INDEX TO APPENDIX

Page No.

EXHIBIT A

EXHIBIT A

FILED

MAR 26 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOE ORTEGA PEREZ, Petitioner-Appellant, v. BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 20-16944 D.C. No. 3:17-cv-00538-HDM-CLB District of Nevada, Reno ORDER

Before: CHRISTEN and WATFORD, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

EXHIBIT B

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FILED

FEB 10 2021

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FOR THE NINTH CIRCUIT

NOE ORTEGA PEREZ, Petitioner-Appellant, v. BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 20-16944 D.C. No. 3:17-cv-00538-HDM-CLB District of Nevada, Reno ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

EXHIBIT C

EXHIBIT C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NOE ORTEGA PEREZ, Petitioner, v. BAKER, WARDEN, et al., Respondents.	Case No. 3:17-cv-00538-HDM-CLB ORDER

This is a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by a Nevada state prisoner. The petitioner, Noe Ortega Perez, challenges his 2010 state court conviction, following a jury trial, of six counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under 14 years of age. (Pet. Ex. 33).[1] The first amended petition comes before the court for consideration of the merits. (ECF No. 17). Respondents have answered (ECF No. 28), and the petitioner has filed a reply (ECF No. 37).

I. Factual and Procedural Background

On April 17, 2009, the petitioner was charged by way of indictment with eight counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under 14

[1] The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 18-21, 23 and 29-30. The petitioner's exhibits, located at ECF Nos. 18-21 and 23, are cited as Pet. Exs. The respondents' exhibits, located at ECF Nos. 29-30, are cited as Resp. Exs.

years of age, for acts that he engaged in with his 13-year-old niece-by-marriage, R.B., on September 13, 2008. (Pet. Exs. 3-10).[2]

On September 2, 2009, the State noticed the expert testimony of Dr. John Paglini. (Resp. Ex. 11). The notice stated that Dr. Paglini would "testify as to grooming techniques used upon children." (*Id.*) Attached to the notice was Dr. Paglini's curriculum vitae. (*Id.*) On October 12, 2009, defense counsel moved to exclude Dr. Paglini's testimony on the grounds that the notice was insufficient. (Pet. Ex. 15). The court denied the motion. (Pet. Ex. 14 (Tr. 23)).

At the trial, which commenced on October 15, 2009, the following relevant evidence was presented.

On September 12, 2008, the petitioner, his wife, Maria Perez, and their 13-year-old niece R.B., traveled by car to Las Vegas. (Pet. Ex. 19 (Tr. 66)). A week prior, the petitioner told Maria Perez that he had purchased three tickets for a concert in the city and that they should bring R.B. along. (Pet. Ex. 20 (Tr. 133)).

On the way to Las Vegas, the petitioner, Maria Perez, and R.B. stopped at a restaurant, where the petitioner played footsie with R.B. under the table. (Pet. Ex. 19 (Tr. 67)). After checking into the hotel room, they walked down Las Vegas Boulevard. As Maria Perez walked in the front, the petitioner and R.B. held hands. (*Id.* at 68-69). Maria Perez noticed during the walk that the petitioner was grabbing R.B.'s shoulder. (Pet. Ex. 20 (Tr. 131-32)). To R.B., Maria Perez appeared upset when she saw this. (Pet. Ex. 19 (Tr. 70)).

[2] One of the lewdness counts was later dropped. (Pet. Exs. 13, 16).

Later that night, back in the hotel room, the petitioner kissed R.B. while Maria Perez was in the bathroom. (*Id.* at 71-77).

The next day while swimming at the hotel pool, the petitioner flirtatiously touched R.B. under the water. (*Id.* at 78)). R.B. told the petitioner that she was enjoying the trip and that she wished she could be there alone with him. (*Id.* at 79). Around 2 or 3 p.m., they returned to the hotel room, where first R.B. and then Maria Perez took a shower. (*Id.* at 80-81). While Maria Perez was in the bathroom, the door slightly ajar, the petitioner began to kiss R.B. (*Id.* 83-84). The petitioner paused to go into the bathroom and check in on Maria Perez, and he closed the bathroom door upon his return. (*Id.* at 84-85). The petitioner then knelt in front of R.B., who was by then sitting on the corner of one of the beds. (*Id.* at 85-86). They kissed again, then lay on the bed, where the petitioner pulled down R.B.'s pants and panties. (*Id.* at 86-87). The petitioner then touched and penetrated R.B.'s vagina with his fingers and tongue and kissed her breasts. (*Id.* at 88-89).

R.B. testified that she did not want to kiss the petitioner but did not tell him no and in fact kissed him back because she had feelings for him and she wanted him to know that. (*Id.* at 134-36). She testified that she told the petitioner she wanted to be alone with him because of those feelings, but that she did not expect him to do all the things he did. (*Id.* at 98-99, 137, 139). She was surprised when he pulled her pants down, and she did not want him to pull her pants down, but she did not scream because she was afraid Maria Perez would be mad and did not stop the petitioner because she was afraid of losing his trust. (*Id.* at 152, 166).

Maria Perez came out of the bathroom to retrieve a sponge, saw R.B. and the petitioner together on the edge of the bed, and began to yell. (*Id.* at 89; Pet. Ex. 20 (Tr. 141-43)). Hitting the petitioner, Maria Perez asked what was going on. (Pet. Ex. 20 (Tr. 144-45)). Neither the petitioner nor R.B. responded. (*Id.* at 145). R.B. quickly pulled up her pants and the petitioner stepped back. (Pet. Ex. 19 (Tr. 92); Pet. Ex. 20 (Tr. 142-43)). Maria Perez grabbed and opened her cell phone, and the petitioner knocked it out of her hands. (Pet. Ex. 19 (Tr. 93)). Yelling, screaming, and crying, Maria Perez asked R.B. what happened. When R.B. did not answer, Maria Perez began to slap her. (*Id.* at 93-94)). As the petitioner pulled Maria Perez off R.B., hotel security knocked at the door. (*Id.* at 94-95).

The two hotel security officers who responded to the room heard arguing and things being thrown around as they approached. (Pet. Ex. 22 (Tr. 31-33)). After they knocked, the petitioner opened the door and said, "I didn't do anything." (*Id.* at 33). The petitioner then went down the hallway with one officer while R.B. and Maria Perez went with the other officer. (*Id.* at 34). Maria Perez, who was crying, shaking and very upset, told the officer that when she had opened the door she saw R.B.'s pants and panties down to her upper thigh, which she indicated by pointing to her upper thigh. (*Id.* at 35-36). Maria Perez said she wanted to press charges, so the officer took her to another location to fill out voluntary statements. (*Id.* at 36-37). The officer wrote down what Maria Perez said verbatim and read it back to her before Maria Perez signed it. (*Id.* at 38-39).

When the police arrived, Maria Perez reported that she saw the petitioner grabbing R.B.'s chest and kissing R.B. and that R.B.'s pants were down around her ankles. (Pet. Ex. 22 (Tr. 65)). She also stated that she had tried to call the police but the petitioner had snatched her cell phone out of her hands. (*Id.* at 110-11). Maria Perez stated that she had become suspicious of the petitioner's relationship with R.B. earlier in the day. (Pet. Ex. 20 (Tr. 163-64)).

At trial, however, Maria Perez denied both that R.B.'s pants were down and that she told hotel security or the police as much. (Pet. Ex. 20 (Tr. 144, 151, 160); Pet. Ex. 22 (Tr. 17-20)). She testified that R.B. and the petitioner were not lying down, that the petitioner was not on top of R.B., and that they were not kissing; she testified she saw no part of the petitioner in or near R.B.'s vagina. (Pet. Ex. 22 (Tr. 17-20)). She also denied that the petitioner had prevented her from calling the police. (Pet. Ex. 20 (Tr. 148)). Maria Perez testified that R.B. claimed the petitioner forced her only after she threatened to tell R.B.'s mother what had happened. (Pet. Ex. 22 (Tr. 28)).

The petitioner told police that he kissed R.B. on the neck, that he had romantic feelings toward her, and that R.B. was a woman. (Pet. Ex. 22 (Tr. 126-27)). He admitted to telling her he was falling in love with her before their trip. (*Id.* at 130-31). He denied having sex with R.B. (*Id.* at 131).

R.B. told security that the petitioner had pinned her down on the bed and touched her and that she tried to push him off. (Pet. Ex. 19 (Tr. 97-98, 141-42)). She told police that she could feel the petitioner's erect penis and that she had been wearing a robe.

(*Id.* at 90-91, 173-75). At trial, she testified that none of this was true. (*Id.* at 90-91, 97-98, 143, 173-75). R.B. testified that she lied because she was afraid that if she told the truth, Maria Perez would leave her alone in Vegas. (*Id.* at 97-98, 151). For the same reason, she did not tell police that the petitioner put his finger and tongue in her vagina. (*Id.* at 148-49). When asked if she remembered this first report and whether all of it was true, R.B. said, "Most of it was true and most of it was a lie." (*Id.* at 150).

A week after the Las Vegas incident, R.B. decided to tell her family the truth. (Pet. Ex. 19 (Tr. 144)). She explained to them that she and the petitioner had been kissing and were together. (*Id.* at 100-01).

R.B. testified that she had known the petitioner her entire life. (Pet. Ex. 19 (Tr. 49)). The summer before the incident, their relationship began to change and the petitioner started calling and texting her and acting romantically toward her. (*Id.* at 50-54, 128-31). In June 2008, the petitioner winked at R.B. during a family gathering. (*Id.* at 122-23). At another gathering, he grabbed and rubbed R.B.'s feet. (*Id.* at 124, 127). The petitioner told R.B. that he had feelings for her, and that he was uncomfortable when she was around other boys; he also described to her dreams of a sexual nature he had about her. (*Id.* at 54, 64-66). One day, when R.B. and the petitioner were alone in a car, he touched her thigh and hand and then they began kissing. (*Id.* at 63-64).

