affirmed the denial of Petitioner's second state habeas petition on June 22, 2016. (ECF No. 37-11.) Remittitur issued on July 19, 2016. (ECF No. 37-12.)

Petitioner moved to reopen his federal case on September 8, 2016. (ECF No. 36.) This Court granted the motion. (ECF No. 39.) Respondents again moved to dismiss.

(ECF No. 41.) This Court granted the motion, dismissing Grounds Five, Six, Seven, and Nine as procedurally defaulted. (ECF No. 48 at 5.) Respondents answered the remaining grounds in the amended petition on April 18, 2018. (ECF No. 51.) Petitioner replied on November 5, 2018. (ECF No. 56.)

In his remaining grounds for relief, Petitioner asserts the following violations of his federal constitutional rights: (1) the police used coercive tactics to obtain his incriminating statements; (2) his right to confront the witnesses against him was violated when the state district court admitted numerous out-of-court statements; (3) the state district court admitted a prejudicial out-of-court statement; (4) his trial counsel failed to challenge the accusations against him at trial; (5) his appellate counsel failed to argue on appeal that there was legally insufficient evidence to support his lewdness conviction. (ECF No. 11 at 9-29.)

III. LEGAL STANDARD

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases 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." *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." *Id.* 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 409–10) (internal citation omitted).

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 the 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)).

IV. DISCUSSION

The Petition asserts five remaining grounds for relief. The Court will address each ground in turn.

A. Ground One

In Ground One, Petitioner alleges that his federal constitutional rights were violated when the police used coercive tactics to obtain his incriminating statements. (ECF No. 11 at 9.) Petitioner elaborates that the police used psychological and physical

coercion—including using physical force, handcuffing him to a bar during the interrogation, and forcing him to stay in a cold room—to pressure him into making an incriminating statement. (*Id.* at 11.) In Petitioner's appeal of his judgment of conviction, the Nevada Supreme Court held:

> Hernandez-Ayala contends that the district court erred in admitting his statement to the police because his statement was coerced.
>
> Due process requires that any confession admitted at trial be voluntary. *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). That is, a confession cannot be admitted into evidence unless "it is made freely and voluntarily, without compulsion or inducement." *Id.* A voluntary confession is the "product of a 'rational intellect and a free will.'" *Id.* at 213-14, 735 P.2d at 322-23. (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)). A confession is involuntary if "coerced by physical intimidation or psychological pressure." *Id.* (citing *Townsend v. Sain*, 372 U.S. 293, 307 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992)). A district court's decision regarding the voluntariness of a defendant's confession "will not be disturbed on appeal if it is supported by substantial evidence." *Allan v. State*, 118 Nev. 19, 23-24, 38 P.3d 175, 178 (2002), *overruled on other grounds by Rosky v. State*, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). "Substantial evidence is that which a reasonable mind might consider adequate to support a conclusion." *Steese v. State*, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).
>
> Hernandez-Ayala contends that the district court erred in admitting his statements because he made allegations below that police officers put a gun to his head and beat him prior to his statement. The district court found that his statement was not coerced because the videotape of Hernandez-Ayala's statement showed that he was relaxed, he never complained of mistreatment, officers brought him hot tea because he said that he was cold, and the video and his booking photo showed no evidence of a beating.
>
> We conclude that the district court did not err in admitting the statement because there was no evidence presented demonstrating that the statement was coerced. Hernandez-Ayala directs us to no evidence demonstrating coercion and appears to argue that the district court should not have admitted the statement purely on the basis that he made an allegation of coercion. Rather, the district court's finding is supported by substantial evidence.

(ECF No. 13-22 at 3–4.) The Nevada Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court.

The admission into evidence at trial of an involuntary confession violates a defendant's right to due process under the Fourteenth Amendment. *Lego v. Twomey*,

404 U.S. 477, 478 (1972); *Jackson v. Denno*, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession"); *see also Dickerson v. United States*, 530 U.S. 428, 444 (2000) (explaining that the requirement that *Miranda* rights be given prior to a custodial interrogation does not dispense with a due process inquiry into the voluntariness of a confession). An inculpatory statement is only voluntary if it is the product of rational intellect and free will. *Blackburn*, 361 U.S. at 208. "[C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (internal quotation marks omitted).

Detective Enrique Hernandez interviewed Petitioner on August 27, 2006, from 5:18 a.m. to 7:00 a.m. (ECF No. 12-2 at 2, 39.) At the beginning of the interview, both parties acknowledged that the interview room was cold, and during the interview, Detective Hernandez brought Petitioner hot water and tea. (*Id.* at 2-3, 34.) Following Detective Hernandez's reading of Petitioner's *Miranda* rights, Petitioner stated that he understood his rights. (*Id.* at 7.) Petitioner explained that he touched the outside of J.F.'s vagina while bathing her, but he denied touching the inside of J.F.'s vagina. (*Id.* at 10–12.) After Detective Hernandez explained that someone had touched the inside of J.F.'s vagina, Petitioner explained that it was not him. (*Id.* at 13.) Later in the interview, Detective Hernandez stated:

> I have done this for a long time. It is not my first day okay. I came from the hospital. I talked to the doctors. I have the DNA, we have enough. We have all we need to say it did happen, and I know it happened. I know it happened [Petitioner]. And you can't look at me in the eyes and deny it. And I know you can't do that. Because you are [a] good human person who can not lie.

(*Id.* at 25.) Petitioner then stated, "I did touch her, I did make the attempt, I made the attempt, I am not going to deny that. . . . When I tell you that at no time have I stuck my finger in her, is because the truth is that I only made the attempt." (*Id.*) Petitioner then

demonstrated how far he inserted his finger into J.F.'s vagina and commented, "[i]f the girl shows more than that. You need to investigate somewhere else, because it wasn't me." (*Id.*)

When asked how many times this incident happened, Petitioner responded, "[o]ne time" and explained, "I had the intention but . . . I did not do it. . . . Some times [sic] the girl would provoke me." (*Id.* at 28.) Petitioner elaborated, "[s]ometimes [J.F.] would go to her room[,] . . . take her clothes off and come out[,] . . . [s]o I resisted." (*Id.* at 29.) Petitioner stated that he "was going to look for help but [he] didn't do it because [he] didn't want [his] wife to suspect anything." (*Id.* at 35.) Petitioner also admitted regret and commented, "I know I didn't have to tell you anything if I didn't want to. . . . But I have the advantage that I didn't—that I had enough time to do more things and I didn't do it." (*Id.* at 36–37.) Finally, Petitioner stated, "I don't feel that I have done such a bad thing to have to get an attorney." (*Id.* at 37.)

During the trial, outside the presence of the jury, the State informed the state district court that a hearing may need to be held to determine whether Petitioner's police interview statements were coerced because Petitioner "made allegations . . . in . . . an internal affairs complaint . . . claiming that [the police officers] beat him to get a confession out of him." (ECF No. 12-17 at 28.) The following day, again outside the presence of the jury, Petitioner orally moved to suppress his police interview statement. (ECF No. 12-22 at 42.) Petitioner explained that on the way to his police interview he was beaten, hit in the back of the head, and had a gun held to his head. (*Id.* at 42–43.) Petitioner also cited issues with the room's temperature and the fact that "his arm [was] handcuffed to a bar" during the interview. (*Id.* at 43.) Petitioner explained that after the interview was over and he was being transported to the Clark County Detention Center, "his nose started to bleed . . . as a result of what had happened earlier" on his way to give his interview. (*Id.* at 44.) The state district court denied Petitioner's motion, finding, in part, that "if he was beaten and coerced so bad, it would appear to the Court that he would have . . . been coerced in the very beginning and he would have given his confession" right away as

opposed to waiting until the end of the interview to confess. (*Id.* at 49.)

Detective Hernandez testified at Petitioner's trial that he first contacted Petitioner while he was in the back of a patrol car. (ECF No. 12-22 at 67, 69.) After being told why he was under arrest and being read his *Miranda* rights, Petitioner indicated that he wished to speak to Detective Hernandez, and, as such, Petitioner was moved to Detective Hernandez's vehicle and transported to Detective Hernandez's office. (*Id.* at 69–70.) Petitioner was the only passenger in Detective Hernandez's vehicle. (*Id.* at 70.) During the interview, which was conducted exclusively in Spanish, Petitioner "was handcuffed to [a] pole." (*Id.* at 71–72.) Detective Hernandez admitted that the interview room was cold, but he explained that he "tried to alleviate that [issue] by giving [Petitioner] something hot to drink." (*Id.* at 73.) Detective Hernandez testified that he did not threaten or physically harm Petitioner and that Petitioner was not mistreated by anyone in the police department. (*Id.* at 73, 78; *see also id.* at 66 (testimony from Detective Shannon Tooley that she watched portions of Petitioner's police interview and did not "see [Petitioner] being mistreated by Detective Hernandez").)

The Nevada Supreme Court reasonably determined that Petitioner failed to present evidence that his statement was coerced. Petitioner failed to present any evidence that he was beaten up, hit in the back of the head, or had a gun pointed at his head. *See Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) ("Jones's conclusory allegations did not meet the specificity requirement. The district court did not err in denying habeas relief on this ground."). In fact, Petitioner acknowledges that the police interview videotape and his booking photographs show no injuries.[1] (ECF No. 56 at 10; *see also* ECF No. 12-21.) Regarding Petitioner's other allegations of coercion, Detective Hernandez admitted that the interview room was cold, that Petitioner was handcuffed to a pole, and that he only told Petitioner that he expected to be able to retrieve DNA evidence implicating Petitioner in order to elicit a response from Petitioner. (*See* ECF

[1]Petitioner argues that his injuries were to his body, not his face, so there would not have been anything to see in the videotape or booking photographs. (ECF No. 56 at 10.)

No. 12-22 at 71–74.) However, it cannot be concluded that these commonplace interrogation occurrences overcame Petitioner's rational intellect and free will. *Blackburn*, 361 U.S. at 208. Indeed, Detective Hernandez attempted to alleviate the cold temperature concerns by giving Petitioner hot tea, explained that Petitioner was handcuffed to make sure he was secure, and stated that commenting on what the DNA evidence will demonstrate is a common interview technique. (ECF No. 12-22 at 71, 73–74.) Moreover, Petitioner commented during the interrogation that "[he] kn[e]w [he] didn't have to tell [Detective Hernandez] anything if [he] didn't want to." (*Id.* at 36–37.) Because the Nevada Supreme Court reasonably denied Petitioner's claim that his confession was involuntary based on a lack of coercion, *Connelly*, 479 U.S. at 167, Petitioner is denied federal habeas relief for Ground One.

B. Ground Two

In Ground Two, Petitioner alleges that his right to confront the witnesses against him was violated when the state district court admitted numerous out-of-court statements from J.F.'s mother, J.F.'s aunt, and Detective Tooley.[2] (ECF No. 11 at 11–13.) In Petitioner's appeal of his judgment of conviction, the Nevada Supreme Court held:

> Hernandez-Ayala contends that the district court erred in admitting hearsay statements that the victim made to her mother, her aunt, and a detective, for two reasons: (1) these statements violated the Confrontation Clause and (2) the statements effectively bolstered the victim's testimony.
>
> Generally, "[a] trial court's evaluation of admissibility of evidence will not be reversed on appeal unless it is manifestly erroneous." *Medina v. State*, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). Under *Crawford v. Washington*, 541 U.S. 36 (2004), "when the declarant is unavailable, reliability assessments of testimonial hearsay cannot survive scrutiny under the Confrontation Clause without actual confrontation." *Pantano v. State*, 122 Nev. 782, 789, 138 P.3d 477, 481 (2006).
>
> We conclude that because the victim testified and Hernandez-Ayala was offered the opportunity to cross-examine her, there is no Confrontation Clause violation. [Footnote 1: Hernandez-Ayala chose not to cross-examine the victim at trial.] *Pantano*, 122 Nev. at 790, 138 P.3d at 482. We further

[2]Petitioner appears to only take issue with J.F.'s out-of-court statements, not G.F.'s out-of-court statements. (*See* ECF No. 56 at 14 (arguing that "permitting these witnesses to testify as to J.F.'s out-of-court accusations . . . unfairly magnified her testimony and deprived [Petitioner] of his right to confront his accuser"). Indeed, Petitioner was not convicted of any accusations regarding G.F. (*See* ECF No. 13-2 at 2–3.)