During trial, Dr. Paglini was called and asked whether, in the situation of "a 13-year-old niece who had known her 33-year-old uncle for her whole life and seen him on a regular basis," the

following hypotheticals occurring "over about a three or four month period," constituted grooming, (Pet. Ex. 20 (Tr. 54-62)): the perpetrator (1) "touching the nieces [sic] foot under the table at family parties, maybe winking at the niece", (*id.* at 54); (2) making "phone calls . . . to the individual who is being groomed" telling her how pretty she was, (*id.* at 57-58); (3) making "comments … that … the … alleged perpetrator thought that this child was someone he could trust," (*id.* at 58); (4) spending more time with the niece over the three-month period, with touching and winking, (*id.* at 59); (5) trying to get the 13-year-old alone with him, (*id.* at 59); (6) while alone, holding his niece's hand, touching her thigh, and French kissing her, (*id.* at 59); (7) making statements to his niece that he was concerned about her spending time with other boys, (*id.* at 60); (8) telling the niece about a dream he had about taking her clothes off, (*id.* at 60); (9) sitting at a table with his wife and touching the niece's foot under the table, (*id.* at 61); (10) while out walking with his wife and niece, with his wife in front, grabbing his niece and putting his arm around her, (*id.* at 61-62); (11) touching the niece under water while swimming, (*id.* at 62); and (12) inviting the niece on an out-of-town trip to attend a concert, (*id.* at 62). Dr. Paglini responded that all of it was potential grooming. (*Id.* at 58-60, 62).

Additionally, the State introduced a phone call between the petitioner and his wife that was recorded while the petitioner was incarcerated. (Pet. Ex. 21). As defense counsel refused to stipulate to foundation, the State first called a witness from the prison to authenticate the phone call.

Ultimately, the jury found the petitioner guilty on all but one count. (Pet. Ex. 25). The petitioner was then sentenced to several concurrent terms of imprisonment, including two terms of life with the possibility of parole after thirty-five years. (Pet. Ex. 33).

The petitioner pursued a direct appeal and a state postconviction petition and appeal. Failing to obtain relief in state court, the petitioner filed the instant federal habeas petition.

II. Standard

28 U.S.C. § 2254(d) provides the legal standards for this Court's consideration of the merits of the petition in this case:

> 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.

AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with

[Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted.)

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Andrade*, 538 U.S. 63 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

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." *Andrade*, 538 U.S. at 74 (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).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id.* The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." *Id.* at 973. Rather, AEDPA requires substantially more deference:

> .... [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181. The state courts' decisions on the merits are entitled to deference under AEDPA and may not be disturbed unless they were ones "with which no fairminded jurist could agree." *Davis v. Ayala*, - U.S. -, 135 S. Ct. 2187, 2208 (2015).

The petitioner claims in this action each assert ineffective assistance of counsel. Such claims are governed by *Strickland v.*

Washington, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain habeas relief—deficient performance by counsel and prejudice. 466 U.S. at 687. With respect to the performance prong, a petitioner must carry the burden of demonstrating that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In assessing prejudice, the court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent [counsel's] errors." *Strickland*, 466 U.S. at 696.

III. Analysis

A. Ground One

In his first ground for relief, the petitioner asserts that counsel on direct appeal was ineffective for failing to adequately brief, and omitting meritorious arguments in support of, his claim that his right to a fair trial was violated by Dr. Paglini's inappropriate and unnoticed expert testimony. (ECF No. 17 at 8).

On direct appeal, counsel raised a single issue: that Dr. Paglini's testimony was erroneously admitted. (Pet. Ex. 37). In the brief, counsel argued that the notice was insufficient and Dr. Paglini was not qualified to testify on grooming. (*Id.*)

The Nevada Supreme Court affirmed. In a 4-3 decision, the Supreme Court rejected the petitioner's argument that the notice was insufficient, explaining that it was filed more than a month

before trial, identified that Dr. Paglini would testify as to grooming, and included Dr. Paglini's curriculum vitae demonstrating experience relevant to his expertise. (Ex. 43 at 17-18).[3] The court continued:

> Perez's brief argument does not allege that the State acted in bad faith or that his substantial rights were prejudiced because the notice did not include a report or more detail about the substance of Dr. Paglini's testimony. . . . Under the circumstances, we discern no abuse of discretion in allowing Dr. Paglini to testify.

(*Id.* at 18). The court also concluded that (1) Dr. Paglini was qualified to testify, (2) the testimony was relevant and, with one exception, limited to Dr. Paglini's area of expertise, and (3) Dr. Paglini did not improperly vouch for the victim. (Pet. Ex. 43 at 6-17). In part of its analysis, the court explained:

> As to unfair prejudice, Dr. Paglini's testimony did not stray beyond the bounds set by this court and other jurisdictions for expert testimony. Dr. Paglini generally addressed how grooming occurs and its purpose. He then offered insight in the form of hypotheticals that were based on Perez's conduct and indicated that such conduct was probably grooming behavior. *See Shannon v. State*, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989) (providing that experts can testify to hypotheticals about victims of sexual abuse and individuals with pedophilic disorder). He did not offer an opinion as to the victim's credibility or express a belief that she had been abused. *See Townsend*, 103 Nev. at 118-19, 734 P.2d at 708-09. Dr. Paglini's testimony therefore meets the first component of the "assistance" requirement.

(*Id.* at 13).

In state postconviction proceedings, the petitioner argued that appellate counsel was ineffective for failing to argue that the State's insufficient notice was in bad faith, that Dr. Paglini's testimony failed to help the jury understand the evidence

[3] Citation is to ECF page number at the top of the page.

or determine an issue, and that the testimony caused him prejudice. (Pet. Ex. 54 at 41-42, 49-50).[4] The Nevada Supreme Court held:

> [A]ppellant contends that his appellate counsel was ineffective by failing to argue on direct appeal that an expert's testimony failed to assist the jury in understanding the evidence or determining an issue and that appellant was prejudiced by the testimony. Because this court nonetheless addressed these subjective issues and specifically concluded that the expert's testimony assisted the jury and did not prejudice appellant, . . . there was no reasonable probability of a different outcome on appeal had counsel made these arguments. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."). The district court therefore properly rejected this claim. . . .
>
> Lastly, appellant argues that his appellate counsel should have asserted that the State acted in bad faith in providing an inadequate notice of the expert's testimony. Appellant has not demonstrated prejudice, however, because this court concluded in *Perez*, 129 Nev., at 862-63, 313 P.3d at 870, that the expert witness notice was sufficient, and thus, any argument concerning the State's bad faith in providing an insufficient notice would not have altered the outcome. Further, appellate counsel challenged the adequacy of the expert witness notice and appellant has not pointed to anything that demonstrates the State's bad faith or that he was prejudiced by the expert notice. [n.3: The dissent concludes that appellate counsel's failure to allege that the State acted in bad faith in providing its expert witness notice warranted an evidentiary hearing because appellant was surprised by the expert's testimony and did not know that the expert would be presented with hypotheticals involving facts similar to the underlying facts here. During a pretrial hearing, however, the State specifically informed appellant that the expert would testify regarding grooming techniques and then be asked to apply his knowledge of those techniques to the facts of this case.] Thus, the district court did not err in rejecting appellant's claim of ineffective assistance of appellate counsel.

(Pet. Ex. 57 at 2-4).

The petitioner asserts that Dr. Paglini's testimony was highly prejudicial because it employed hypotheticals directly

[4] Citation is to original page of document.

mirroring the facts of the case, which suggested that the petitioner had groomed R.B. and was akin to profile evidence, which is generally inadmissible. In addition, he argues, the testimony had the effect of rationalizing R.B.'s inconsistent testimony.[5] He argues that the case against him was weak, as evidenced by R.B. and Maria Perez's inconsistent and conflicting statements. The petitioner argues that given the highly prejudicial nature of Dr. Paglini's testimony and the weak evidence supporting his guilt, it is reasonably likely that at least one justice on direct appeal would have voted to reverse his conviction if counsel had appropriately briefed the appeal.

The state courts were not objectively unreasonable in concluding that the petitioner had not shown a reasonable likelihood of a different result if his counsel had made these arguments. The majority justices concluded on postconviction review that they would not have decided the appeal any differently even if counsel had briefed the appeal as the petitioner asserts he should have – either because they actually decided the issues or because the petitioner's claims were unsupported. This was a reasonable conclusion. Many of the arguments the petitioner asserts should have been raised were in fact raised in the amicus brief and/or addressed directly by the court in its majority opinion. While bad faith was not argued or decided by the court on direct appeal, the postconviction court held that there was no evidence of bad faith and that the petitioner was not surprised by

[5] The petitioner additionally makes several arguments for the first time in his reply. The court will not consider contentions raised for the first time in the reply. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).

Dr. Paglini's testimony. These conclusions were not objectively unreasonable. Thus whatever the deficiencies of counsel's briefing, it is not reasonably likely that a better brief would have changed the result.

In sum, the state courts' conclusion that the petitioner suffered no prejudice from the alleged deficient performance of counsel is not contrary to, or an unreasonable application of, clearly established federal law, nor is it an unreasonable determination of the facts. Accordingly, the petitioner is not entitled to relief on Ground One.

B. Ground Two

In his second ground for relief, the petitioner asserts that trial counsel was ineffective for (1) "irrationally failing to stipulate to the foundation of" a jail call made by the petitioner; and (2) allowing an attorney to participate in the trial despite having his license suspended for mental health reasons. (ECF No. 17 at 17).

i. Jail Call

Before trial began, the State advised the court that it would be introducing the transcript of a phone call between the petitioner and his wife, recorded while the petitioner was incarcerated, and that it would need to call a witness from the jail to authenticate the call because the defense was refusing to stipulate to foundation. Defense counsel responded to this by stating he was "not stipulating to anything." (*See* Ex. 17 (Tr. 17-18)). Defense counsel explained that he had several objections to the phone call coming in but that he would continue to refuse to

stipulate even if the court otherwise deemed the call admissible. (*Id.* at 18-22).

Later, defense counsel stated that he was not stipulating to foundation because he was certain the jury would know or at least suspect the calls were recorded while the defendant was in jail. (See Ex. 19 (Tr. 181-83)). The court told counsel that the recording was probably going to come in and to focus on whether he wanted any prejudicial statements redacted therefrom. (*Id.* at 183-86).

The next day, the court ruled that the call was coming in and told defense counsel to decide whether to stipulate to foundation. (Ex. 20 (Tr. 10)). Defense counsel replied, "I can't help them with their case, Judge." (*Id.*) The court responded, "Actually, I think it's helping your client." (*Id.* at 10-11). The court then asked the petitioner whether he was "on board with that decision." (*Id.* at 11). After counsel and the petitioner spoke, the petitioner invoked the Fifth Amendment. (*Id.*) The court advised that its question did not implicate the Fifth Amendment and that she just wanted to make sure the petitioner was on board because she believed that counsel's refusal to stipulate would be prejudicial to the defense. (*Id.* at 11-12). Then, for the next forty-five minutes, the court went back and forth with the petitioner and counsel about whether the petitioner could refuse to answer the question. (*Id.* at 12-39). At some point, defense counsel stated that he did not think the State could get the call in without causing reversible error. (*Id.* at 29). Eventually the court ceased the discussion, concluding that she would assume that the petitioner agreed with his counsel's strategy. (*Id.* at 39).

During the testimony of the jail witness that followed, defense counsel immediately moved for a mistrial on the grounds that the jury now knew his client was incarcerated. (Ex. 20 (Tr. 90-92)).

In his state postconviction petition, the petitioner argued that trial counsel was ineffective for failing to stipulate to the foundation for the call, thus assuring that the jury would hear from a State witness that the petitioner was incarcerated. The Nevada Supreme Court addressed the petitioner's claim as follows:

> [C]ounsel's decision not to stipulate to the foundation for a jail phone call did not establish deficient representation as the decision was merely a trial strategy and appellant was given the opportunity to contest that trial strategy, but chose not to do so. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (providing that a strategy decision "is a tactical decision that is virtually unchallengeable absent extraordinary circumstances" (internal quotations omitted)). [Thus], … appellant failed to establish a deficiency in his trial counsel's representation. . . ."

(Pet. Ex. 57 at 3).

There is sufficient evidence in the record made during the trial court proceedings to support the Nevada Supreme Court's conclusion that counsel's refusal to stipulate to the foundation for the call was strategic. Counsel stated that he was not going to help the State put on its case, and that he believed introduction of the petitioner's incarceration status would be grounds for reversal. Counsel further suggested he believed the jury would surmise the call had been recorded while the petitioner was in jail. The court cannot conclude that the Nevada Supreme Court was objectively unreasonable in concluding that counsel's refusal to stipulate to foundation was a strategic decision within

the wide bounds of reasonable representation.[6] Accordingly, the petitioner is not entitled to relief on Ground Two(A).

ii. Suspended Attorney

In Ground Two(B), the petitioner asserts that trial counsel was ineffective for allowing John Rogers to participate in his representation despite the fact that Rogers' license had been suspended for mental health issues. (ECF No. 17 at 17). The petitioner argues that Rogers "participated in bench conferences, sat at the defense table, addressed the court, and even appeared as counsel in the court documents and transcripts." (*Id.* at 22). The Nevada Supreme Court addressed this claim as follows:

> [A]ppellant failed to include specific factual allegations that demonstrated that without the unlicensed attorney's participation in the trial, he would have received a more favorable outcome. Thus, he failed to establish that the unlicensed attorney's participation was deficient assistance of counsel by either the unlicensed attorney or his trial counsel.

(Pet. Ex. 57 at 3).

The petitioner concedes it is unknown the extent to which Rogers participated but asserts that where there is *de facto* absence of counsel, prejudice can be presumed. The respondents assert that the record suggests that Rogers primarily sat behind the counsel table and took notes and that it was the petitioner's counsel who did everything during trial. In reply, the petitioner argues that he was never given the opportunity to develop his claim of prejudice on this claim and that the court should therefore conduct an evidentiary hearing.

[6] The court therefore need not, and does not, address respondents' alternative contention that the petitioner was not prejudiced by counsel's conduct.

First, the petitioner has provided no legal or factual support for his assertion that Rogers' participation in his defense resulted in a *de facto* deprivation of counsel. The petitioner was represented by licensed counsel. Further, Rogers' license was suspended and not revoked. Under these circumstances, there is no support for the finding that the petitioner suffered *de facto* deprivation of counsel. *See United States v. Hoffman*, 733 F.2d 596, 599-601 (9th Cir. 1984).

Second, the petitioner has not established a reasonable likelihood of a different outcome had Rogers not participated in his trial. There is no evidence or specific factual allegation of how Rogers influenced any events during the trial, much less a compelling argument that the result of trial would have been different had those events not occurred. The state courts were not therefore objectively unreasonable in rejecting this claim.

Indeed, the petitioner concedes that his claim is unsupported but argues that he is entitled to an evidentiary hearing to develop the factual basis of his claim. For the reasons discussed *infra*, the petitioner is not entitled to an evidentiary hearing on this claim.

Accordingly, the petitioner is not entitled to relief on Ground Two(B).

IV. Request for Evidentiary Hearing

Although the petition contains a request for an evidentiary hearing, there is no argument provided in support of that request in the petition nor is there a separately filed motion for an evidentiary hearing. While the reply contains argument in support

of the request, the court will not consider arguments raised for the first time in the reply. *Zamani*, 491 F.3d at 997.

Further, even if the court were to consider the petitioner's arguments, the request for a hearing would be denied, as the petitioner has made no "colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief." *Williams v. Filson*, 908 F.3d 546, 564-65 (9th Cir. 2018).

V. Certificate of Appealability

In order to proceed with an appeal, the petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

The court has considered the issues raised by the petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appealability and determines that none meet that

standard. Accordingly, the petitioner will be denied a certificate of appealability.

VI. Conclusion

In accordance with the foregoing, IT IS THEREFORE ORDERED that the first amended petition for writ of habeas corpus (ECF No. 17) is hereby DENIED.

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

The Clerk of Court shall enter final judgment accordingly and CLOSE this case.

IT IS SO ORDERED.

DATED: This 14th day of September, 2020.

Howard D McKibben

UNITED STATES DISTRICT JUDGE

EXHIBIT D

EXHIBIT D

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JASON F. CARR
Assistant Federal Public Defender
Nevada State Bar No. 006587
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (fax)
Jason_Carr@fd.org

Attorney for **Petitioner Noe Ortega-Perez**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NOE ORTEGA-PEREZ,

Petitioner,

v.

BAKER, WARDEN,

Respondents.

Case No. 3:17-cv-00538-HDM-VPC

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NEVADA)

Petitioner Noe Ortega Perez, by counsel, submits this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. Ortega asks this Court to grant this writ and order the State of Nevada to release him from his unconstitutional confinement.

I. PROCEDURAL HISTORY

A. State Trial Court Proceedings

On April 8, 2011, the Clark County, Nevada, District Attorney (DA) obtained a grand jury indictment against Petitioner, Noe Ortega Perez (Perez), charging the following offenses: eight counts of Lewdness with a Child Under 14 Years of Age; and

two counts of Sexual Assault with a Minor Under Fourteen Years of Age. (*See* Exhibit (Ex.) 10.)[1]

Retained counsel David L. Phillips represented Perez at the initial arraignment on May 19, 2009. (*See* Ex. 1, Minutes (dated 5/19/09).) Perez pleaded not guilty and waived the sixty-day rule.

On October 12, 2009, in open court, the DA filed an Amended Indictment, dropping one of the lewdness charges. (*See* Ex. 13.)

Perez proceeded to jury trial October 13, 2009, and it concluded on October 21, 2009. (*See* Exs. 16-20, 22-33 (Trial Transcripts (TT).). On October 21, 2009, the jury returned guilty verdicts as to seven counts of Lewdness with a Child Under 14 Years of Age, and two counts of Sexual Assault with a Minor Under Fourteen Years of Age. (*See* Ex. 25 (Verdict).) The jury acquitted Ortega of one count of lewdness (Count III). (*See id.* at 2.)

Perez filed a Motion for New Trial prior to sentencing, arguing *Doyle* error and, more pertinent to this petition, that Dr. Paglini, the DA's expert witness, should not have been allowed to testify at trial. (*See* Ex. 30.) The trial court held a hearing on November 10, 2009. (*See* Ex. 31 (transcript).) At this hearing, the DA requested for time for trial transcripts to be prepared to aid in drafting their opposition to the motion.

The court continued to a hearing later date but not before the court addressed another issue. The court made a record that it was unaware that attorney John Rogers, while sitting at defense table during the entire jury trial, had his license to

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[1] Petitioner Perez contemporaneously files with this First Amended Petition only the most pertinent state court exhibits. It is anticipated Respondents will file any non-duplicative exhibits it deems important to the resolution of this matter. *See* Local Rule 3-3.