> conclude that, as discussed below, the hearsay statements were properly admitted and, particularly given the young age of the child, [Footnote 2: The victim was six years old and starting kindergarten.] were not so cumulative as to amount to vouching for the victim's testimony or unduly prejudicing the case. *See Felix v. State*, 109 Nev. 151, 200, 849 P.2d 220, 253 (1993). The evidence strongly supported the verdict—particularly, Hernandez-Ayala's inculpatory statement to the police, which was consistent with the victim's statement.
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> *Statements to family members*
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> Child victim hearsay statements are admissible if the statements meet the requirements of NRS 51.385 and the United States Constitution. *Felix*, 109 Nev. at 200, 849 P.2d at 253. NRS 51.385(1) allows the admission of the child's hearsay statement regarding sexual conduct if the child is under the age of ten and: "(a) [t]he court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and (b) [t]he child testifies at the proceeding or is unavailable or unable to testify."
>
> In this case, the district court held a hearing regarding the testimony of the mother and aunt, found that the statements made by the child victim were spontaneous, and that any questioning conducted by the mother and aunt of the child was limited and within the scope of proper parental or familial concern. NRS 51.385(2). Thus, the district court correctly applied NRS 51.385 in determining the reliability of the child victim's statements.
>
> *Statement to police officers*
>
> Hearsay is a statement offered to prove the truth of the matter asserted unless the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (a) [i]nconsistent with [her] testimony." NRS 51.035(2).
>
> In the present case, (1) the victim testified to one act of sexual assault and testified that she did not remember talking to a police officer; (2) Detective Shannon Tooley testified that the victim had made a statement to her during investigation that Hernandez-Ayala had touched her on her "private areas a lot," including her buttocks, demonstrating that the statement was inconsistent with the victim's testimony; and (3) the victim was subject to cross-examination, although defense counsel chose not to exercise that right. Thus, the statement was properly admitted as an inconsistent statement of the child declarant.

(ECF No. 13-22 at 4–6.) The Nevada Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court.

The state district court held a hearing outside the presence of the jury to evaluate J.F.'s and G.F.'s out-of-court statements. (*See* ECF No. 12-17 at 6.) The state district court heard testimony from Blanca Zaragoza (hereinafter "Blanca"), the aunt of J.F. and

G.F.; Betel Zaragoza (hereinafter "Betel"), the mother of J.F. and G.F.; and G.F. (*Id.* at 14-27, 34–43.) The state district court held that it would allow Betel to testify about J.F.'s statements and Blanca to testify about J.F.'s and G.F.'s statements. (*Id.* at 52.) The state district court also held that G.F. was "unable to testify, because he [was] not competent." (*Id.* at 52–53.)

Thereafter, Betel testified before the jury that she learned of J.F.'s accusations against Petitioner through her sister-in-law, Christina, after she finished work one day. (ECF No. 12-17 at 72–73, 80, 82.) After hearing the accusations, Betel took J.F. into Betel's sister-in-law's bedroom, and "[t]hen [J.F.] told [her] . . . that [Petitioner] had touched her." (*Id.* at 83–84.) Specifically, Betel explained that J.F. told her "[t]hat [Petititioner] had sticked [sic] his finger inside of her vagina." (*Id.* at 84.) Betel then took J.F. to the hospital. (*Id.* at 88.)

Next, J.F., who was six years old at the time of Petitioner's trial, testified that when she was five years old, Petitioner touched her on the inside of her vagina with his middle finger. (ECF No. 12-17 at 99–100, 108–09, 114.) This touching occurred while J.F.'s mother was at work. (*Id.* at 110.) J.F. testified that Petitioner did not touch her anywhere else and, specifically, that Petitioner did not "touch[her] on [her] butt." (*Id.* at 110, 113.) J.F. also testified that she did not remember talking to a police officer while in the hospital. (*Id.* at 111.)

Third, Blanca testified that on August 27, 2006, she was bathing J.F. and G.F. (ECF No. 12-17 at 117, 121.) As Blanca was "wash[ing J.F.'s] private part," J.F. "yelled an ouch." (*Id.* at 121.) Blanca asked J.F. what was wrong, and J.F. "said that [Petitioner] put [his] hands on her . . . vagina." (*Id.* at 123.) Blanca then asked G.F. if Petitioner had ever touched him, and "[h]is response was, he did it like this. And then he touched his penis" and moved his hand back and forth. (*Id.* at 123–24.)

Finally, Detective Tooley testified that she responded to Sunrise Hospital on August 27, 2006, to investigate J.F.'s case. (ECF No. 12-22 at 56–57.) Detective Tooley interviewed J.F. and her aunt at the hospital. (*Id.* at 57.) J.F. told Detective Tooley that

she was "touched . . . on her private areas . . . a lot." (*Id.* at 59–60.) J.F. also told Detective Tooley that Petitioner had touched her "[o]n her buttocks." (*Id.* at 64.)[3]

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). While "the Confrontation Clause guarantees an opportunity for effective cross-examination," it does guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (internal quotation marks omitted); *see also Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) ("[T]he Confrontation Clause's functional purpose i[s] ensuring a defendant an opportunity for cross-examination."). Regarding out-of-court statements admitted at trial, as is the case at hand, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53–54.

Although the state district court admitted J.F.'s out-of-court statements through the testimony of Betel, Blanca, and Detective Tooley, the Nevada Supreme Court reasonably concluded that there was no Confrontation Clause violation. Indeed, J.F. testified at Petitioner's trial, and even though Petitioner chose not to cross-examine J.F., he was offered the opportunity to do so. (*See* ECF No. 12-17 at 114.) Because J.F. appeared at the trial and Petitioner had the opportunity to cross-examine her, there was no Confrontation Clause violation, *Crawford*, 541 U.S. at 53–54; *Douglas*, 380 U.S. at

[3]It is noted that Petitioner objected to Detective Tooley testifying about J.F.'s statements on hearsay grounds. (ECF No. 12-22 at 60.) The State responded that J.F.'s prior statements to Detective Tooley in the hospital should be admitted as prior inconsistent statements since J.F. had testified the previous day that Petitioner did not touch her buttocks, Petitioner only touched her vagina once, and she did not recall speaking to a police officer at the hospital. (*Id.*) The state district court overruled Petitioner's objection, noting, in part, that a prior inconsistent statement is not hearsay, J.F. was subject to cross-examination, and J.F. could not be confronted with her prior statements because she could not read. (*Id.* at 61, 63.)

418, and the Nevada Supreme Court reasonably denied relief.

Petitioner is denied federal habeas relief for Ground Two.

C. Ground Three

In Ground Three, Petitioner alleges that his right to a fair trial and right to confront the witnesses against him were violated when the state district court admitted a prejudicial out-of-court statement. (ECF Nos. 11 at 13, 56 at 14–15.) Specifically, Petitioner alleges that Blanca made inadmissible hearsay statements to her sister, who Petitioner was unable to cross-examine. (ECF Nos. 11 at 14, 56 at 15.) In Petitioner's appeal of his judgment of conviction, the Nevada Supreme Court held:

> Hernandez-Ayala contends that the district court erred in allowing a witness to testify regarding statements the victim made to a non-testifying adult.
>
> We note that Hernandez-Ayala did not object to the testimony during trial, thus we review for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602.
>
> During trial, the victim's aunt, Blanca Saragoza, testified that she was giving the victim and her brother a bath, and when she began washing the victim's private area, she said it hurt. When Saragoza inquired why, the victim told her that Hernandez-Ayala had digitally penetrated her. Sarazoga exited the bathroom and told some family members what the victim had said. Sarazoga's older sister, Anna Blacencia, went into the bathroom and the victim repeated what she had told Saragoza. Blacencia did not testify at trial.
>
> It is not apparent from the record that the statement was sought to prove the matter asserted—that Hernandez-Ayala sexually assaulted the victim—but rather to show how the statement affected Saragoza and the actions she took thereafter. However, even if the testimony was inadmissible hearsay, Hernandez-Ayala did not demonstrate plain error. The testimony was nonspecific and evidence of Hernandez-Ayala's guilty was substantial in that the victim testified that Hernandez-Ayala had digitally penetrated her and Hernandez-Ayala admitted to the conduct in his statement to the police.

(ECF No. 13-22 at 6–7.) The Nevada Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court.

After Blanca testified about J.F.'s and G.F.'s statements to her while they were in the bathtub, the State asked Blanca, "what did you do?" (ECF No. 12-17 at 125.) Blanca responded that she left the bathroom and because "most of [her] sisters and brothers

were there," she "told them what [J.F.] was telling [her]. And then [her] older sister[4] went in the bathroom . . . , and she again asked [J.F.] the same question. And [J.F.] again said the same thing to her." (*Id.*) Petitioner's trial counsel did not object to the foregoing testimony. (*See id.* at 125.)

The Supreme Court has explained that "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9; *see also Tennessee v. Street*, 471 U.S. 409, 414 (1985) ("The *nonhearsay* aspect of Peel's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns." (emphasis in original)).

Here, the Nevada Supreme Court reasonably determined that Blanca's testimony about Blancenia's statements was not hearsay. The Nevada Supreme Court explained that Blanca's testimony about Blancenia was not offered for the truth of the matter asserted—that Petitioner sexually assaulted J.F.—but rather to explain a separate issue: the actions Blanca took after hearing J.F.'s accusations. This finding was reasonable. Blanca's statement about Blancenia was in response to a question by the State asking Blanca "what did you do" following hearing J.F.'s accusations. (ECF No. 12-17 at 125.) Because Blanca was the first person to learn about J.F.'s accusations against Petitioner, the progression of events following that conversation were necessary to explain how future events—such as Blanca calling child protective services, telling Betel about the accusations, and informing Betel that J.F. needed to be examined at the hospital—unfolded. Accordingly, because the Nevada Supreme Court's conclusion that Blanca's testimony did not amount to hearsay was reasonable, there is no Confrontation Clause violation. *See Crawford*, 541 U.S. at 59 n.9; *see also Moses v. Payne*, 555 F.3d 742, 755-56 (9th Cir. 2009) (determining that "the state appellate court's analysis" that "the government did not introduce the testimony to prove the truth of the matter asserted . . . ,

[4] The older sister's name is Anna Blacencia. (ECF No. 12-27 at 126.)

but rather to explain a separate relevant issue" was "consistent with *Crawford* and does not meet the criteria for habeas relief").

Petitioner is denied federal habeas relief for Ground Three.

D. Ground Four

In Ground Four, Petitioner alleges that his federal constitutional rights were violated when his trial counsel failed to challenge the accusations made by Blanca and J.F. (ECF No. 11 at 14–16.) In Petitioner's first state habeas appeal, the Nevada Supreme Court held:

> [A]ppellant argues that his trial counsel was ineffective for failing to cross-examine the victim to question whether the victim's aunt encouraged her to fabricate the allegations. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel stated on the record that he did not cross-examine the six-year-old victim because she discussed everything during direct examination that he would have questioned her about. 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. Further, counsel questioned the victim's aunt regarding her dislike of appellant and argued that the aunt's dislike of appellant led the aunt to coerce the victim into fabricating her testimony. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel cross-examined the victim as appellant confessed to committing the sexual assault. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

(ECF No. 14-22 at 3.) The Nevada Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court.

In *Strickland*, the Supreme Court propounded a two-prong test for analysis of claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1) that the 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 v. Washington*, 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must apply a "strong presumption that counsel's conduct falls 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. Additionally, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

Where a state district court previously adjudicated the claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult. *See Harrington*, 562 U.S. at 104–05. In *Harrington*, the United States 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, 995 (9th Cir. 2010) (internal quotation marks omitted) ("When a federal court reviews a state court's *Strickland* determination under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's description of the standard as doubly deferential.").

Petitioner's trial counsel chose not to cross-examine J.F. (ECF No. 12-17 at 114.) Following Petitioner's trial counsel's hearsay objection to Detective Tooley's testimony about J.F.'s police interview statements, a sidebar conference was held. (ECF No. 12-22 at 60.) During that sidebar, following the state district court's indication that "it's not a *Crawford* issue because [J.F.] was subject to . . . cross-examination," Petitioner's trial counsel explained, "[w]hich I didn't want to do because she said everything I needed her

to say." (*Id.* at 63.) Petitioner's trial counsel then responded "[e]xactly" when the state district court commented, "[w]ell and what were you going to cross-examine her on" and "[y]ou were happy with her response." (*Id.*) Finally, Petitioner's trial counsel responded "[y]eah" when the state district court commented, "[s]o I understand why you didn't cross-examine her. You were happy with her response." (*Id.*)

Turning to Blanca, Petitioner's trial counsel cross-examined Blanca about several issues. First, Petitioner's trial counsel asked Blanca if it was correct that she never liked Petitioner. (ECF No. 12-17 at 130.) Blanca responded that she "ha[d] no reason to dislike him or like him." (*Id.*) Petitioner's trial counsel then asked Blanca if it was true that she told Detective Tooley that she never liked Petitioner, and Blanca responded in the affirmative and explained that her "reason of saying that dislike that day was because of what he did . . . to [her] niece." (*Id.* at 130–31.) Petitioner's trial counsel clarified that Blanca told Detective Tooley that she never liked Petitioner, and Blanca indicated that she remembered that. (*Id.* at 131.) In fact, Blanca then admitted that she never liked Petitioner. (*Id.*) Petitioner's trial counsel then asked Blanca about her feelings about her sister's relationship with Petitioner; her feelings about her sister and her sister's children moving out of her apartment to live with Petitioner; and the reduced time she got to see her sister's children after they moved in with Petitioner. (*Id.* at 131–32.)