Since the exhibits will not have electronic court filing numbers at the time Perez files this petition, all page number references are to those provided in the exhibits excluding the exhibit cover page.

practice suspended for mental health issues. (*See id.* at 3-5, 12-13.) The judge was irate that Phillips had not advised the court or the DA about the fact that the State Bar had suspended. (*See, e.g., id.* at 13 ("I promise you that had I known that, I probably would have not wanted him anywhere near the case because of the issues that could raise"); *id.* at 18 ("I'm so upset that [Rogers] came up here to the bench").)

On March 9, 2010, the district court heard the motion for new trial prior to sentencing Ortega. (*See* Ex. 32, at 1 (transcript).) The court denied the motion and sentenced Ortega Perez to Life with Possibility of Parole after thirty-five years on two counts, and Life with the Possibility of Parole after ten years on the remaining seven counts. (*See id.* at 6-7.) T

The court filed a document entitled "Judgment of Conviction (Jury Trial)" on March 19, 2010, confirming that sentence. (*See* Ex. 33.)

Both Perez, who unsuccessfully tried to fire his attorney after sentencing, and counsel filed notices of appeal. (*See* Exs. 34, 35; *see also* Ex. 54, at 39-40 (describing Perez's conflict with counsel).) The Nevada Supreme Court docketed this appeal under case number 55817.

Perez filed an opening brief raising one issue for review: "The court erred by allowing the forty six page grooming testimony by Dr. Paglini, clearly not qualified expert." (*See* Ex. 37.)

The DA filed an answering brief but counsel for Perez did not file a reply. (*See* Ex. 38 (Answering Brief); *see also* Ex. 36 (Nevada Supreme Court order threatening sanctions against Mr. Phillips for failing to file a transcript request form).)

The Nevada Supreme Court took an interest in Perez's direct appeal. The court invited *amicus curiae* briefing on the issue of expert testimony regarding grooming behaviors. Both the Nevada Attorneys for Criminal Justice and Nevada District Attorneys Association filed briefs in support of their respective positions. (*See* Exs. 41, 42.)

On November 27, 2014, the Nevada Supreme Court issued a published opinion affirming Perez' convictions. *See Perez v. State*, 313 P.3d 862 (Nev. 2013) (filed as Exhibit 43.) It was a close, 4-3 decision that relied on amicus briefing to fill gaps in Perez's appellate counsel's briefing. *See Perez*, 313 P.3d at 867.

Significant to his filing, the majority opinion found that the DA's expert notice, whilst terse, was sufficient. In so holding, the court noted that "Perez's brief argument does not allege that the State acted in bad faith or that his substantial rights were prejudiced because the notice did not include a report or more detail about the substance of Dr. Paglini's testimony." *Perez*, 313 P.3d at 863.

The dissent, however, found that the notice was insufficient. *See id.* at 868. Dr. Paglini's testimony involved "hypotheticals" that directly mirrored the trial testimony. The DA did not inform Perez of this or that Dr. Paglini's testimony would be informed by, and molded to, the case's investigative materials. This DA's conduct "ambushed Perez with expert testimony he was not warned to be prepared to defend against." *Id.*

Perez would later allege that appellate counsel was ineffective for, inter alia, failing to allege and brief the DA's bad faith.

B. State Post-Conviction Proceedings

Ortega Perez field his proper person Petition for Writ of Habeas Corpus (Post-Conviction) on April 21, 2014. Ortega Perez raised the following grounds:

1. Petitioner was denied effective assistance of counsel in violation of the 6th and 14th Amendments to the US Constitution as counsel failed to adequately review and investigate Petitioner's case.

2. Petitioner was denied effective assistance of counsel in violation of the 6th and 14th Amendments to the U.S. Constitution as counsel failed to interview witnesses.

3. Petitioner is in custody in violation of his right to due process and a fair trial as guaranteed by the 5th and 14th Amendments to the U.S. Constitution over use of expert witnesses that were faulty and unqualified.

4. Petitioner was denied his 6th and 14th Amendment rights to effective assistance of counsel as he failed to adequately investigate and prepare for trial.

(*See* Ex. 45 (claims amended for clarity and omitting illegible material).)

A state district court granted Perez's request for counsel and appointed Matthew Carling to represent him in his post-conviction proceedings. Carling filed a supplemental petition added the following grounds:

1. Appellate counsel was ineffective for failing to adequately attack the qualifications of the expert witness in the trial court and then failing to adequately attach the notice of such expert on appeal.

   A. The State filed to give adequate notice of the expert witness, Dr. Paglini, and the extent of his testimony prior to trial.

   B. Dr. Paglini's testimony failed to assist the jury in understanding the evidence or determining an issue.

   C. Mr. Phillip's deficient performance prejudiced Perez because the admission of Dr. Paglini's expert testimony was prejudicial.

2. Perez received ineffective assistance of counsel (a) when trial counsel failed to adequately prepare or investigate this case; (b) when a trial attorney rendered unauthorized practice of law; (c) when trial counsel undertook a strategy that was prejudicial to Perez's defense, all of which prejudiced Perez and undermines the verdict in this matter.

   A. Mr. Phillips failed to adequately prepare, investigate, and interview witnesses and was otherwise ineffective trial counsel.

   B. Mr. Rogers was unlicensed at the time of trial and rendered unauthorized practice of law and Mr. Phillips assisted Mr. Rogers in do so.

C. Mr. Phillips refused to stipulate to the foundation of the jailhouse telephone call, which caused the State to authenticate such evidence and therefore introduced evidence of Perez's custody status to the jury.

(Ex. 46.)

The DA responded to the supplemental petition and Perez filed a reply. (*See* Exs. 47, 48.) After a brief hearing, consisting only of legal argument, the district court denied the petition. (*See* Ex. 49, at 2 (transcript).) The DA prepared the Findings of Fact, Conclusions of Law and Order. (*See* Ex. 50.) Perez filed objections to the proposed findings. (*See* Ex. 51.) On March 30, 2015, the court, without addressing the objections, entered the DA-drafted final order.

Perez appealed that order. (*See* Ex. 52 (notice of appeal).) The Nevada Supreme Court docketed this appeal under case number 67736. Carling continued to represent Mr. Perez. Carling raised the following claims:

1. The trial court encumbered Perez's ability to appeal the dismissal order by failing to appropriately enter Findings of Fact and Conclusions of Law.

2. The district court incorrectly applied the law-of-the-case doctrine to this matter.

3. The dismissal order inappropriately determined Perez had not established a reasonable probability of success of issues Phillips failed to raise on direct appeal.

4. The remaining errors constitute cumulative error and requires reversal of the dismissal order.

(*See* Ex. 54, at 1 (opening brief).)

The DA filed an answering brief to which Perez replied. (*See* Exs. 55, 56.)

On June 27, 2017, after oral argument, the court denied Perez relief in an unpublished decision. (*See* Ex. 57.)

Once again the court split 4-3. The majority opinion found Perez failed to sustain his ineffective assistance of counsel claims. (*See* Ex. 57, at 2-4.) The dissent, however, emphasized that the direct appeal decision relied on "amicus briefing because appellant's counsel's briefing regarding [the expert witness] was minimal." (*Id.* at 5.) Further, that deficiency was prejudicial because "the sufficiency of the expert notice was an incredibly close issue in direct appeal." (*Id.* at 6.) As was the issue of whether the grooming testimony was appropriate. "If appellate counsel had more fully and thoroughly briefed these issues, the decision on appeal may have been different." (*Id.* at 7.)

The lower court should have at least held a hearing on Perez's IAC claims. (*See id.*)

C. Federal Court Proceedings.

Ortega Perez mailed his *pro se* §2254 petition to this Court on September 1, 2017. (*See* ECF No. 01-1.) This is a timely filing as Perez's one year Anti-Terrorism and Effective Death Penalty Act (AEDPA) filing deadline did not expire until May 30, 2018.

Ortega Perez also filed an Application to Proceed In Forma Pauperis (ECF No. 1), and a Motion for the Appointment of Counsel. (*See* ECF No. 01-2.) On December 6, 2017, this Court granted Perez's motion for counsel and appointed the Federal Public Defender (FPD). (*See* ECF No. 5.)

Because of language barrier issues and the need to investigate the case, the FPD requested more time to file Perez's amended petition. Now that investigation is complete and Perez hereby submits this First Amended Petition.

II. GROUND ONE: APPELLATE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE BY OMITTING ARGUMENTS IN SUPPORT OF, AND OTHERWISE FAILING TO ADEQUATELY BRIEF, THE DIRECT APPEAL CLAIM THAT PEREZ FAILED TO RECEIVE A FAIR TRIAL DUE TO INAPPROPRIATE AND UNNOTICED EXPERT TESTIMONY

A. Statement of Exhaustion

Perez raised this issue in post-conviction proceedings where he cited numerous federal authorities including one of the bedrock cases discussing ineffective assistance of appellate counsel claims, *Jones v. Barnes*, 463 U.S. 745 (1983). (*See* Ex. 54, at 52-53; *see also* Ex. 57, at 1 (Nevada Supreme Court decision cites *Strickland v. Washington*, 466 U.S. 668 (1984)).

This ground for relief also relates to the sole issue Perez raised in state direct appeal proceedings: Whether the district court properly admitted Dr. Palini's testimony. *See Perez v. State*, 313 P.3d 862 (Nev. 2013).

B. Summary of Trial Evidence

The following summary is derived from trial transcripts, as well as Perez's Presentence Investigation Report and the Facts and Procedural History section of the published direct appeal decision *Perez v. State*, 313 P.3d 862 (Nev. 2013). (*See* Exs. 43, 59.)

This case involves the alleged sexual assault of a minor. The complaining witness, was then a thirteen-year old previously and hereafter referred to as "R.B." Perez's wife, M.P., was R.B.'s aunt.[2]

At trial, R.B. testified that her relationship with Perez began to change once she turned thirteen. *See Perez*, 313 P.3d at 865.[3] Perez called her more, complimented her, and began "winking" at her during parties. *See id.* Perez kissed

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[2] The DA and Nevada Supreme Court refer to R.B. as Perez's "niece." *See, e.g., Perez*, 313 P.3d at 854. This is misleading as R.B. was related by blood to Perez's wife D.P., but not Perez. It is more accurate to refer to R.B. as Perez's niece by marriage.

[3] (*See also* Exs. 18, 19, TT, at 48-179 (trial testimony of R.B.).)

R.B. and touched her thigh.[4] Perez related to R.B. a dream he had about underdressing and being on top of her.[5] *See Perez,* 313 P.3d at 865. Perez told her he was uncomfortable when R.B. was around other boys.[6]

On September 12, 2008, R.B., M.P., and Perez, having traveled to Las Vegas for a concert, were staying in a room at the Luxor.[7] Perez kisses R.B. when his wife is in the bathroom. The kissing appears to be consensual.[8]

Around noon the next day, September 13, the three were swimming in the hotel's pool. Mr. Perez started swimming up to R.B. and touching her hand under the water. He would swim away and come back to touch her hands and feet.[9]

R.B. appeared to reciprocate these overtures indicated she wanted to be alone with Perez.[10]

At about 2:00 p.m. all three went back to the room to get ready for dinner. While her aunt was in the shower, Perez began kissing R.B.[11] Perez undressed her, kissed her breasts, rubbed her vaginal areas, and penetrated her vagina with his fingers and tongue.[12]

The aunt, M.P., emerged from the shower and saw this scene.[13] M.P. was enraged and began screaming and slapping R.B. The aunt tried to use her cell

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[4] (*See id.* at 63.)
[5] (*See id.* at 65-66.)
[6] (*See id.* at 64-65.)
[7] (*See id.* at 66-68.)
[8] (*See id.* at 76-77.)
[9] (*See id.* at 78-80.)
[10] (*See id.* at 79, 98-99.)
[11] (*See id.* at 83-84, 86-88.)
[12] (*See* Ex. 18, TT, at 88-89.)
[13] (*See id.* at 89-92*; see also* Ex.20, TT, at 128-84 (M.P.'s trial testimony).)

phone.[14] Mr. Perez grabbed it and threw it. She then tried to use the room phone, but he prevented her from doing so.[15]

Due to the amount of noise, the occupants from a neighboring room called hotel security who responded. Once security was in the room the aunt told security officers what had happened; but would later testify that she only witnessed kissing at trial.[16] R.B. said Perez pinned her to the bed. Security detained Perez and called the police. R.B. told security that Perez had pinned her to the bed and was "touching" and "grabbing" her.[17] It was not true that Perez had pinned her down. R.B. told that lie to prevent her aunt from leaving her in Las Vegas.[18]

After law enforcement officers arrived they interviewed M.P., and Perez. D.B.'s statement was consistent with the abuse detailed in the counts of conviction. At trial, however, she testified that she saw only kissing and R.B. was fully clothed. *See id.* at 865.[19]

Mr. Perez admitted kissing the victim but stated that the reason that his pants were down was because of the friction from their movements on the bed.[20]

Law enforcement arrested Perez and transported him to the Clark County Detention Center where they booked him accordingly.

At trial, the DA's expert witness, Dr. Paglini, would testify to hypotheticals that "mirrored" the specific facts of the case. *Perez,* 313 P.3d at 868. Dr. Paglini affirmed Perez's behaviors were, in his opinion, grooming behaviors. *See id.* at 873-74.

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[14] (*See* Ex. 18, TT, at 93-95.)

[15] (*See id.* at 92.)

[16] (*Accord* Ex. 20, TT, at 143-46 ("No, No, [R.B.'s] pants were not down.").)

[17] (*See* Ex. 18, TT, at 97.)

[18] (*See id.* at 97-98.)

[19] (*See* Ex. 20, TT, at 144-47.)

[20] (*See* Ex. 22, TT, at 123-30 (testimony of Detective Lebario).)

C. The Testimony at Issue

The primary issue in this petition is the prosecution's use of an expert witness—clinical psychologist Dr. John Paglini. The DA called Dr. Paglini as an expert witness to testify regarding "grooming" techniques used in sexual assault cases and the effect of those techniques on victims.[21] Perez contends that, had direct appeal counsel argued that the DA's expert notice was deliberately vague and proffered in bad faith, and further he argued the testimony of the expert violated his constitutional rights, there is a reasonable probability the Nevada Supreme Court's 4-3 opinion against him would have come out the other way.

The DA's notice explained that it planned to call Dr. Paglini as an expert to testify about grooming behavior on children.[22] Perez filed a motion to exclude Paglini as an expert witness because, inter alia, his testimony did not meet Nevada statutory requirements as set forth in Nevada Revised Statute 50.275.[23] The DA countered that Dr. Paglini was a licensed psychologist practicing in the area of sexual assaults.[24] The district court denied the motion and allowed Dr. Paglini to testify.[25]

Dr. Paglini has a bachelor's degree in psychology and a doctorate in clinical psychology.[26] After his internship, Dr. Paglini went into private practice. For the last ten-years he has been writing child custody evaluations where domestic violence

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[21] (*See* Ex. 20, TT, at 30-85 (Dr. Paglini's trial testimony).)

[22] (*See* Ex. 14 (pretrial hearing transcript).)

[23] (*See* Ex. 15.)

[24] (*See* Ex. 14, at 5.)

[25] (*See id.* at 7.)

[26] (*See* Ex. 20, at 41-42 (trial testimony).)

of sexual abuse is alleged.[27] Dr. Paglini performed pretrial competencies, death penalty evaluations, and psychological evaluations on defendants.[28]

Dr. Paglini had not published any articles, written any books, or written a treatise on grooming.[29]

One of the variables in assessing the risk of a sex offender is whether grooming was involved.[30] The goal of grooming is to reduce victim resistance and the chance the abuse will be reported.[31]

Dr. Paglini had not interviewed either Perez or any of the DA's witnesses.[32] Dr. Paglini, had, however read the case's voluntary statements, arrest reports, hearing and grand jury transcripts. He testified by hypotheticals.[33] The hypothetical examples Dr. Paglini consisted of behaviors from the facts of Perez's case.[34]

D. The Nevada Supreme Court's Direct Appeal Opinion

As previously noted, the Nevada Supreme Court took notice of Perez's challenge to Dr. Paglini's testimony. After receiving amicus briefs from the Nevada Attorney for Criminal Justice and the Nevada District Attorney's Association, the Court entered a detailed published decision against Perez. *See Perez v. State*, 313 P.3d 862 (Nev. 2013). The court's 4-3 majority decision was challenged by a robust dissent. *See id.* at 871-74.

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[27] (*See id.* at 42-43.)

[28] (*See id.* at 42; *accord id.* at 44 (Dr. Paglini completed approximately 1,000 psychosexual evaluations).)

[29] (*See id.* at 74-76.)

[30] (*See id.* at 43-44.)

[31] (*See id.* at 45-50.)

[32] (*See id.* at 54.)

[33] (*Id.*)

[34] (*See id.* at 56-61.)

The court concluded Dr. Paglini's academic career and professional experience sufficiently qualified him to testify as an expert on grooming behaviors and their effects. *See id.* at 866-68. While Dr. Paglini's career is impressive, his experience, as noted by the dissent, lacked any involvement with sexual abuse victims. *See id.* at 871. Yet the DA offered his testimony to explain why R.B.'s statements were inconsistent, *i.e.,* an expert opinion on how grooming impacted an alleged sexual abuse victim. *See id.*

The majority opinion found that, on a case-by-case basis, grooming behavior testimony can be deemed appropriate. *See id.* at 868-69. Dr. Paglini's testimony meets admissibility requirements because his testimony was useful in evaluating R.B.'s credibility. *See id.* at 869.

Paglini's opinions were the product of reliable methodology. While a portion of his testimony, concerning the neurology of adolescents, was improper, that admission did not amount to plain error. *See id.* Dr. Paglini did not vouch for the complaining witness. He offered a general opinion on the impacts and effects of grooming. *See id.* at 870.

Significantly, the court found the DA's pretrial expert notice sufficient because Perez failed to allege the DA "acted in bad faith or that his substantial rights were prejudiced because the notice did not include a report or more detail about the substance of Dr. Paglini's testimony."[35] *Id.*

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[35] Since Perez had preserved the issue of the adequacy of the expert notice for appeal, the court's reference to "substantial rights" must be referring to constitutional rights and not the third prong of the plain error standard of review. Perez made an allegation that the admission of Dr. Paglini's testimony "presents serious constitutional issues" but he did not elaborate on that contention in his briefs. (*See* Ex. 37, at 5 (Perez's opening brief).) It is likely the court is alluding to this brief reference.

The dissenting opinion disagreed finding the DA did not provide sufficient expert witness notice and that the testimony did not assist the jury. The testimony is highly prejudicial. *See id.* at 871-74.