Petitioner's trial counsel then asked Blanca if she "would always ask the children if [Petitioner] was touching them," to which Blanca responded, "[n]o, I asked them if everything was fine." (*Id.* at 132–33.) When Petitioner's trial counsel subsequently asked if Blanca asked J.F. "if her private parts were ever touched," Blanca responded that she "asked her a couple of times" but it was more akin to "telling her that if something like that ever happened to let [her] know." (*Id.* at 133.) Petitioner's trial counsel then questioned Blanca about her statement to Detective Tooley that she "was always asking [J.F.] . . . if her private parts were being touched." (*Id.*) Thereafter, Blanca admitted that she "did specifically and literally ask[J.F.] if [Petitioner] had ever touched her." (*Id.* at 133–34.) Petitioner's trial counsel then asked Blanca if she dissuaded J.F.'s mother from

speaking to Petitioner about the allegations and if she believed J.F. was actually in pain when Blanca touched her in the bath. (*Id.* at 134–35.)

Later, during Petitioner's trial counsel's closing argument, he focused, in part, on Blanca's credibility and the possibility that Blanca influenced or implanted J.F.'s accusations against Petitioner. Petitioner's trial counsel first commented that "[w]e don't have any evidence whatsoever other than the statements of an individual that I would severely question her credibility and her intent as to why she would say that, and that would be the aunt." (ECF No. 12-22 at 177.) Second, Petitioner's trial counsel commented that he did not think J.F. was lying, but he thought "that maybe she took [the touching] out of context and everyone else here has placed it into a certain context for her." (*Id.* at 179.) Petitioner's trial counsel then questioned, "[d]id Blanca start this whole thing off" with her questions to J.F. in the bathtub and her previous questioning of whether Petitioner ever did anything to J.F. (*Id.* at 180–81.) Specifically, Petitioner's trial counsel commented that Blanca was "always ask[ing] them if they were touched in their private parts" and suggested that these questions "would instill a suggestibility issue with the children eventually over time." (*Id.* at 183–84.) Petitioner's trial counsel then questioned Blanca's credibility because she admitted she did not like Petitioner. (*Id.* at 183.) Finally, Petitioner's trial counsel commented that Blanca "wanted things to get into motion" by calling child protective services before telling Betel about J.F.'s allegations. (*Id.* at 185.)

It is clear that Blanca and J.F.'s accusations against Petitioner were damaging to Petitioner. It is also clear that Blanca and J.F. had potential credibility issues. However, the Nevada Supreme Court reasonably concluded that Petitioner failed to demonstrate that his trial counsel's performance in challenging their accusations or credibility was deficient. *Strickland*, 466 U.S. at 688. First, although Petitioner's trial counsel did not cross-examine J.F., it appears that this decision was strategic. Indeed, Petitioner's trial counsel explained that he did not cross-examine J.F. "because she said everything [he] needed her to say" on direct examination. (ECF No. 12-22 at 63.) In fact, as is further explained in Ground Eight, J.F. testified during direct examination, contrary to her police

interview statement, that Petitioner only touched the inside of her vagina once and never touched her buttocks. (ECF No. 12-17 at 110, 113.) Turning to Blanca, Petitioner's trial counsel cross-examined her about the fact that she always disliked Petitioner—as opposed to her dislike stemming only from the accusations—and about the fact that Blanca had previously questioned J.F. about Petitioner inappropriately touching her. (ECF No. 12-17 at 133–34.) Petitioner's trial counsel summarized Blanca's credibility issues during closing argument by asking the jury to consider whether Blanca implanted J.F.'s accusations against Petitioner through her previous questions due to her dislike of Petitioner. (ECF No. 12-22 at 179–81, 183–84.) Accordingly, because the Nevada Supreme Court reasonably denied Petitioner's ineffective assistance of counsel claim, Petitioner is denied federal habeas relief for Ground Four.[5]

E. Ground Eight

In Ground Eight, Petitioner alleges that his federal constitutional rights were violated when his appellate counsel failed to argue on appeal that there was legally insufficient evidence to support his lewdness conviction. (ECF No. 11 at 26.) Petitioner elaborates that the only evidence presented at trial supporting the lewdness conviction was the victim's prior, unreliable out-of-court statement, which amounted to hearsay and

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[5]Petitioner also argues in his reply brief that his trial counsel failed to conduct a proper investigation in order to properly challenge Blanca's and J.F.'s accusations because a proper investigation would have disclosed: (1) that Blanca misled J.F. into making false allegations; and (2) that J.F. was hypersensitive to touching. (ECF No. 56 at 18–19.) In support of this argument, Petitioner cites to two declarations of Michele Blackwill, dated October 7, 2013 and October 8, 2013; a declaration of Maria Hernandez dated October 7, 2013; and a declaration of Cristina Zaragoza dated October 8, 2013. (*See id.* (citing ECF Nos. 14-25, 14-26, 14-27, 14-28).) First, these arguments were presented in Ground Five, which this Court dismissed as procedurally defaulted. (ECF No. 48 at 5.) Moreover, the Court is restricted from considering evidence that was not a part of the record reviewed by the Nevada Supreme Court at the time it ruled on the issue. *See Cullen*, 563 U.S. at 181 ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Here, the declarations were not made until after the Nevada Supreme Court affirmed the denial of Petitioner's first state habeas petition on February 13, 2013. (ECF No. 14-22.)

lacked sufficient details about when the act occurred. (*Id.* at 27.) In Petitioner's first state habeas appeal, the Nevada Supreme Court held:

> [A]ppellant argues that his appellate counsel was ineffective for failing to argue there was insufficient evidence for the lewdness conviction as the victim testified that appellant did not touch her buttocks. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Following the six-year-old victim's testimony that appellant did not touch her buttocks and that she did not remember telling the police that he had touched her buttocks, the district court admitted her statement to police that appellant had touched her buttocks as a prior inconsistent statement. *See* NRS 51.035(2). As the statement was properly admitted as a prior inconsistent statement, it was properly considered as substantive evidence that appellant improperly touched the victim's buttocks. *See Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). Accordingly, there was sufficient evidence presented to support the lewdness conviction. Appellant fails to demonstrate a reasonable likelihood of success on appeal had appellate counsel argued that there was insufficient evidence of the lewdness conviction. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

(ECF No. 14-22 at 5.) The Nevada Supreme Court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court.

The *Strickland* standard outlined in Ground Four is utilized to review appellate counsel's actions: a petitioner must show "that [appellate] counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them" and then "that, but for his [appellate] counsel's unreasonable failure to file a merits brief, [petitioner] would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000). In order to assess whether Petitioner's appellate counsel was ineffective, this Court must first assess whether a sufficiency of the evidence claim regarding the lewdness conviction would have been successful on appeal.

Petitioner was convicted of one count of lewdness with a child under the age of fourteen. (ECF No. 13-6.) That lewdness count provided that Petitioner "commit[ted] a lewd or lascivious act with the body of [J.F.], a child under the age of fourteen years, by touching and/or rubbing and/or fondling the buttocks of the said [J.F.], with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of" Petitioner or

J.F. (ECF No. 13-3 at 3.) At the time of Petitioner's acts against J.F. and his trial, NRS § 201.230(1) provided that a person is guilty of lewdness if the person "willfully and lewdly commits any lewd or lascivious act . . . upon . . . a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of that person or of that child." The Nevada Supreme Court reasonably concluded that there was sufficient evidence supporting Petitioner's lewdness conviction pursuant to NRS § 201.230(1).

Although J.F. denied that Petitioner "touch[ed her] butt" (ECF No. 12-17 at 110, 113), Detective Tooley testified that J.F. reported to her that Petitioner had touched her "[o]n her buttocks." (ECF No. 12-22 at 64.) Petitioner asserts that Detective Tooley's testimony about J.F.'s police interview statements was inadmissible hearsay. (ECF No. 11 at 27.) However, the Nevada Supreme Court, the final arbiter of Nevada law, determined that pursuant to NRS § 51.035(2), Detective Tooley's testimony about J.F.'s police interview statement was properly admitted as a prior inconsistent statement. This ruling was reasonable. J.F. testified at the trial that Petitioner did not touch her buttocks, Petitioner only touched her vagina once, and she did not recall speaking to a police officer at the hospital (ECF No. 12-17 at 110–111, 113). Accordingly, J.F.'s statement to Detective Tooley that Petitioner "touched . . . on her private areas . . . a lot" and touched her "[o]n her buttocks" (ECF No. 12-22 at 59–60, 64) was inconsistent. Because J.F. testified at the trial and was subject to cross-examination, there was no hearsay issue regarding Detective Tooley's testimony. *See* NRS § 51.035(2)(a) (stating that a out-of-court statement that is inconsistent with the declarant's testimony is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement).[6]

[6]Petitioner also argues that he had no opportunity to confront J.F. on her police interview statement because she did not remember speaking to law enforcement and was not old enough to read, making confrontation with her prior statement impossible. (ECF No. 11 at 27.) However, as was discussed in Ground Four, Petitioner's trial counsel chose not to cross-examine J.F. because her direct-examination testimony was less damaging than her police interview statement.

Petitioner also asserts that the evidence lacked sufficient details about when the alleged touching took place. (ECF No. 11 at 27.) However, time is not an element of lewdness under Nevada law. *See* NRS § 201.230(1); *see also Wilson v. State*, 121 Nev. 345, 368-69, 114 P.3d 285, 301 (2005) (holding that "there is no requirement that the State allege exact dates unless the situation is one in which time is an element of the crime charged. Instead, the State may provide approximate dates on which it is believed that the crime occurred"). Thus, based on Detective Tooley's testimony, a rational trier of fact viewing the evidence in the light most favorable to the prosecution could have found, beyond a reasonable doubt, that Petitioner committed a lewd or lascivious act upon the body of J.F., who was under fourteen years old. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that, on direct review of a sufficiency of the evidence claim, a state court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); NRS § 201.230(1); *see also Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) ("It is well established law in Nevada that in a rape case, a jury may convict upon the uncorroborated testimony of the victim.").

Further, there was testimony from Detective Hernandez that Petitioner had stated that J.F. was "very provocative" and that "he had the opportunity [to do other things] but that he had resisted." (ECF No. 12-22 at 67, 76–77.) Additionally, Betel testified that Petitioner "had told [her] that . . . when [J.F.] grows up and if she accepted that he would sleep with her." (ECF No. 12-17 at 72–73, 89–90.) Based on this circumstantial evidence, a rational trier of fact viewing the evidence in the light most favorable to the prosecution could have found, beyond a reasonable doubt, that Petitioner had "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of" himself or J.F. when he committed the lewd act. *Jackson*, 443 U.S. at 319; NRS § 201.230(1); *see also Grant v. State*, 24 P.3d 761, 766 (2001) ("Intent need not be proved by direct evidence but can be inferred from conduct and circumstantial evidence.").

Because the Nevada Supreme Court's finding that there was sufficient evidence to convict Petitioner of lewdness with a child under the age of fourteen was reasonable, its finding that Petitioner's appellate counsel was not ineffective for failing to raise this claim on direct appeal was also reasonable. *See Strickland*, 466 U.S. at 688; *Smith*, 528 U.S. at 285; *Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.").

Petitioner is denied federal habeas relief for Ground Eight.

V. CERTIFICATE OF APPEALABILITY

This is a final order adverse to Petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability ("COA"). Therefore, this Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). Applying this standard, the Court finds that a certificate of appealability is unwarranted.

VI. CONCLUSION

It is therefore ordered that the first amended petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 (ECF No. 11) is denied.

It is further ordered that Petitioner is denied a certificate of appealability.

It is further ordered that under to Federal Rule of Civil Procedure 25(d), the Clerk of Court is directed to substitute Renee Baker for Robert LeGrand as the Respondent warden on the docket for this case.

The Clerk of Court is directed to enter judgment accordingly and close this case.

DATED THIS 16th day of March 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOAQUIN ERNESTO HERNANDEZ-AYALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68705

FILED
JUN 22 2016
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Joaquin Ernesto Hernandez-Ayala claims the district court erred by denying his postconviction petition for a writ of habeas corpus as procedurally barred. This claim lacks merit.

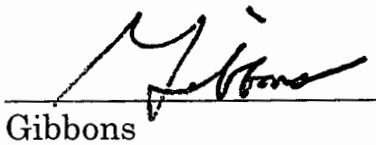
Hernandez-Ayala filed his petition on February 26, 2015, more than five years after issuance of the remittitur on direct appeal on September 1, 2009.[1] Thus, Hernandez-Ayala's petition was untimely filed. *See* NRS 34.726(1). Moreover, Hernandez Ayala's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised a claim that was new and different from those raised in his previous petition. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Hernandez-Ayala's petition was

[1]*See Hernandez-Ayala v. State*, Docket No. 50720 (Order of Affirmance, August 5, 2009).

procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Hernandez-Ayala asserted ineffective assistance of his first postconviction counsel constituted good cause and actual prejudice to overcome the procedural bars. The district court denied the petition as procedurally barred after finding Hernandez-Ayala failed to demonstrate good cause and actual prejudice to excuse the procedural bars because his claims of ineffective assistance of counsel were themselves procedurally barred. We conclude the district court did not err by denying Hernandez-Ayala's petition as procedurally barred. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014) (explaining that postconviction counsel's performance does not constitute good cause to excuse the procedural bars unless the appointment of postconviction counsel was mandated by statute); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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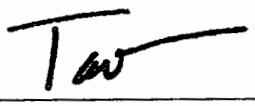

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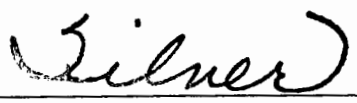
Tao



_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOAQUIN HERNANDEZ-AYALA, Petitioner, vs. ROBERT LEGRAND, et al., Respondents.	3:13-cv-00134-MMD-WGC **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

Petitioner, Joaquin Hernandez-Ayala ("Hernandez-Ayala"), by and through his attorney of record, Jonathan M. Kirshbaum, Assistant Federal Public Defender, files this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

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[1] The Exhibits referenced in this First Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

I.