The DA's notice was insufficient because it was too brief and only identified Dr. Paglini's proposed testimony in the broadest terms. *See id.* at 874. Dr. Paglini's testimony consisted of his opinion on "hypothetical" scenarios that mirrored the facts of the case. The notice did not inform Perez of this causing him to be "ambushed" at trial. *Id.*

E. The Nevada Supreme Court's Post-Conviction Decision

In post-conviction denial briefing, Perez maintained that his direct appeal counsel was ineffective for failing to argue: 1) the DA failed, in bad faith, to provide adequate expert witness notice; and 2) that Dr. Paglini's testimony failed to assist the jury in understanding the evidence. (*See* Ex. 54, at 49-50 (opening brief).)

In an unpublished order the Nevada Supreme Court rejected those contentions. (*See* Ex. 57.) Once again the issue was razer close with a 4-3 split. Significantly, the makeup of the judges was not the same. Judge Saitta, who joined the majority in the direct appeal decision, was replaced by Judge Stiglich. Hence, we cannot know whether Judge Saitta would have joined the three judges of the dissent had Perez' counsel adequately briefed the issue.

The dissent notes that, at a minimum, the trial court erred in not holding an evidentiary hearing on Perez's IAC claims. (*See id.* at 5.) :"The sufficiency of the expert notice was an incredibly close issue in the direct appeal." (*Id.* at 6.) Perez's appellate counsel failed to argue bad faith when the record supports the conclusion Perez was ambushed at trial. Similarly, the question of whether the expert's testimony on grooming assisted the jury was close. (*Id.*) "If appellate counsel had

more fully and thoroughly briefed these issues, the decision on the direct appeal may have been different."[36] (*Id.* at 7.)

F. But for Appellate Counsel's Deficient Performance, there is a Reasonable Probability Perez Would Have Won his Direct Appeal

Perez presents a strong case for relief. The Nevada Supreme Court's expert testimony opinion is contentious eliciting a strong dissent. The error in question is not harmless. The case against Perez was contestable while the evidence at question unquestionably prejudicial.

The dissent stressed that the case against Perez was not strong. *See Perez*, 313 P.3d at 874 ("the question of guilt or innocence is close").) R.B.'s testimony was inconsistent with her statements on the scene. Perez's wife testified at trial that Perez had merely kissed R.B. This testimony consistent with Perez's statements to law enforcement. *See id.* No physical evidence supported the convictions. *Id.*

Dr. Paglini's expert testimony was prejudicial. It rationalized R.B.'s inconsistencies. *See id.* The problem was exacerbated by the emphasis the DA placed on Dr. Paglini's work conducting "risk assessments" on known sex offenders. *Id.* By proceeding act by act through hypothetical questions mirroring the facts of the offense, Dr. Paglini presented Perez as a sex offender "on par with the 1,000 other convicted sex offenders [Dr. Paglini evaluated] of risk to the community." *Id.*

The Nevada Supreme Court's post-conviction dissent emphasized that the direct appeal decision relied on "amicus briefing because appellant's counsel's briefing regarding [the expert witness] was minimal." (Ex. 57, at 5.) Direct appeal counsel failed to argue DA acted in bad faith by ambushing him with a minimal expert notice.

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[36] The DA states that the direct appeal's reliance on Perez's failure to brief the issue, along with dissent stating that briefing could well have made a difference, "do not constitute reliable proof that this claim would have had a reasonable probability of success had it been raised." (Ex. 55, at 14 (answering brief).)

This is a curious statement as what better evidence could one hope to have in arguing that appellate counsel's failures were prejudicial?

(See id. at 6.) Further, counsel failed to adequately brief the core issue of whether the grooming evidence was admissible. (See id.) H

Had appellate counsel addressed these issues, "the decision on direct appeal may have been different." (*Id.* at 7.)

These are strong words providing firm support for Perez's contention that had appellate counsel adequately briefed the direct appeal issue, there is a reasonable probability Perez would have prevailed. This quality of direct evidence is rare.

The court emphasized counsel's poor performance. That lack of performance could have impacted the appellate result. Perez need not show he would have won the appeal or even that is was more likely than not he would. The Supreme Court is clear about this point. *Strickland v. Washington*, 466 U.S. 688, 693 (1984) ("On the other hand, we that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case."); *see also Smith v. Robbins*, 528 U.S. 259, 263 (2000) ("[t]he proper standard for evaluating Robbins' claim [of ineffective assistance of appellate counsel] on remand is that enunciated in *Strickland v. Washington*"). Perez need only show a reasonable probability.

Given the closeness of the appeal, and the observation shared by the dissent that competent briefing may well have altered the outcome on appeal, Perez has made that modest showing. Perez is entitled to relief on this robust claim of ineffective assistance of appellate counsel.

III. GROUND TWO: TRIAL COUNSEL VIOLATED PEREZ'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY: 1) IRRATIONALLY FAILING TO STIPULATE TO THE FOUNDATION OF JAIL CALL MADE BY PEREZ TO PREVENT THE JURY FROM LEARNING OF HIS PRETRIAL INCARCERATION; AND 2) ALLOWING AN ATTORNEY TO PARTICIPATE IN THE TRIAL DESIPTE HAVING HIS LICENSE SUSPEDED FOR MENTAL HEALTH REASONS

A. Statement of Exhaustion

Perez raised this issue in post-conviction proceedings where he cited numerous federal authorities including *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002), a case that employs the *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel, constitutional analysis. (*See* Ex. 54, at 58; *see also* Ex. 57, at 1 (Nevada Supreme Court decision citing *Strickland*).) Although Perez raised the issue as one discussing the propriety of accumulating prejudice based on each discrete deficient performance instances, the Nevada Supreme Court analyzed each IAC ground individually. (*See* Ex. 54, at 2.)

B. Ground 2(a): Counsel's Failure to Stipulate to the Foundational Requirements for Admission of Perez's Jail Calls was Irrational and Therefore Cannot have Been the Product of a Reasoned Strategic or Tactical Decision.

During the trial, outside the presence of the jury, the court discussed the admissibility of jail house telephone recordings between Perez and his wife, M.P.[37] Phillips, counsel for Perez, objected to their admission on hearsay grounds.[38] The court patiently explained the calls are not hearsay because Perez's recorded statements constitute admissions of a party opponent and the wife's statements are admissible for context.[39] The calls are admissible provided the DA lays the proper foundation. If the DA has to lay that foundation, the jury will necessarily know about

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[37] (*See* Ex. 19, at 181-90.)

[38] (*See id.* at 181.)

[39] (*See id.* at 181-83.)

Perez's custodial status.[40] It would be in your best interests to avoid this. Perez's objections will, of course, be preserved.[41]

The discussion continued the next day.[42] Because Phillips would not agree to any redactions to the transcript of the calls, the trial court made its own redactions to protect Perez's rights.[43] Again the court gave Phillips the opportunity to stipulate to foundation so that the DA could admit the transcript of the calls, with English translations, without the jury knowing they were jailhouse recordings.[44] Phillips refused repeatedly stating "I can't help them with their case, Judge."[45]

The trial court, questioning this logic, asked Phillips whether he had discussed the possibility of a foundational stipulation with his client, Perez.[46] Phillips had not. Phillips then briefly conferred with Perez.

Phillips then objected to the court asking Perez whether he agreed with counsel's strategy.[47] Phillips asserted Perez's Fifth Amendment right to remain silent.[48]

Exasperated, the court explained that the jail calls, with redactions, are admissible. The court has so ruled.[49] Given that ruling Perez could avoid undue prejudice by stipulating to the jail recording's foundation.[50] The court wanted to

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[40] (*See id.* at 183-86.)

[41] (*See id.* at 185-86.)

[42] (*See* Ex. 20, TT, at 4-40.)

[43] (*See id.* at 6-7.)

[44] (*See id.* at 10; *see also* Ex. 21 (call transcript).)

[45] (*See* Ex. 20, TT, at 10.)

[46] (*See id.* at 10-12 (explaining the court thought that forcing the DA to bring in a witness to expose Perez's custodial status "is detrimental to your client").)

[47] (*See id.* at 11.)

[48] (*Id.*)

[49] (*See id.* at 12.)

[50] (*See id.* at 12-15.)

confirm Perez agrees with his attorney's questionable strategy. If the court sees an action it believes is detrimental to the defendant, there is an obligation to inquiry if the defendant understands the risks.[51]

On advice of counsel, Perez refused to answer whether he was "onboard with the trial strategy."[52] The court responded: "Mr. Phillips, you know, I'm flabbergasted that you're telling your client to not answer the Court's question."[53] Phillips persisted. The court admonished Phillips his client cannot "assert the Fifth Amendment when the Court is asking a question that in no way, shape, or form would cause him to incriminate himself."[54]

The court bemoaned the "horrific position" Mr. Phillips had imposed on the court.[55] "I've never had a lawyer instruct their client not to answer the Court." (*Id.*) The court offered to take a break and allow Phillips to confer with Perez and then inform the court of his position.[56] "We're not going to proceed until I get an answer from you."[57]

Phillips continued to protest. The court lost patience with Phillip's illogical reasoning explaining "I'm not even going to ask you have that makes sense, because it's so nonsensical that if [statement cut-off by Mr. Phillips]."[58]

The court took a recess.[59]

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[51] (*See id.* at 15.)

[52] (*Id.* at 16.)

[53] (*Id.*)

[54] (*Id.* at 17.)

[55] (*Id.* at 18.)

[56] (*See id.* at 19.)

[57] (*Id.*)

[58] (*Id.* at 19-20; *accord id.* at 21 (affirming that Mr. Phillips arguments "make no sense whatsoever").)

[59] (*See id.* at 22-23.)

Phillips still refused to allow his client to answer the court's inquiry.[60] The court once again informed Phillips that his legal objections were invalid.[61] The court noted its patience and that it went to "extraordinary lengths" by *sua sponte* redacting the jail-call transcripts even though Phillips didn't make the request.[62]

Much to the court's frustration, Mr. Phillips was obstinate to the end.[63] The court told Phillips to take a seat and outlined the issue for Perez.[64] Perez still refused to answer, but also claimed he was having problems hearing the interpreter.[65]

Recording issues rectified, Perez still steadfastly refused to answer the court's question. Lacking other options, the court eventually "assumed" Perez agreed with Phillips' strategy.[66] Given Perez later brought up this instance as an example of ineffective assistance of counsel, that assumption may have been incorrect.[67]

Because Mr. Phillips rebuffed the DA's repeated offers to stipulate, the DA was forced to call Robert Foster, who described the inmate phone system. [68]Mr. Phillips moved for a mistrial.[69] The court chastised Phillips for making that objection in the presence of the jury.[70] The DA noted it "took every opportunity they could to enter [into] a stipulation with the defense, so that the testimony as to the Defendant being

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[60] (*See id.* at 23-24.)

[61] (*Id.* at 24-25 ("Mr. Phillips, you have to stop saying that because it makes no sense").)

[62] (*Id.* at 26.)

[63] (*See id.* at 34-35.)

[64] (*See id.* at 35-36.)

[65] (*See id.* at 35-37.)

[66] (*See id.* at 38-40.)

[67] (*See* Ex. 46, at 53-56.)

[68] (*See* Ex. 20, TT, at 86-101.)

[69] (*See id.* at 90.)

[70] (*See id.* at 91.)

in custody could be avoided."[71] The court noted it went to "great lengths" to avoid this prejudicial testimony and was frankly surprised Phillips was "jumping up and objecting like you're surprised that this testimony came in." (*Id.* at 94-95.)

1. The Post-Conviction Denial

The Nevada Supreme Court denied Perez's post-conviction claim of ineffective assistance finding Mr. Perez's decision not to stipulate to foundation "was merely a trail strategy and appellant was given the opportunity to contest that trail strategy, but chose not do so." (Ex. 57, at 2.)

It is difficult to reconcile the Nevada Supreme Court's determination with the record. There does not appear to be anything tactical or strategic about Mr. Phillips' action. His decision was based on ignorance and obstinacy. Phillips did not understand the situation despite the court's repeated efforts to help him in that understanding. His responses were, as noted by the trial court, "nonsensical."

Once the court had ruled the tapes were admissible, and repeatedly ensured Mr. Phillips his objections to that order were preserved, there was no conceivable reason to not stipulate to foundation; especially given the foundational witness was waiting outside the courtroom door. Mr. Phillips prejudiced his client for no reason other than his failure to understand the basics of trying a criminal case. This is text-book deficient performance.

It is well-established that a defendant suffers prejudice when a jury learns of his incarcerated status. Nevada courts recognize that prejudice. "Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as brining a shacked defending into the courtroom." *Haywood v.*

[71] (*Id.* at 92-93.)

State, 809 P.2d 1272, 1273 (Nev. 1991).[72] But for this error, there is a reasonable probability the jury would have rendered a different verdict in this case where "the question of guilt or innocence [was] close." *Perez v. State,* 313 P.3d 862, 874 (Nev. 2013) (Douglas, J., dissenting).)

C. Ground 2(b): Mr. Rogers, Represented as Co-counsel for the Defense, was Unlicensed at the Time of Trial

Mr. Phillips was assisted at trial by Mr. Rogers. This attorney participated in bench conferences, sat at the defense table, addressed the court, and even appeared as counsel in the court documents and transcripts.[73]

Rogers' bar license was not in good standing and hadn't been for years.

Approximately three years before Perez's trial, the Nevada State Bar had suspended Rogers' license for a mental disability.[74] The status of Mr. Rogers' license did not come to light until after the trial.[75] The trial court was not pleased at having been misled.[76] In fact, it "about dropped dead" once finding out Rogers did not have a valid license.[77]

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[72] *Haywood* recognizes "a defendant has a constitutional right to appear before the jury without physical restraints." 809 P.2d at 1273 (citing, inter alia, *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970).

[73] (*See, e.g.,* Ex. 20, TT, title page; *see also* Ex. 31, Hearing Transcript (HT), at 3-6 ("[Rogers] addressed me, and he also made an appearance at the time I took the verdict"); Ex. 31, at 8-9 (relating a time where Phillips conversed with Rogers during trial about a hearsay objection).)

[74] (*See* Ex. 31, at 3, 6-7, 13.)

[75] (*See id.* at 7.)

[76] (*See, e.g.,* at 3, 6, 8, 10-11, 13-14, 18.)

[77] (*Id.* at 20.)

Had the court known his license was suspended it would not have allowed Rogers to even sit at defense counsel table, much less approach for bench conferences.[78]

At no time did anyone tell the court Rogers' license was suspended.[79] What Phillips did to the court "was just awful, to lead me to believe. . . [Rogers] was licensed to practice law, and his license was in good standing."[80]

The DA did not seek a remedy or perceive any harm flowing from Rogers' unlicensed practice of law.[81]

Ultimately, the court felt, it was an issue between Rogers and the State Bar.[82] Phillips agreed, however, that the event was a "terrible oversight on my part and- - a big mistake."[83]

The Nevada Supreme Court determined Perez did not allege sufficient facts to prove he suffered prejudice from Rogers' participation at trial.

1. Trial Counsel's Aiding and Abetting of the Unlicensed Practice of Law, to Perez's Detriment, Constitutes Deficient Performance

Phillips' conduct violated the Nevada Rules of Professional Responsibility. "A lawyer shall not . . .[a]ssist another person in the authorized practice of law." Nev. R. Prof. R. Con. 5.5(a)(2). "Though the standard for counsel's performance is not determined solely by reference to codified standards of professional responsibility, these standards can be important guides." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Phillips allowed Rogers to participate in conferences, sit at counsel table, and other

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[78] (*See id.* at 8 ("I was flabbergasted to find out his license was not in good standing because I unequivocally would not have let him sit at that Defense table."); *accord id.* at 11 ("It was terrible."); *id.* at 12 ("I was clearly misled.").)

[79] (*Id.* at 3; *see also id.* at 10 (the DA did not know).)

[80] (*Id.*)

[81] (*See id.* at 24.)

[82] (*See id.* at 23-24.)

[83] (*Id.* at 27.)

actions that gave, at the very least, the appearance of practicing law. By doing so, Mr. Phillips violated rules of professional responsibility and provided deficient performance.

Perez was constitutionally entitled to representation by appropriately licensed attorneys.

As for prejudice, it is unknown as to what extent Mr. Rogers' participated in the case. In this case of the de facto deprivation of counsel, a petitioner may be relieved of the need of demonstrating prejudice. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). Even if a showing of prejudice is necessary, the trial court made a detailed record as to the harm the event caused both the administration and appearance of justice.

IV. PRAYER FOR RELIEF

Accordingly, petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Petitioner Noe Ortega Perez brought before the Court so that he may be discharged from his unconstitutional confinement. Specifically, by ordering the State of Nevada to retry Perez within a reasonable period of time or order Perez released from Nevada Department of Corrections custody;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this amended petition and any defenses that may be raised by respondents; and

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

Dated this 26th Day of October, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Jason F. Carr
JASON F. CARR
Assistant Federal Public Defender

V. DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

Further, pursuant to the pleading rules set forth in Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts, the amended petition sets forth the facts supporting each ground for relief and requests a new trial should be ordered based on those allegation.

By complying with those pleading requirements, Petitioner Noe Ortega Perez does not waive any legal arguments he intends to present later in a legal memorandum or traverse to establish why a writ of habeas corpus should issue under governing legal standards including those set forth in 28 U.S.C. § 2254(d).

Dated this 26th Day of October, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/Jason F. Carr
JASON F. CARR
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: **Natasha M. Gebrael, Office of the Nevada Attorney General**

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days.

/s/ Jason F. Carr
JASON F. CARR
Asst. Fed. P. Defender

EXHIBIT E

EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF NEVADA

NOE ORTEGA PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67736

ORDER OF AFFIRMANCE

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

Appellant asserts that both his counsel at trial and on appeal were ineffective. To establish a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). We defer to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Appellant first contends that he was cumulatively prejudiced by his trial counsel's failure to be prepared and investigate the case,

failure to properly supervise an unlicensed attorney, and failure to stipulate to the foundation for a jail phone call. Because appellant did not include specific factual allegations that demonstrate that better preparation or investigation would have favorably changed the outcome of the trial, the district court properly concluded that appellant failed to establish ineffective assistance of trial counsel in this regard. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 553, 538 (2004) (explaining that a defendant who claims counsel failed to adequately investigate the case must demonstrate how a better investigation would have rendered a more favorable outcome probable). Additionally, appellant failed to include specific factual allegations that demonstrated that without the unlicensed attorney's participation in the trial, he would have received a more favorable outcome. Thus, he failed to establish that the unlicensed attorney's participation was deficient assistance of counsel by either the unlicensed attorney or his trial counsel. *Lyons*, 100 Nev. at 432, 683 P.2d at 505. Lastly, counsel's decision not to stipulate to the foundation for a jail phone call did not establish deficient representation as the decision was merely a trial strategy and appellant was given the opportunity to contest that trial strategy, but chose not to do so. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (providing that a strategy decision "is a tactical decision that is virtually unchallengeable absent extraordinary circumstances" (internal quotations omitted)). As appellant failed to establish a deficiency in his trial counsel's representation, he could not be cumulatively prejudiced.