PROCEDURAL BACKGROUND

1. On December 14, 2007, the Clerk of the Eighth Judicial District Court, Clark County, Nevada, entered a Judgment of Conviction in the case entitled State of Nevada v. Joaquin Ernesto Hernandez-Ayala, Case No. C227313. (Ex. 29.)

2. Following a three-day jury trial, the jury convicted Mr. Hernandez-Ayala of Sexual Assault with a Minor Under Fourteen Years of Age (Count 1) and Lewdness with a Child Under the Age of 14 (Count 3). The judge sentenced Mr. Hernandez-Ayala as follows: Count 1 - to a maximum life term with a minimum parole eligibility of twenty (20) years; and, Count 3 - to a maximum life term with a minimum parole eligibility of ten (10) years. Count 3 was ran concurrent to Count 1. Mr. Hernandez-Ayala received credit for four hundred sixty-six (466) days time served. The court further imposed a special sentence of lifetime supervision. (Id.) Mr. Hernandez-Ayala is currently housed at the Lovelock Correctional Center in Lovelock, Nevada.

3. The Amended Criminal Complaint was filed on September 22, 2006, charging Mr. Hernandez-Ayala with Sexual Assault with a Minor Under Fourteen Years of Age (Counts 1-3) and Lewdness with a Child Under the Age of 14 (Counts 4-6).[2] (Ex. 5.)

4. On October 20, 2006, per negotiations, Mr. Hernandez-Ayala, who was present with his attorney Michael Sanft, waived his right to a preliminary hearing and was bound over to the Eighth Judicial District Court on Counts 1-6 as listed in the Amended Criminal Complaint. (Ex. 3.)

5. The Information was filed on October 31, 2006, charging Mr. Hernandez-Ayala with Lewdness with a Child Under the Age of 14, a violation of Nevada Revised Statute ("NRS") 201.230, a felony (Count 1). (Ex. 6.)

6. An Amended Information was filed on November 8, 2006, charging Mr. Hernandez-Ayala with Sexual Assault with a Minor Under Fourteen Years of Age, a violation of NRS 200.364 and 200.366, a felony (Counts 1-3) and Lewdness with a Child Under the Age of 14, a violation of NRS 201.230, a felony (Counts 4-6). (Ex. 9.)

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[2] The original Criminal Complaint was filed on August 29, 2006, charging Mr. Hernandez Ayala with two (2) counts of Sexual Assault and one (1) count of Lewdness. (Ex. 4.)

7. The arraignment on the Amended Information was held on November 8, 2006. (Ex. 8.) Mr. Hernandez-Ayala was present throughout with attorney Sanft. Mr. Hernandez- Ayala pled not guilty to the charges as listed in the Amended Information and invoked the sixty (60) day rule. (Id.)

8. On November 22, 2006, attorney Sanft filed a Motion to Withdraw as Attorney of Record. (Ex. 10.) Mr. Sanft sought to withdraw because Mr. Hernandez-Ayala would not follow his advice to accept the plea negotiations and was insisting on proceeding to trial. (Id.) The hearing on the motion was held on December 5, 2006, before the Honorable Michelle Leavitt. (Ex. 11.) Mr. Hernandez-Ayala was present throughout with attorney Sanft. At the hearing, the court denied the motion. (Id.)

9. A calendar call hearing was held on October 16, 2007. (Ex. 14.) Mr. Hernandez-Ayala was present throughout with attorney Sanft. At the hearing, Mr. Sanft informed the court that he was prepared to proceed to trial; however, Mr. Hernandez-Ayala had agreed to accept a plea offer from the State and requested a change of plea hearing. (Id.) The change of plea hearing was held on October 18, 2007 (Ex. 15.) Mr. Hernandez-Ayala was present throughout with attorney Sanft. At the hearing, attorney Sanft advised the court that Mr. Hernandez-Ayala would be entering a plea of guilty to one count of attempted lewdness with a child under the age of fourteen. During the plea canvass, Mr. Hernandez-Ayala did not provide a factual basis for the guilty plea. As such, the court would not accept his plea and set the case for trial. (Id.)

10. The case proceeded to trial on October 22, 2007 and continued through October 25, 2007. The Honorable Michelle Leavitt presided. (Exs. 16, 17, 22 and 23.) Mr. Sanft represented Mr. Hernandez-Ayala throughout the trial.

a. On the second day of the trial, prior to proceedings and outside the presence of the jury, a hearing was held regarding the competency of one of the minor victims, G.F., and regarding the admissibility of out-of-court statements made by the minor victims, J.F. and G.F., to their mother and aunt. Following testimony from witnesses and arguments by counsel, the court found G.F. incompetent to testify. The court ruled that the statements to the mother and aunt of the victims were admissible. (Ex. 17 at 46-47 and 51-52.)

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b. On the third day of the trial and outside the presence of the jury, a hearing was held regarding the admissibility of Mr. Hernandez-Ayala's video-recorded statement to law enforcement. Following review of the video-recording and transcript of the statement and arguments by counsel, the court found that the statement was given voluntarily and free of coercion and permitted the State to use the statement during trial. (Ex. 22 at 48.)

c. On the third day of the trial, the State moved to dismiss counts 2 and 3 of the Amended Information, which concerned allegations against G.F. (Ex. 22 at 143-144.) The Second Amended Information was filed on December 6, 2007, charging Mr. Hernandez-Ayala with Sexual Assault with a Minor Under Fourteen Years of Age (Count 1) and Lewdness with a Child Under the Age of 14 (Counts 2-4). (Ex. 26.)

d. At the close of trial, the jury convicted Mr. Hernandez-Ayala of Sexual Assault with a Minor Under Fourteen Years of Age (Count 1) and one count of Lewdness with a Child Under the Age of 14 (Count 3), but found him not guilty on the other two Lewdness counts. (Ex. 25.)

11. The sentencing hearing took place on December 6, 2007. (Ex. 27.) The sentence the trial court imposed is set forth above in paragraph two. The Judgment of Conviction followed on December 14, 2007. (Ex. 29.)

DIRECT APPEAL

12. A timely proper person Notice of Appeal was filed on December 13, 2007. (Ex. 28.) A second timely Notice of Appeal was filed by attorney Kenneth Long on December 14, 2007. (Ex. 30.) The Nevada Supreme Court docketed this appeal as case number 50720.

13. On January 22, 2008, the Nevada Supreme Court filed an order remanding the case for appointment of appellate counsel or a determination that Mr. Hernandez-Ayala must retain counsel for his appeal. (Ex. 32.) At a hearing on February 5, 2008, Mr. Hernandez-Ayala stated that he had retained attorney Kenneth Long for his direct appeal. (Ex. 33.)

14. On March 31, 2008, Mr. Long sent a letter to the Nevada Supreme Court informing the court that he had been suspended from practicing law. (Ex. 36.)

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15. On April 2, 2008, the Nevada Supreme Court removed Mr. Long as counsel and remanded the case to the district court for the purpose of securing counsel for Mr. Hernandez-Ayala. (Ex. 37.) At a hearing on April 29, 2008, attorney Christopher Oram confirmed as counsel for Mr. Hernandez-Ayala. (Ex. 3.) Mr. Oram filed his Notice of Appearance on May 2, 2008. (Ex. 38.) An Order of Appointment appointing Mr. Oram was filed in the district court on June 3, 2008. (Ex. 39.)

16. Appellant's Opening Brief was filed on February 13, 2009. (Ex. 42.) Mr. Oram raised the following issues on appeal:

I. The Court committed error permitting several instances of hearsay testimony regarding Judith's accusations, in violation of the confrontation clause of the Sixth Amendment to the Constitution.

II. Mr. Hernandez-Ayala received an unfair trial when Blanca described how her other older sister questioned Judith in the bathroom and that Judith repeated the allegations that she had stated against Mr. Hernandez-Ayala, in violation of the confrontation clause of the Sixth Amendment in the United States Constitution.

III. The District Court committed error when it permitted the State to introduce the defendants statements in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

17. Respondent's Answering Brief was filed on March 18, 2009 (ex. 43) and Appellant's Reply Brief was filed on May 15, 2009 (ex. 44).

18. On August 5, 2009, the Nevada Supreme Court filed an Order of Affirmance, denying Mr. Hernandez-Ayala relief on appeal. (Ex. 45.) Remittitur issued on September 1, 2009. (Ex. 47.)

STATE POST-CONVICTION

19. On April 6, 2010, Mr. Hernandez-Ayala, in proper person, filed his Petition for Writ of Habeas Corpus (Post-Conviction) in the Eighth Judicial District Court. (Ex. 51.) He raised the following grounds for relief:

I. Petitioner received constitutionally ineffective assistance of trial counsel based on counsel's failure to:

a. file a motion to suppress Petitioner's confession;

b. conduct a full investigation;

c. file a motion to have the complaining witness submit to an independent psychological examination;

d. counter the State's Sexual Assault Nurse Examiner (SANE) with a similar independent, private expert; and,

e. move for dismissal of the charges when Petitioner refused to proceed with the Guilty Plea Agreement (GPA); and should have objected when the court failed to accept the GPA.

II. Petitioner received constitutionally ineffective assistance of appellate counsel based on counsel's failure to communicate adequately with Petitioner during preparation of his direct appeal.

III. The State presented insufficient evidence to convict Petitioner on Counts 1 and 3.

IV. The trial judge engaged in judicial misconduct by:

a. instructing Petitioner to communicate with his appointed trial counsel;

b. commenting that pursuant to the negotiated GPA Petitioner was going to plead to a "serious charge";

c. refusing to accept Petitioner's plea when Petitioner failed to admit to a factual basis for the plea; and,

d. exhibiting a bias against Petitioner by stating her willingness to ensure the complaining witness and the State's SANE witness would be available to testify at trial.

V. The trial court erred by:

a. admitting into evidence Petitioner's videotaped confession;

b. allowing a conviction when the State's evidence was insufficient to permit the jury to conclude beyond a reasonable doubt that Petitioner committed the crimes alleged; and,

c. allowing Petitioner to be convicted of both Sexual Assault and Lewdness, a violation of his right to be free from double jeopardy.

VI. Cumulative errors during trial, including the court's judicial misconduct and refusal to accept Petitioner's guilty plea, which deprived Petitioner of due process and a fair trial.

20. Mr. Hernandez-Ayala requested appointment of counsel and to proceed in forma pauperis on April 6, 2010. (Exs. 48-50.)

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21. The State filed its Response to Defendant's post-conviction petition on June 23, 2010. (Ex. 53.)

22. On July 1, 2010, a hearing on the petition was held before Judge Leavitt. (Ex. 3.) Mr. Hernandez-Ayala was not present for this hearing, nor was he represented by counsel. At the hearing, the court orally denied the Petition. (Id.)

23. Mr. Hernandez-Ayala, in proper person, filed a timely Notice of Appeal on July 22, 2010. (Ex. 54.) The Nevada Supreme Court docketed this appeal as case number 56470.

24. The Findings of Fact, Conclusions of Law, and Order was filed on September 8, 2010. (Ex. 57.) In addition to denying the Petition for Writ of Habeas Corpus (Post-Conviction), the court also denied Mr. Hernandez-Ayala's Motion for Appointment of Counsel. (Id.) The Notice of Entry of Decision and Order was mailed to Mr. Hernandez-Ayala on September 24, 2010. (Ex. 58.)

25. On December 13, 2010, the Nevada Supreme Court filed an order of Reversal and Remand. (Ex. 59.) The court found that the district court had erred in denying Mr. Hernandez-Ayala's petition without appointing post-conviction counsel; it reversed the decision and remanded the case for further proceedings. (Id.) Remittitur issued on January 7, 2011. (Ex. 61.)

26. On January 25, 2011, a hearing was held wherein attorney Cynthia Dustin confirmed as counsel for Mr. Hernandez-Ayala. (Ex. 3.)

27. On June 2, 2011, Mr. Hernandez-Ayala filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). (Ex. 63.) He raised the following additional grounds for relief:

I. Trial counsel failed to challenge the accusations against the defendant during the trial depriving the defendant of his Sixth and Fourteenth right to effective assistance of counsel.

II. The defendant was deprived of his Sixth and Fourteenth Amendment rights as trial counsel conducted no investigation towards the viable defense in the instant case.

III. The defendant was deprived of his right to effective assistance of counsel under the Sixth and Fourteenth as his appellate counsel failed to challenge the conviction under count three.

IV. Both trial counsel and appellate counsel's actions denied the defendant of equal protection under the constitution.

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28. The State filed its response to the supplemental petition on August 23, 2011 (ex. 64), and Mr. Hernandez-Ayala replied on September 12, 2011 (ex. 66).

29. On September 22, 2011, a hearing on the petition was held. (Ex. 67.) Mr. Hernandez-Ayala was not present for this hearing; however he was represented by attorney Dustin. At the hearing, the court orally denied the Petition. At her request, the court appointed Ms. Dustin as counsel on appeal. (Id.)

30. The Findings of Fact, Conclusions of Law, and Order was filed on October 14, 2011. (Ex. 68.) The Notice of Entry of Decision and Order was mailed to Mr. Hernandez-Ayala on November 14, 2011. (Ex. 72.)

31. Mr. Hernandez-Ayala filed a timely Notice of Appeal on November 9, 2011. (Ex. 69.) A second timely Notice of Appeal was filed by Mr. Hernandez-Ayala, in proper person, on November 30, 2011. (Ex. 74.) The Nevada Supreme Court docketed this appeal as case number 59657.

32. Appellant's Opening Brief was filed on March 15, 2012. (Ex. 77.) Ms. Dustin raised the following issues on appeal:

I. The lower court erred in summarily finding that trial counsel's actions were proper when trial counsel failed to challenge the accusations against the appellant during the trial.

II. Error occurred when the lower court determined that trial counsel's actions were proper even though trial counsel conducted no investigation towards a viable defense in the instant case.

III. The lower court erred in finding that the appellant was not deprived of his right to effective assistance of counsel under the Sixth and Fourteenth due to his appellate counsel's failure in challenge his conviction under count three.

IV. The lower court erred in finding that trial counsel and appellate counsel's actions did not deprive the appellant of equal protection under the constitution.

V. The trial court erred in summarily denying all of the appellant's claims in his pro per petition for writ of habeas corpus without holding an evidentiary hearing.

33. Respondent's Answering Brief was filed on April 16, 2012 (ex. 78) and Appellant's Reply Brief was filed on May 24, 2012 (ex. 79).

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34. On November 27, 2012, attorney Dustin filed a Motion to Withdraw as Counsel. (Ex. 80.) Ms. Dustin was elected to the bench of the Las Vegas Justice Court, Department 5, and could not continue on as counsel in Mr. Hernandez-Ayala's case. (Id.) On November 28, 2012, the Nevada Supreme Court filed an Order Granting Motion to Withdraw and Remanding for Appointment of Counsel. (Ex. 81.) A hearing was held on December 20, 2012, before the Honorable David Barker wherein attorney Matthew Carling was confirmed as counsel. (Ex. 3.) An Order of Appointment was filed on December 27, 2012. (Ex. 82.)

35. On February 13, 2013, the Nevada Supreme Court filed an Order of Affirmance, denying Mr. Hernandez-Ayala relief on appeal. (Ex. 83.) Remittitur issued on March 12, 2013. (Ex. 84.)

FEDERAL POST-CONVICTION

36. Mr. Hernandez-Ayala mailed his Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody in the instant action on March 13, 2013. (CR 5.)

37. Mr. Hernandez-Ayala requested appointment of counsel (CR 1-2) and to proceed in forma pauperis (CR 1) on March 18, 2013.

38. On May 15, 2013, this Court filed an Order granting Mr. Hernandez-Ayala in forma pauperis status and provisionally appointing the Federal Public Defender as counsel. (CR 4.)

39. Assistant Federal Public Defender Jonathan M. Kirshbaum filed his Notice of Appearance on June 14, 2013. (CR 8.)

II.

GROUNDS FOR RELIEF

GROUND ONE

THE POLICE USED COERCIVE TACTICS TO OBTAIN HERNANDEZ-AYALA'S INCRIMINATING STATEMENTS IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on direct appeal (Ex. 42), and was decided upon by that court (Ex. 45).

A confession is involuntary, and its admission violates the Constitution, if it was obtained through physical or mental coercion.

Prior to trial, the prosecutor informed the court that a voluntariness hearing was going to be necessary. (Ex. 17 at 27.) He pointed out that Hernandez-Ayala had filed an internal affairs complaint alleging that the officers had beaten him to get his confession. (Id.) Defense counsel stated that he intended to move to suppress the statement. (Id. at 28). He pointed out that the videotaped statement was in Spanish, but that there was an English transcript of the statement. (Id. at 29).

Later that day, defense counsel reiterated that there was an issue as to whether Hernandez-Ayala "was either beaten or somehow coerced" into making his statement to the police. (Ex. 17 at 152.) He informed the court that Hernandez-Ayala had asked him to move to suppress the statement as involuntary. (Ex. 22 at 41.) Hernandez-Ayala was alleging that, when he was first arrested, he had been beaten and then on the way to CCDC or the sexual assault substation, an officer placed a gun to his head. (Id.) He further alleged that someone hit him in the back of the head. (Id. at 42.) The room was cold and one of his arms was handcuffed to a bar during the entire interrogation. (Id.) Counsel pointed out that, during the statement, the detective acknowledged that it was cold in the room. However, the detective was able to leave, while Hernandez-Ayala, who was only in a t-shirt, could not and was made to stay in the room throughout the entire hour and forty minute interrogation. (Id. at 42-43.)

In response, the State pointed out that the videotape of the statement and the booking photo did not show any physical injuries on Hernandez-Ayala. (Ex. 22 at 45.) Hernandez-Ayala also did not mention being beaten or that a gun was held to his head. (Id.)

The videotaped statement showed that Hernandez-Ayala repeatedly denied that he touched J.F. in an inappropriate way; he only touched her when he bathed her. In the face of these denials, the detective questioning Hernandez-Ayala told him, "[T]his is not helping anybody. You are not helping the girl. You are not helping yourself. We are here to help you." (Ex. 2 at 22 (emphasis added).) Shortly thereafter, the detective told Hernandez-Ayala that the police had DNA proving that he had touched J.F.: "I talked to the Doctors. I have the DNA, we have enough. We have all we need to say it did happen, and I know it happened." (Id. at 24.) Immediately in response to this assertion, Hernandez-Ayala made an incriminating statement, stating that he "made the attempt" to touch her. (Id.)

After reviewing the videotaped statement and the transcript, the court concluded that the statement had not been coerced and was admissible. (Ex. 22 at 47-48.) It concluded that Hernandez-

Ayala had denied committing the assault for much of the statement and understood that he did not need to speak to the police. Id.

Hernandez-Ayala's constitutional rights were violated when the court permitted the State to admit his statement to the police at trial. The record established that the statement had been coerced through physical pressure. Hernandez-Ayala raised serious allegations as to physical force being placed on him to confess. Further, the police clearly used other physical means to pressure Hernandez-Ayala to incriminate himself, such as keeping him handcuffed to a bar and forcing him to stay in an unnecessarily cold room throughout the entire lengthy interrogation. Further, the detective used overbearing psychological coercion to pressure Hernandez-Ayala to make an incriminating statement. The coercive nature of the police tactics rendered the confession involuntary. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and Hernandez-Ayala's conviction and sentence should be vacated.

GROUND TWO

HERNANDEZ-AYALA'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WAS VIOLATED WHEN THE COURT ADMITTED NUMEROUS OUT-OF-COURT STATEMENTS AT HIS TRIAL

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on direct appeal (Ex. 42), and was decided upon by that court (Ex. 45).

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.)

A hearing was held prior to trial to determine the competency of G.F. to testify as well as the admissibility of numerous out-of-court statements. (Ex. 17 at 5, 43.) Prior to the hearings, the court pointed out that Crawford was a "huge issue in this case." (Id. at 7.) After questioning G.F., the court concluded that he was not competent to testify. (Id. at 43-47.) No competency hearing was held for J.F.

After hearing testimony from two of the three witnesses who would offer out-of-court statements from J.F. and G.F., namely their aunt and mother, the court ruled that all of the hearsay was admissible. (Id. at 13-25, 34-42, 47-51.)

At trial, Betel Zaragoza, who is J.F.'s mother, testified to an out-of-court statement that she received from J.F. She testified that, on August 27, 2006, she left work, stopped at home, and then went to go pick up her kid's at her sister Blanca's apartment.[3] (Ex. 17 at 79-81.) Prior to picking up the kids at Blanca's apartment, she went to speak to her sister-in-law, who informed her that J.F. had made allegations against Hernandez-Ayala. (Id. at 81-82.) Betel went downstairs, got J.F., brought her to a bedroom, and locked the door. (Id. at 82-83.) She asked J.F. what happened and she said, "that Joaquin had touched her." (Id. at 83.) The prosecutor asked her, "And specifically what did she say regarding Joaquin touching her?" Betel testified, "That Joaquin had sticked [sic] his finger inside her vagina." (Id.)

Blanca Zaragoza is the aunt of J.F. and G.F. (Ex. 17 at 116.) On August 26, 2006, she was taking care of the kids because Betel was at work. (Id. at 120-21.) In the late afternoon, Blanca was giving a bath to J.F. and G.F. (Id. at 116.) She was washing J.F.'s vagina with a soft cloth when J.F. said "Ouch." (Id. at 121.) Blanca asked her what was wrong. J.F. told her not to tell her mother. J.F. then said that Hernandez-Ayala had put his hands on her vagina. (Id. at 122.) Blanca then turned to G.F. and asked him if Hernandez-Ayala had done anything to him. G.F. demonstrated that Hernandez-Ayla had stroked his penis. (Id. at 122-23.)

Blanca described what happened after hearing the statements from J.F. and G.F.:

> What I did is I stepped out of the bathroom, most of my sisters and my brothers were ther. My brother was there. And I stepped out and I - - and I told them what Judith was telling me. And then my older sister went in the bathroom with [J.F.] and [G.F.] still in the bathtub, and she again asked Judith the same question. And Judith again said the same thing to her. I was already in tears when this was going on. I was crying, I was very sad.

(Ex. 17 at 124.)

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[3] Hernandez-Ayala was arrested at 3:45 a.m. on August 27, 2006, after these events occurred. (Ex. 1.) Although Betel did not give a time for when she left work, apparently she did not arrive at her sister's house until after midnight. (Id.)

Detective Shannon Tooley investigated J.F.'s allegations. In the early morning hours of August 27, 2006, she went to Sunrise Hospital and spoke to J.F. (Ex. 22 at 56.) She asked J.F. "if anyone had ever touched her on her private areas, she later in the interview said yes." (Id. at 58.) She asked J.F. how many times this occurred and she said, "A lot." (Id. at 59.) The detective asked J.F. whether anyone had touched her anyplace on her body other than her vagina. (Id. at 59, 63.) J.F. said that Hernandez-Ayala touched her "[o]n her buttocks." (Id. at 63.)

The admission of these out-of-court statements violated Hernandez-Ayala's rights to confront the witnesses against him. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the conviction and sentence vacated.

GROUND THREE

HERNANDEZ-AYALA'S RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WAS VIOLATED WHEN THE COURT ADMITTED A HIGHLY PREJUDICIAL OUT-OF-COURT STATEMENT.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on direct appeal (Ex. 42), and was decided upon by that court (Ex. 45).

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.)

Blanca Zaragoza is the aunt of J.F. and G.F. (Ex. 17 at 116.) On August 26, 2006, she was taking care of the kids because Betel was at work. (Id. at 120-21.) In the late afternoon, Blanca was giving a bath to J.F. and G.F. (Id. at 116.) She was washing J.F.'s vagina with a soft cloth when J.F. said "Ouch." (Id. at 121.) Blanca asked her what was wrong. J.F. told her not to tell her mother. J.F. then said that Hernandez-Ayla had put his hands on her vagina. (Id. at 122.) Blanca then turned to G.F. and asked him if Hernandez-Ayala had done anything to him. G.F. demonstrated that Hernandez-Ayla had stroked his penis. (Id. at 122-23.)

Blanca described what happened after hearing the statements from J.F. and G.F.:

> What I did is I stepped out of the bathroom, most of my sisters and my brothers were ther. My brother was there. And I stepped out and I - - and I told them what Judith was telling me. And then my older sister went in the bathroom with [J.F.] and [G.F.] still in the bathtub, and she again asked Judith the same question. And Judith again said the same thing to her. I was already in tears when this was going on. I was crying, I was very sad.

(Id. at 124). The older sister, whose name was not even mentioned at trial, did not testify. No pre-trial hearing was held as to whether this hearsay should have been admitted.

The admission of the out-of-court statements made to the older sister violated Hernandez-Ayala's constitutional right to a fair trial. This highly prejudicial statement was solely admitted in order to bolster the unreliable testimony of J.F. through adult witnesses. Further, as alleged under Ground Two, numerous hearsay statements were admitted at trial to further bolster J.F.'s testimony. The allegations contained in Ground Two are incorporated herein. The cumulative repetition of multiple hearsay statements unfairly bolstered J.F.'s testimony and undermined the fundamental fairness of the trial. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the conviction and sentence vacated.

GROUND FOUR

HERNANDEZ-AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO CHALLENGE THE ACCUSATIONS AGAINST HERNANDEZ-AYALA AT TRIAL.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal from the denial of his post-conviction petition (Ex. 77), and was decided upon by that court (Ex. 83).

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable: and (2) that there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). "A

reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id.

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.)

At trial, Blanca Zaragoza, who is the aunt of J.F. and G.F., testified that she was like a second mother to the children. (Ex. 17 at 116-18.) On August 26, 2006, she was taking care of the kids because Betel was at work. (Id. at 120-21.) In the late afternoon, Blanca was giving a bath to J.F. and G.F. (Id. at 116.) She was washing J.F.'s vagina with a soft cloth when J.F. said "Ouch." (Id. at 121.) Blanca asked her what was wrong. J.F. told her not to tell her mother. J.F. then said that Hernandez-Ayla had put his hands on her vagina. (Id. at 122.) Blanca then turned to G.F. and asked him if Hernandez-Ayala had done anything to him. G.F. demonstrated that Hernandez-Ayla had stroked his penis. (Id. at 122-23.) Upon a physical examination later that night, J.F. did not have any injuries. (Ex. 22 at 15).

The cross-examination of Blanca covered less than six pages. (Ex. 17 at 129-35.) During cross-examination, defense counsel asked Blanca whether it was true that she never liked Hernandez-Ayala. She said that she had no reason to dislike or like him. (Id. at 129.) She acknowledged that she told a detective that she never liked him. She explained that she meant that she did not like what he had done to her on that day. (Id. at 130.) She denied being unhappy that her sister's relationship with Hernandez-Ayala had led to them moving away from her. (Id. at 130-31.) However, she acknowledged that after they moved out she did not see the kids very much. (Id. at 131.) She acknowledged telling a detective that she was always asking J.F. whether her private parts were being touched, but she explained that she really meant to say that she always asked her everything was fine. (Id. at 132.) Only a couple of times did she ask whether Hernandez-Ayala had touched her. (Id. at 132-33.)

J.F. testified at trial. Defense counsel did not cross-examine her. (Ex. 17 at 113.)

Defense counsel's failure to challenge the allegations represented deficient performance. One of the available defenses was that Blanca's dislike of Hernandez-Ayala resulted in J.F. making up the allegations against him to please her aunt. Blanca clearly did not like Hernandez-Ayala. It was suggested at trial that, in her eyes, he was the one who moved the children away from her. Blanca

acknowledged that she had asked J.F. whether Hernandez-Ayala had touched her. These facts together suggest that, through repetitive suggestion, Blanca was encouraging the children to make allegations against Hernandez-Ayala. In fact, Blanca's explanation of what occurred when J.F. told her about the abuse raised questions. According to Blanca, J.F. expressed pain when Blanca touched her. However, a physical examination that night showed that she had no injuries. It strongly suggested that Blanca's story about how J.F. revealed the alleged abuse was not true. It was incumbent upon defense counsel to establish Blanca's motive and actions in potentially encouraging J.F. to make a false allegation. However, defense counsel did not adequately pursue this logical defense at trial. He engaged in a brief and limited cross examination of Blanca that did not sufficiently pursue the reasons why Blanca disliked Hernandez-Ayala. Just as important, defense counsel did not cross-examine J.F. at all. He did not ask any questions about Blanca's relationship with Hernandez-Ayala or the questions that Blanca asked of her. Counsel's deficient performance prejudiced Hernandez-Ayala. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the conviction and sentence vacated.

GROUND FIVE

HERNANDEZ-AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO CONDUCT AN ADEQUATE INVESTIGATION.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal from the denial of his post-conviction petition (Ex. 77), and was decided upon by that court (Ex. 83).

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable: and (2) that there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984.) "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id.

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Counsel is obligated to fully investigate all aspects of a case. Reasonable performance of trial counsel includes an adequate investigation, as it is an attorney's duty to conduct a thorough investigation of all avenues of a case. This is not strategy but adequate preparation for trial and effective assistance of counsel. Counsel in this case failed to conduct an adequate investigation of crucial aspects of the case and this failure severely prejudiced Hernandez-Ayala.

On November 8, 2006, an information was filed charging Hernandez-Ayala with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.) At his arraignment, at which he was represented by Michael Sanft, he pled not guilty and invoked the 60-day rule. (Ex. 8.) Trial was set for January 7, 2007. (Id.)

On November 22, 2006, Sanft moved to withdraw as Hernandez-Ayala's attorney. (Ex. 10). He stated the following:

> During the course of representing Mr. Hernandez-Ayala, reviewing the paper discovery and a video taped confession, interviewing the detective who interrogated Mr. Hernandez-Ayala and meeting with the State on several occasions and obtaining the best resolution under the circumstances, the undersigned has had multiple conversations with Mr. Hernandez-Ayala and his family in which Mr. Hernandez-Ayala refuses to follow the undersigned's advice. The undersigned is unable to properly or adequately represent Mr. Hernandez-Ayala if he refuses to follow counsel's advice. Mr. Hernandez-Ayala is adamant in his decision and wishes to proceed to trial. However, given the circumstances it is against the undersigned's advice that he proceed to trial. Therefore, the undersigned believes he has no alternative but to withdraw from Mr. Hernandez-Ayala's case.

(Id.)

A hearing was held on the motion on December 5, 2006. (Ex. 11.) The court refused to grant the motion, stating that "it's so soon before trial." (Id. at 6.) Sanft informed the court that his main issue was that they were having a "breakdown in communication." (Id.) The court warned Hernandez-Ayala that he better start communicating with his attorney or "suffer the consequences." (Id.)

At a court date on October 16, 2007, Sanft announced that he was ready for trial, but that a plea had been negotiated and Hernandez-Ayala had accepted it. (Ex. 14 at 5.) He asked for a change of plea hearing; the court scheduled it for October 18, 2007. (Id. at 7.)

At the change of plea hearing on October 18, 2007, Sanft announced that Hernandez-Ayala would plead guilty to one count of attempted lewdness with a child under the age of fourteen "which is a probationable offense." (Ex. 15 at 6.) The court confirmed that this was what Hernandez-Ayala wanted to do and that he understood the agreement. (Id.) The court attempted to obtain a factual basis for the plea. It asked Hernandez-Ayala what he did "on or between January 14, 2006 and August 27, 2006 in Clark County, Nevada that brings you before this Court today that makes you guilty of the offense. (Id. at 11). Hernandez-Ayala answered with a question, "On the 14th of January?" (Id.)

The court then read the lewdness charge in the amended information: "[O]n or between January 14, 2006 and August 27, 2006 in Clark County, Nevada did you willfully lewdly, unlawfully and feloniously, attempt to commit a lewd or lascivious act with the body of J.F. and/or G.F., children under the age of fourteen by attempting to touch, rub or fondle the genital area and/or buttocks of the said, J.F., with your hands and/or fingers and or attempting to touch and/or rub and/or stroke the penis of G.F. with your hands and/or fingers with the intent of arousing, appealing to, or gratifying the lust, passions or your sexual desires or that of the child." (Ex. 15 at 11.) Hernandez-Ayala responded, "Your Honor, you can read that supposedly that crime occurred." (Id.) The court asked whether or not he did it. Hernandez-Ayala stated, "I'm pleading guilty." (Id.) The court told him that it understood that he was pleading guilty, but the court needed to hear what he had done to make him guilty of the crime. (Id.) The court asked him whether he attempted "to commit lewd or lascivious act with J.F. and G.F." (Id. at 11-12.) After reading the allegations again, Hernandez-Ayala stated no. (Id. at 12.)

The court refused to accept the plea. (Ex. 15 at 12.) It asked the attorneys whether they were ready to proceed to trial and defense counsel confirmed that he would be ready for trial the following Monday, October 22, only four days later (Id. at 12-13.)

Counsel was ineffective in failing to conduct an adequate investigation. The record does not show that counsel investigated whether Blanca's motive in potentially encouraging or misleading the children into making sexual abuse allegations against Hernandez-Ayala. Rather than conduct the necessary investigation, it is clear from the record that counsel focused almost exclusively on trying to negotiate Hernandez-Ayala's case, not take it trial. Indeed, counsel sought to withdraw from the case on the ground that Hernandez-Ayala refused to follow his advice to plead guilty. Once the negotiations

did not come to fruition at the October 18, 2007 change of plea hearing, counsel said that he was immediately ready for trial. It is not clear how defense counsel could have been immediately ready for trial based on a sufficient investigation where he had just been expending his energies negotiating a plea.

In fact, a further investigation would have uncovered critical information to support two potential defenses: (1) Blanca's extreme dislike for J.F. led to her encouraging or misleading the children into making sexual abuse allegations against Hernandez-Ayala; and (2) J.F. was hypersensitive to touching from others due to Betel's overvigilance leading J.F. to believe that all types of touching was inappropriate.

It was well-known among Betel's and Hernandez-Ayala's family and friends that Blanca did not like Hernandez-Ayala. Maria Hernandez ("Maria"), Hernandez-Ayala's sister and a friend of Betel, has stated that Blanca did not like Hernandez-Ayala. (Ex. 87, ¶ 4.) Hernandez-Ayala would confide in her about his concerns about Blanca and her obvious dislike of him. (Id.) Hernandez-Ayala told her on multiple occasions that J.F. would tell him, after she came home from spending time with Blanca, that "'her aunt Estella (Blanca) is going to fuck [him] over.'" (Id.; see also Ex. 88, ¶ 5.) This happened up until the day that Hernandez-Ayala was accused of touching J.F. (Ex. 87, ¶ 4.) Maria also has stated that Blanca told others about her dislike of Hernandez-Ayala as a husband for Betel. (Id., ¶ 5.) Blanca was upset about Betel and Hernandez-Ayala getting married because they did not tell anyone beforehand. (Id.) Blanca was upset and angry that Betel had offered to help Hernandez-Ayala with his "'immigration papers'" through their marriage. (Id.)

Wilber Martinez ("Wilber"), a friend of Hernandez-Ayala and Betel, stated to Michele Blackwill, an investigator with the Federal Defender's Office, that Betel, Hernandez-Ayala, J.F. and G.F. shared a house with him and his family, which included two young children, on Jimmy Street in Las Vegas. (Ex. 86, ¶ 5.) They lived together in the weeks before Hernandez-Ayala was arrested. (Id.) Wilber stated that Blanca never liked Hernandez-Ayala. (Id., ¶ 8.) She was the only member of Betel's family who had a problem with him. (Id.) Wilber stated that Betel told him Blanca "lied to the police to 'get rid of Joaquin.'" (Id.)

Betel's sister-in-law, Christina Zaragoza ("Christina"), stated that Blanca never liked Hernandez-Ayala. (Ex. 89, ¶ 6.) They didn't speak to each other. (Id.) She stated that Blanca was very angry at

Betel for leaving the kids alone with Hernandez-Ayala after just meeting him. (Id.) Christina explained that Blanca meant well but was very "over protective"; she had been that way her whole life. (Id., ¶ 7.) She would constantly ask J.F. and G.F., "How did he (Joaquin) treat you today?, Did you get fed today?, Are you ok?, Anything happen?" (Id.) Blanca had an obvious distrust of Hernandez-Ayala. (Id.)

Both Maria and Wilbur stated that Hernandez-Ayala worked many, many hours and "mostly worked, slept and worked some more." (Ex. 86, ¶ 7; Ex. 87 ¶ 6.) Hernandez-Ayala had a good relationship with J.F. and G.F. He was also good with Wilbur's children. (Id.) J.F. never appeared uncomfortable around Hernandez-Ayala. (Ex. 87, ¶ 6; Ex. 89, ¶ 4.) G.F. called him "'father.'" (Id.) After Hernandez-Ayala was arrested, Betel and the children lived with Maria for about two months. (Id., ¶ 7.) J.F. told Maria that she looked a lot like Hernandez-Ayala and would ask when Hernandez-Ayala was coming back. (Id.) G.F. would ask Maria, "'Where is my dad?'" (Id.) Maria never heard J.F. say Hernandez-Ayala touched her. (Id., ¶ 3.) Wilber was "shocked" that Hernandez-Ayala was charged with committing this crime. (Ex. 86, ¶ 9.)

An investigation also would have shown that J.F. was oversensitive to touching as a result of Betel's actions. Maria has stated that Hernandez-Ayala would leave J.F. and G.F. with her when Betel was out looking for work. (Ex. 87, ¶ 3.) She observed some problems with J.F. (Id.) She appeared "'traumatized'" or "'oversensitive'" in regards to being touched in any way. (Id.) Christina also stated that J.F. had a long history of lying and exaggerating and would "'panic' whenever someone touched her. (Ex. 89, ¶ 3.)

Both Maria and Christina related very similar stories about J.F.'s tendency to overreact to touching. According to Maria, when playing, if J.F. was accidently touched on her butt she would be very upset and emotional. Even in school, J.F. was apprehensive about being touched by anyone in anyway. (Ex. 87, ¶ 3.) Christina stated that G. F. was playing with her two daughters and he swatted one of them on their butt while playing. J.F. ran to me and dramatically expressed concern that G.F. had touched my daughter's butt. (Ex. 89, ¶ 3.) Another example that she could remember was J.F. would come out of the shower and immediately panic about being covered up by a towel, so as not to be seen by anyone. (Id.) She was always afraid and had an apprehensive look on her face. (Id.) Christina "always suspected the story because of how J.F. acted." (Id., ¶ 4.)

Maria believed that J.F. behaved the way that she did because of Betel. (Ex. 87, ¶ 3.) Betel would leave J.F. with Betel's father (J.F.'s grandfather), David Zaragoza, who had a history of sexually abusing his own daughters. (Id.) Christina knew that David had sexually abused his daughters and was known as a "pervert." (Ex. 89, ¶ 5.) She had been warned not to leave her children with David; she was aware that Betel did leave J.F. with him. (Id.) According to Maria, when Betel would pick J.F. up from visiting with her grandfather, Betel would inundate her with questions, repeatedly asking "'did grandpa touch you inappropriately?'" (Ex. 87, ¶ 3.) Maria believed that Betel's behavior made J.F. paranoid. (Id.) Hernandez-Ayala also observed Betel act like this. (Ex. 88, ¶ 4.) It was a result of her repeated questioning of J.F. that Hernandez-Ayala came to learn from Betel that David had abused his daughters. (Id.)

Counsel was ineffective for failing to investigate this information and present it at trial. It was critical to establishing the defense that Blanca was the motivating force behind the allegation and that J.F. was oversensitive about touching as a result of his mother's behavior. There was no strategic reason for failing to conduct the investigation. The failure to conduct the investigation prejudiced Hernandez-Ayala. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the murder conviction and sentence should be vacated.

GROUND SIX

HERNANDEZ-AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO INTERVENE WHEN THE COURT REFUSED TO ACCEPT THE PLEA.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal from the denial of his post-conviction petition (Ex. 77), and was decided upon by that court (Ex. 83).

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable:

and (2) that there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984.) "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id.

On November 8, 2006, an information was filed charging Hernandez-Ayala with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.) At his arraignment, at which he was represented by Michael Sanft, he pled not guilty and invoked the 60-day rule. (Ex. 8.) Trial was set for January 7, 2007. (Id.)

On November 22, 2006, Sanft moved to withdraw as Hernandez-Ayala's attorney. (Ex. 10.) He stated the following:

> During the course of representing Mr. Hernandez-Ayala, reviewing the paper discovery and a video taped confession, interviewing the detective who interrogated Mr. Hernandez-Ayala and meeting with the State on several occasions and obtaining the best resolution under the circumstances, the undersigned has had multiple conversations with Mr. Hernandez-Ayala and his family in which Mr. Hernandez-Ayala refuses to follow the undersigned's advice. The undersigned is unable to properly or adequately represent Mr. Hernandez-Ayala if he refuses to follow counsel's advice. Mr. Hernandez-Ayala is adamant in his decision and wishes to proceed to trial. However, given the circumstances it is against the undersigned's advice that he proceed to trial. Therefore, the undersigned believes he has no alternative but to withdraw from Mr. Hernandez-Ayala's case.

(Id.)

A hearing was held on the motion on December 5, 2006. (Ex. 11.) The court refused to grant the motion, stating that "it's so soon before trial." (Id. at 6.) Sanft informed the court that his main issue was that they were having a "breakdown in communication." (Id.) The court warned Hernandez-Ayala that he better start communicating with his attorney or "suffer the consequences." (Id.)

At a court date on October 16, 2007, Sanft announced that he was ready for trial, but that a plea had been negotiated and Hernandez-Ayala had accepted it. (Ex. 14 at 5.) He asked for a change of plea hearing; the court scheduled it for October 18, 2007. (Id. at 7.)

At the change of plea hearing on October 18, 2007, Sanft announced that Hernandez-Ayala would plead guilty to one count of attempted lewdness with a child under the age of fourteen "which is

a probationable offense." (Ex. 15 at 6.) The court confirmed that this was what Hernandez-Ayala wanted to do and that he understood the agreement. (Id.) The court attempted to obtain a factual basis for the plea. It asked Hernandez-Ayala what he did on or between January 14, 2006 and August 27, 2006 in Clark County, Nevada that brings you before this Court today that makes you guilty of the offense. (Id. at 11.) Hernandez-Ayala answered with a question, "On the 14th of January?" (Id.)

The court then read the lewdness charge in the amended information: "[O]n or between January 14, 2006 and August 27, 2006 in Clark County, Nevada did you willfully lewdly, unlawfully and feloniously, attempt to commit a lewd or lascivious act with the body of J.F. and/or G.F., children under the age of fourteen by attempting to touch, rub or fondle the genital area and/or buttocks of the said, J.F., with your hands and/or fingers and or attempting to touch and/or rub and/or stroke the penis of G.F. with your hands and/or fingers with the intent of arousing, appealing to, or gratifying the lust, passions or your sexual desires or that of the child." (Ex. 15 at 11.) Hernandez-Ayala responded, "Your Honor, you can read that supposedly that crime occurred." (Id.) The court asked whether or not he did it. Hernandez-Ayala stated, "I'm pleading guilty." (Id.) The court told him that it understood that he was pleading guilty, but the court needed to hear what he had done to make him guilty of the crime. (Id.) The court asked him whether he attempted "to commit lewd or lascivious act with J.F. and G.F." (Id. at 11-12 (emphasis added).) After reading the allegations again, Hernandez-Ayala stated no. (Id. at 12.) The court refused to accept the plea. (Id.) Counsel did not intervene at this point to advocate that the plea should be accepted.

Counsel was ineffective in failing to intervene and advocate that the plea should be accepted. The record shows that counsel clearly believed that his client should plead guilty. In fact, he moved to withdraw from the case on the ground that Hernandez-Ayala refused to follow his advice to plead guilty. Counsel then negotiated a plea which Hernandez-Ayala accepted. Hernandez-Ayala agreed to plead guilty to a single count of attempted lewdness. However, as alleged in his post-conviction petition, during the plea colloquy Hernandez-Ayala became confused when the court asked him to explain what he did during an eight-month period of time. (Ex. 51 at 10(b).) Further, the court asked him specifically whether he had sexually abused both children, which could have only served to further confuse Hernandez-Ayala as he had never indicated at any point that he had touched G.F. Indeed, he was later

acquitted of that count after trial. Thus, it was clear that Hernandez-Ayala was ready to plead guilty, but the court's colloquy confused him. Counsel should have intervened and attempted to salvage the plea agreement by clarifying to Hernandez-Ayala that he needed to provide the court with a factual basis for the plea. There was no strategic reason for failing to take this basic step. The failure to do this prejudiced Hernandez-Ayala. Under the guilty plea, he faced 2 to 20 years in prison and could have received probation. After trial, he was sentenced to 20 years to life. Consequently, he was deprived of his right to the effective assistance of counsel. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the murder conviction and sentence should be vacated.

GROUND SEVEN

HERNANDEZ-AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO CALL A MEDICAL EXPERT.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal from the denial of his post-conviction petition (Ex. 77), and was decided upon by that court (Ex. 83).

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable: and (2) that there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984.) "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id.

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.)

At trial, Blanca Zaragoza, who is the aunt of J.F. and G.F., testified that, on August 26, 2006, she was taking care of the kids because Betel was at work. (Ex. 17 at 120-21.) In the late afternoon,

Blanca was giving a bath to J.F. and G.F. (Id. at 116.) She was washing J.F.'s vagina with a soft cloth when J.F. said "Ouch." (Id. at 121.) Blanca asked her what was wrong. J.F. told her not to tell her mother. J.F. then said that Hernandez-Ayala had put his hands on her vagina. (Id. at 122.)

J.F. testified that Hernandez-Ayala placed his middle finger into her vagina. (Ex. 17 at 108-09.)

Dr. Michael Zbiegien, director of Pediatric Emergency Services at Sunrise Hospital, conducted an examination of J.F. in the early morning hours of August 27, 2006. (Ex. 22 at 11, 13.) J.F. did not have any injuries. (Id. at 15, 17.) Nevertheless, he testified that the exam was consistent with someone touching J.F. (Id. at 15.) On cross-examination, he acknowledged that the evidence was also consistent with someone who had not been touched; he admitted that J.F.'s symptoms were "acute," as relayed by the officer. (Id. at 17.)

The defense did not present any medical expert testimony.

Defense counsel was ineffective for failing to present any medical expert testimony. The evidence against Hernandez-Ayala was not strong. The jury was required to believe J.F. in order to convict Hernandez-Ayala of sexual abuse. However, the allegations of abuse were not supported by the medical evidence, particularly where J.F. had indicated that she felt pain earlier on the night that she was examined. It was incumbent upon defense counsel to present to the jury a neutral and disinterested expert to interpret the lack of medical findings of abuse. Questioning the State's expert was insufficient to challenge the abuse allegations. Expert testimony was necessary to convince the jury that the medical evidence actually disproved the abuse allegations. This deficient performance prejudiced Hernandez-Ayala. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the murder conviction and sentence should be vacated.

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GROUND EIGHT

APPELLATE COUNSEL WAS INEFFECTIVE IN VIOLATION OF PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BASED ON COUNSEL'S FAILURE TO ARGUE ON APPEAL THAT THERE WAS LEGALLY INSUFFICIENT EVIDENCE TO SUPPORT THE LEWDNESS CONVICTION

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court in the appeal from the denial of the post-conviction petition (Ex. 77), and was decided upon by that court (Ex. 83).

Hernandez-Ayala's conviction is invalid under the federal constitutional guarantees of due process and a fair trial because he was deprived of the effective assistance of appellate counsel based on counsel's failure to raise a legal insufficiency claim as to the lewdness conviction. The failure of Hernandez-Ayala's attorney resulted in a breach of his constitutional right to effective counsel. Counsel had no tactical or strategic justification within the range of reasonable competence for his failure to properly advise and represent Hernandez-Ayala as further alleged in his claim. The ineffectiveness of his counsel undoubtedly undermines the confidence in the validity of the direct appeal. Hernandez-Ayala was prejudiced by his lawyer's performance. A reasonable likelihood exists, that but for his lawyer's deficient performance, Hernandez-Ayala would have received a more favorable outcome on appeal.

On November 8, 2006, an information was filed charging Hernandez-Ayala with, inter alia, Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he fondled the butt of four-year-old J.F. (Ex. 9.)

At trial, J.F. testified that, on one occasion, Hernandez-Ayala touched the inside of her vagina with his finger. (Ex. 17 at 108-09.) She specifically denied that Hernandez-Ayala ever touched her butt. (Id. at 112.) She denied remembering that she spoke to a detective at the hospital about the incident. (Id. at 110.) She denied remembering Detective Shannon Tooley and denied remembering talking to a lady who worked for the police. (Id.) Defense counsel did not cross-examine J.F. (Id. at 113.)

The State sought to have Detective Tooley testify about J.F.'s prior statement. (Ex. 22 at 59.) Defense counsel objected, arguing that it was hearsay. (Id.) While noting that there really was not an opportunity to confront J.F. on her prior statement due to her inability to read and her testimony that she

did not recall speaking to an officer, the court allowed the statement in as a prior inconsistent statement. (Id. at 60-62.)

Detective Tooley testified that she spoke with J.F. at the hospital on August 27, 2006, and J.F. stated to her that Hernandez-Ayala had touched her "[o]n her buttocks." (Ex. 22 at 56, 63.)

Appellate counsel was ineffective for failing to argue that the evidence was legally insufficient to support the lewdness conviction. J.F. specifically denied that Hernandez-Ayala had touched her on her buttocks. The only evidence at trial in support of the lewdness count was J.F.'s prior out-of-court statement to Detective Tooley. However, that evidence was fundamentally unreliable. In the first instance, it was hearsay. Moreover, the defense had no opportunity to confront J.F. on this statement. As even the trial court indicated, J.F. did not remember even speaking to the detective who testified about the statement and J.F. was not even old enough to read, making confrontation impossible. Just as important, the single statement that he touched her buttocks was not sufficient to establish lewdness. The out-of-court statement provided no details about how or when it occurred. He could have touched her buttocks in any number of innocent ways, such as in the process of picking her up. There simply was no evidence to establish, as required under the lewdness statute, that, when he allegedly touched her buttocks, it was done with the intent to arouse, appeal to, or gratify the lust, passions or sexual desires of either person. It is impossible to convict him of this crime without knowing more than the simple fact that he touched her buttocks at some point in time. As such, the evidence was insufficient to support the lewdness conviction. Appellate counsel was ineffective for failing to raise it and this error prejudiced Hernandez-Ayala. Any contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the murder conviction and sentence should be vacated.

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GROUND NINE

HERNANDEZ-AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO CHALLENGE THE VICTIM'S COMPETENCE TO TESTIFY.

Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show: (1) that the counsel's performance was professionally unreasonable: and (2) that there "is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984.) "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id.

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F. (Ex. 9.)

A hearing was held prior to trial to determine the competency of G.F. to testify. After questioning G.F., the court concluded that he was not competent to testify. (Ex. 17 at 43-47.) No competency hearing was held for J.F.

J.F. testified at trial. Defense counsel did not raise a challenge to her competency, even though she was only six years old, she could not name some of her body parts, could not say what her birthday was, could not give the name of her school teacher, gave testimony that was significantly different from her prior statements, provided no details about when or where the touching occurred, gave testimony that was inconsistent with other witnesses, and could not even remember speaking to a detective. (Ex. 17 at 99-10, 112; Ex. 18.) The defense did not cross-examine J.F. (Ex. 17 at 113.)

The jury convicted Hernandez-Ayala on two counts related to J.F. It acquitted Hernandez-Ayala on the count related to G.F. (Ex. 25.)

Counsel was ineffective for failing to challenge J.F.'s competency to testify. J.F. was a child witness who did not meet the basic level of competency to testify. Defense counsel was ineffective for failing to raise a competency challenge. This deficient performance prejudiced Hernandez-Ayala. Any

contrary decision by a state court would be contrary to, or an unreasonable application of, clearly established federal law, and/or would involve an unreasonable determination of the facts. See 28 U.S.C. 2254(d)(1) and (2). The writ should be granted and the conviction and sentence vacated.

V.

PRAYER FOR RELIEF

1. Issue a writ of habeas corpus to have Petitioner brought before the Court so that he may be discharged from his unconstitutional confinement; and

2. Conduct a hearing at which proof may be offered concerning the allegations in this Petition and any affirmative defenses raised by Respondents; and

3. Grant leave to perform additional necessary and reasonable discovery to substantiate the claims for relief addressed in this petition; and

4. Grant any other relief that may be appropriate in the interests of justice.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 9, 2013, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Jared M. Frost
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

/s/ Susan Kline
Susan Kline, An Employee of the
Federal Public Defender's Office

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An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAQUIN ERNESTO HERNANDEZ-AYALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59657

FILED
FEB 13 2013
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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; Michelle Leavitt, Judge.

On appeal from the denial of his April 6, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial 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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

13-04650

First, appellant argues that his trial counsel was ineffective for failing to cross-examine the victim to question whether the victim's aunt encouraged her to fabricate the allegations. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel stated on the record that he did not cross-examine the six-year-old victim because she discussed everything during direct examination that he would have questioned her about. 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. Further, counsel questioned the victim's aunt regarding her dislike of appellant and argued that the aunt's dislike of appellant led the aunt to coerce the victim into fabricating her testimony. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel cross-examined the victim as appellant confessed to committing the sexual assault. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his trial counsel was ineffective for failing to investigate evidence to establish that the victim fabricated the allegations. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. At trial, counsel questioned multiple witnesses regarding the aunt's motives for encouraging the victim and the victim's brother to fabricate allegations that appellant sexually abused them. The aunt admitted that she did not like appellant, but testified that she would not have coached the victim or her brother to falsely accuse appellant of a crime. Appellant fails to demonstrate what evidence further investigation would have revealed or how any possible evidence would have demonstrated that the aunt coached the victim. Therefore, appellant fails to demonstrate a reasonable probability of a

different outcome had counsel performed additional investigation into possible evidence that the victim fabricated the allegations. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that his trial counsel's performance violated appellant's equal protection rights for failing to make reasonable efforts to defend him. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant fails to demonstrate that trial counsel did not make reasonable efforts to defend appellant and appellant fails to identify any additional efforts that reasonable counsel would have performed. Given his confession, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel undertaken additional efforts to defend appellant against the charges. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

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 argue there was insufficient evidence for the lewdness conviction as the victim testified that appellant did not touch her buttocks. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Following the six-year-old victim's testimony that appellant did not touch her buttocks and that she did not remember telling the police that he had touched her buttocks, the district court admitted her statement to police that appellant had touched her buttocks as a prior inconsistent statement. See NRS 51.035(2). As the statement was properly admitted as a prior inconsistent statement, it was properly considered as substantive evidence that appellant improperly touched the victim's buttocks. See Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). Accordingly, there was sufficient evidence presented to support the lewdness conviction. Appellant fails to demonstrate a reasonable likelihood of success on appeal had appellate counsel argued that there was insufficient evidence of the lewdness conviction. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his appellate counsel's performance violated appellant's equal protection rights for failing to make reasonable efforts to defend him. Appellant fails to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. Appellant fails to demonstrate that appellate counsel did not make reasonable efforts on appellant's behalf on direct appeal and appellant fails to identify any additional efforts that reasonable counsel would have performed. Appellant fails to demonstrate a reasonable likelihood of a different outcome had counsel made an additional effort on direct appeal. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant argues that the district court erred in denying appellant's claims from his proper person petition without conducting an evidentiary hearing. Appellant lists the claims raised in the proper person petition, but fails to provide any cogent argument as to how or why the district court erred in denying these claims without conducting an evidentiary hearing. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Thus, we need not address these claims. Therefore, appellant fails to demonstrate that the district court erred in denying the claims raised in appellant's proper person petition without conducting an evidentiary hearing.

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

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Michelle Leavitt, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAQUIN ERNESTO HERNANDEZ-AYALA A/K/A JOAQUIN ERNES HERNANDEZ-AYALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50720

FILED

AUG 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault of a minor under fourteen years of age and one count of lewdness with a minor under fourteen years of age. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Joaquin Ernesto Hernandez-Ayala to a prison term of twenty years to life for sexual assault and a concurrent term of ten years to life for lewdness.

On appeal, Hernandez-Ayala contends that (1) the district court erred in admitting his statement to the police because it was coerced; (2) the district court abused its discretion in allowing multiple witnesses to testify to hearsay statements made by the child victim in violation of the Confrontation Clause, which effectively bolstered the testimony of the child victim; and (3) the district court abused its discretion by allowing testimony regarding statements made by the victim to another non-testifying witness.

Voluntariness of appellant's statement

First, Hernandez-Ayala contends that the district court erred in admitting his statement to the police because his statement was coerced.

Due process requires that any confession admitted at trial be voluntary. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). That is, a confession cannot be admitted into evidence unless "it is made freely and voluntarily, without compulsion or inducement." Id. A voluntary confession is the "product of a 'rational intellect and a free will.'" Id. at 213-14, 735 P.2d at 322-23. (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)). A confession is involuntary if "coerced by physical intimidation or psychological pressure." Id. (citing Townsend v. Sain, 372 U.S. 293, 307 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992)). A district court's decision regarding the voluntariness of a defendant's confession "will not be disturbed on appeal if it is supported by substantial evidence." Allan v. State, 118 Nev. 19, 23-24, 38 P.3d 175, 178 (2002), overruled on other grounds by Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). "Substantial evidence is that which a reasonable mind might consider adequate to support a conclusion." Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

Hernandez-Ayala contends that the district court erred in admitting his statements because he made allegations below that police officers put a gun to his head and beat him prior to his statement. The district court found that his statement was not coerced because the videotape of Hernandez-Ayala's statement showed that he was relaxed, he never complained of mistreatment, officers brought him hot tea because he

said that he was cold, and the video and his booking photo showed no evidence of a beating.

We conclude that the district court did not err in admitting the statement because there was no evidence presented demonstrating that the statement was coerced. Hernandez-Ayala directs us to no evidence demonstrating coercion and appears to argue that the district court should not have admitted the statement purely on the basis that he made an allegation of coercion. Rather, the district court's finding is supported by substantial evidence.

The child victim's hearsay statements

Hernandez-Ayala contends that the district court erred in admitting hearsay statements that the victim made to her mother, her aunt, and a detective, for two reasons: (1) these statements violated the Confrontation Clause and (2) the statements effectively bolstered the victim's testimony.

Generally, "[a] trial court's evaluation of admissibility of evidence will not be reversed on appeal unless it is manifestly erroneous." Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). Under Crawford v. Washington, 541 U.S. 36 (2004), "when the declarant is unavailable, reliability assessments of testimonial hearsay cannot survive scrutiny under the Confrontation Clause without actual confrontation." Pantano v. State, 122 Nev. 782, 789, 138 P.3d 477, 481 (2006).

We conclude that because the victim testified and Hernandez-Ayala was offered the opportunity to cross-examine her, there is no

Confrontation Clause violation.[1] Pantano, 122 Nev. at 790, 138 P.3d at 482. We further conclude that, as discussed below, the hearsay statements were properly admitted and, particularly given the young age of the child,[2] were not so cumulative as to amount to vouching for the victim's testimony or unduly prejudicing the case. See Felix v. State 109 Nev. 151, 200, 849 P.2d 220, 253 (1993). The evidence strongly supported the verdict—particularly, Hernandez-Ayala's inculpatory statement to the police, which was consistent with the victim's statement.

Statements to family members

Child victim hearsay statements are admissible if the statements meet the requirements of NRS 51.385 and the United States Constitution. Felix, 109 Nev. at 200, 849 P.2d at 253. NRS 51.385(1) allows the admission of the child's hearsay statement regarding sexual conduct if the child is under the age of ten and: "(a) [t]he court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and (b) [t]he child testifies at the proceeding or is unavailable or unable to testify."

In this case, the district court held a hearing regarding the testimony of the mother and aunt, found that the statements made by the child victim were spontaneous, and that any questioning conducted by the mother and aunt of the child was limited and within the scope of proper parental or familial concern. NRS 51.385(2). Thus, the district court

---

[1]Hernandez-Ayala chose not to cross-examine the victim at trial.

[2]The victim was six years old and starting kindergarten.

correctly applied NRS 51.385 in determining the reliability of the child victim's statements.

Statement to police officers

Hearsay is a statement offered to prove the truth of the matter asserted unless the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (a) [i]nconsistent with [her] testimony." NRS 51.035(2).

In the present case, (1) the victim testified to one act of sexual assault and testified that she did not remember talking to a police officer; (2) Detective Shannon Tooley testified that the victim had made a statement to her during investigation that Hernandez-Ayala had touched her on her "private areas a lot," including her buttocks, demonstrating that the statement was inconsistent with the victim's testimony; and (3) the victim was subject to cross-examination, although defense counsel chose not to exercise that right. Thus, the statement was properly admitted as an inconsistent statement of the child declarant.

Hearsay statement of non-testifying witness

Hernandez-Ayala contends that the district court erred in allowing a witness to testify regarding statements the victim made to a non-testifying adult.

We note that Hernandez-Ayala did not object to the testimony during trial, thus we review for plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602.

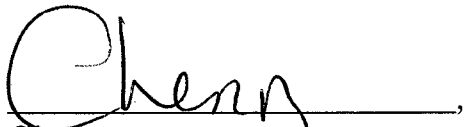
During trial, the victim's aunt, Blanca Saragoza, testified that she was giving the victim and her brother a bath, and when she began washing the victim's private area, she said it hurt. When Saragoza inquired why, the victim told her that Hernandez-Ayala had digitally

penetrated her. Sarazoga exited the bathroom and told some family members what the victim had said. Sarazoga's older sister, Anna Blacencia, went into the bathroom and the victim repeated what she had told Sarazoga. Blacencia did not testify at trial.

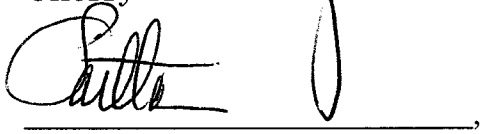
It is not apparent from the record that the statement was sought to prove the matter asserted—that Hernandez-Ayala sexually assaulted the victim—but rather to show how the statement affected Sarazoga and the actions she took thereafter. However, even if the testimony was inadmissible hearsay, Hernandez-Ayala did not demonstrate plain error. The testimony was nonspecific and evidence of Hernandez-Ayala's guilt was substantial in that the victim testified that Hernandez-Ayala had digitally penetrated her and Hernandez-Ayala admitted to the conduct in his statement to the police.

Accordingly, having considered Hernandez-Ayala's contentions and determined they are without merit, we

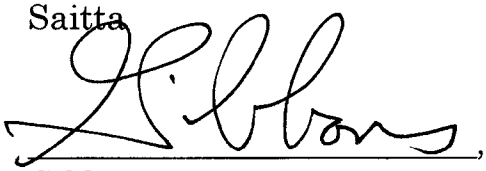
ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

INDEX TO APPENDIX

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CLERK OF THE COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOAQUIN ERNESTO HERNANDEZ-AYALA
aka Joaquin Ernes Hernandezayala
#2588285

Defendant.

CASE NO. C227313

DEPT. NO. XII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony), in violation of NRS 200.364, 200.366, COUNT 2 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony), in violation of NRS 201.230, COUNT 3 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony), in violation of NRS 201.230, COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony), in violation of NRS 201.230;and the matter having been tried before a jury and the Defendant having been found guilty

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of the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony), in violation of NRS 200.364, 200.366, COUNT 3 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony), in violation of NRS 201.230; thereafter, on the 6th day of December, 2007, the Defendant was present in court for sentencing with his counsel, MICHAEL SANFT, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO LIFE with a MINIMUM parole eligibility of TWENTY (20) YEARS and $1,587.20 Restitution; AS TO COUNT 3 - TO LIFE with a MINIMUM parole eligibility of TEN (10) YEARS, COUNT 3 to run CONCURRENT with COUNT 1, with FOUR HUNDRED SIXTY-SIX (466) DAYS credit for time served. COUNTS 2 and 4 - DISMISSED.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole.

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after any release from custody.

DATED this 13 day of December, 2007

MICHELLE LEAVITT
DISTRICT JUDGE