Second, appellant contends that his appellate counsel was ineffective by failing to argue on direct appeal that an expert's testimony

failed to assist the jury in understanding the evidence or determining an issue and that appellant was prejudiced by the testimony. Because this court nonetheless addressed these subjective issues and specifically concluded that the expert's testimony assisted the jury and did not prejudice appellant,[1] *Perez v. State*, 129 Nev., 850, 859-60, 313 P.3d 862, 868-69 (2013), there was no reasonable probability of a different outcome on appeal had counsel made these arguments. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."). The district court therefore properly rejected this claim.[2]

Lastly, appellant argues that his appellate counsel should have asserted that the State acted in bad faith in providing an inadequate notice of the expert's testimony. Appellant has not demonstrated prejudice, however, because this court concluded in *Perez*, 129 Nev., at 862-63, 313 P.3d at 870, that the expert witness notice was sufficient, and thus, any argument concerning the State's bad faith in providing an insufficient notice would not have altered the outcome. Further, appellate counsel challenged the adequacy of the expert witness notice and appellant has not pointed to anything that demonstrates the State's bad

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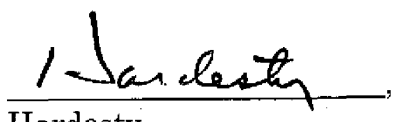
[1]In the direct appeal, this court asked for amicus briefing regarding these issues.

[2]Appellant also argues that the district court improperly applied the law-of-the-case doctrine. Because the district court alternatively denied this claim on the merits, we need not consider whether the court properly applied the law-of-the-case doctrine.

faith or that he was prejudiced by the expert notice.[3] Thus, the district court did not err in rejecting appellant's claim of ineffective assistance of appellate counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, J.
Gibbons



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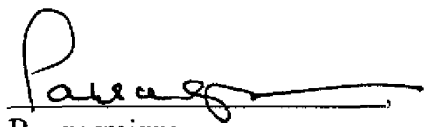
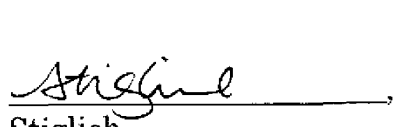


_____, J.
Parraguirre



_____, J.
Stiglich

DOUGLAS, J., with whom CHERRY, C.J., and PICKERING, J., agree, dissenting:

I respectfully dissent because the district court should have held an evidentiary hearing before denying appellant's postconviction petition for a writ of habeas corpus.

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[3]The dissent concludes that appellate counsel's failure to allege that the State acted in bad faith in providing its expert witness notice warranted an evidentiary hearing because appellant was surprised by the expert's testimony and did not know that the expert would be presented with hypotheticals involving facts similar to the underlying facts here. During a pretrial hearing, however, the State specifically informed appellant that the expert would testify regarding grooming techniques and then be asked to apply his knowledge of those techniques to the facts of this case.

[4]We reject appellant's argument that the district court's findings of fact and conclusions of law are inadequate.

The district court clearly erred when it concluded that appellant's ineffective-assistance-of-counsel claims were barred under the law-of-the-case doctrine because the issues had already been decided on appeal. In the direct appeal, this court did not address, nor could it have addressed, whether appellate counsel was effective. *See Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) (explaining that the law-of-the-case "doctrine only applies to issues previously determined, not to matters left open by the appellate court"). The district court's erroneous application of the law-of-the-case doctrine as grounds for denying the ineffective-assistance-of-appellate-counsel claims appears to have impacted the court's decision to deny the claims without a hearing.

An evidentiary hearing on a postconviction petition for a writ of habeas corpus is necessary when the claims are supported by specific factual allegations, the factual allegations are not belied by the record, and the factual allegations, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The majority concludes that appellant's claims of ineffective assistance of appellate counsel were properly rejected because the issues concerning the expert witness notice and the expert witness testimony on grooming activities were considered by this court and rejected on appeal, and thus appellant could not show a reasonable probability of a different outcome had his counsel adequately addressed them. The majority decision in the direct appeal, however, only included four justices and relied on amicus briefing because appellant's counsel's briefing regarding these issues was minimal.

The sufficiency of the expert witness notice was an incredibly close issue in the direct appeal. The dissent on direct appeal concluded that the State failed to provide an adequate expert witness notice because the notice was too brief, only identified the subject matter of the testimony in broad terms, and did not sufficiently address the substance of the expert's testimony. *See* NRS 174.234(2)(a) (requiring an expert witness disclosure to, at a minimum, give "[a] brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony"). Further, appellant's counsel failed to allege that the State had acted in bad faith in providing an inadequate notice when the expert's testimony about the specific conduct at issue appeared to have ambushed appellant as he had no knowledge of what materials the expert had reviewed or that the expert would be presented with hypotheticals identical to the facts of this case.

The issue of whether the expert's testimony on grooming activity assisted the jury was similarly close. The dissent in the direct appeal concluded that because the victim explained how appellant's conduct allayed her resistance to his abuse, the expert's testimony was unnecessary, confused the jury, and only served to imply that the expert found the testimony of the victim to be credible. *See People v. Williams*, 987 N.E.2d 260, 263 (N.Y. 2013) (explaining that tailoring hypothetical questions to include facts of the underlying case goes beyond explaining the victim's behavior and has "the prejudicial effect of implying that the expert found the testimony of [the victim] to be credible"). Therefore, there was a serious question as to whether the limited probative value of the expert's testimony, NRS 48.015, was substantially outweighed by the

danger of unfair prejudice, NRS 48.035(1), that was not adequately addressed by appellant's counsel in the direct appeal.

If appellate counsel had more fully and thoroughly briefed these issues, the decision on the direct appeal may have been different. Thus, an evidentiary hearing was necessary to determine whether a reasonably competent attorney would have more fully and thoroughly briefed the issues related to the expert witness notice or the admissibility of the expert's testimony. *See Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (providing that a counsel's performance is deficient when the representation fell below an objective standard of reasonableness). Because appellant presented claims of ineffective assistance of appellate counsel that if true, would entitle him to relief, an evidentiary hearing was warranted. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

I would reverse and remand this matter so the district court can hold the necessary evidentiary hearing.

Douglas, J.

We concur:

Cherry, C.J.

Pickering, J.

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

EXHIBIT F

EXHIBIT F

129 Nev., Advance Opinion 90

IN THE SUPREME COURT OF THE STATE OF NEVADA

NOE ORTEGA PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55817

FILED

NOV 27 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of lewdness with a child under 14 years of age and two counts of sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed.

David Phillips, Las Vegas,
for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Steven S. Owens, Chief Deputy District Attorney, and James R. Sweetin, Deputy District Attorney, Clark County,
for Respondent.

Robert Arroyo and Amy Coffee, Las Vegas,
for Amicus Curiae Nevada Attorneys for Criminal Justice.

Richard A. Gammick and Terrence P. McCarthy, Reno,
for Amicus Curiae Nevada District Attorneys Association.

3/10/14: Corrected per letter to publishers. OT

13-35850

BEFORE THE COURT EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are concerned with the admissibility of expert testimony related to sex offender grooming behavior and the effect that behavior has on a child victim. "Grooming" generally describes conduct or actions by an offender that are undertaken to develop a bond between the victim and offender and, ultimately, make the victim more receptive to sexual activity with the offender. In particular, we address whether (1) the district court abused its discretion in concluding that the State's expert was qualified to offer grooming behavior testimony, (2) the expert's testimony improperly vouched for the complaining witness's testimony, and (3) the expert witness notice was insufficient.

As a general matter, we hold that whether expert testimony on grooming behavior is admissible in a case involving sexual conduct with a child must be determined on a case-by-case basis, considering the requirements that govern the admissibility of expert testimony. Those requirements include whether the particular expert is qualified to testify on the subject, whether the testimony is relevant and the product of reliable methodology such that it will assist the jury to understand the evidence or to determine a fact in issue, and whether the testimony is limited in scope to matters that are within the expert's specialized knowledge. Applying those considerations, we conclude that the district court did not abuse its discretion in admitting the expert testimony in this case. We further conclude that the expert's testimony did not improperly

vouch for the complaining witness's testimony and that the State's pretrial notice was sufficient. We therefore affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Appellant Noe Perez was convicted of six counts of lewdness with a minor under 14 years of age and two counts of sexual assault of a minor under 14 years of age, involving his niece. At trial, the victim testified that her relationship with Perez began to change after she turned 13. He began calling her more and complimenting her, as well as winking at her when they attended the same parties. After driving her and a couple home one evening, Perez kissed the victim and touched her thigh when they were alone. He later called her and told her about a dream he had about undressing her and said that he was uncomfortable when she was close to other boys.

In September 2008, Perez invited the victim to accompany him and his wife, Maria, to Las Vegas, Nevada, for a concert. Perez's own children did not come on this trip. On the first evening, Perez played with the victim's feet under the table at dinner, hugged her while they walked along the street, and kissed the victim while Maria was in the shower. The next day, Perez again played with the victim's feet while she was swimming in the hotel pool, and the victim indicated that she wanted to spend time alone with Perez.

In the hotel room, Perez began kissing the victim after Maria had entered the bathroom and turned on the shower. Perez undressed the victim, kissed her breasts, rubbed her vaginal area, and penetrated her vagina with his fingers and tongue. Maria emerged from the shower and began screaming at Perez and the victim and slapping the victim. Hotel

security arrived shortly thereafter, and the victim told them that Perez had pinned her down and touched her. The victim testified that she told security that Perez forced her down because she feared Maria would leave her in Las Vegas. While Maria's reports to hotel security and responding officers were consistent with the victim's testimony, Maria testified that she only saw Perez kissing the victim, who was fully clothed.

Dr. John Paglini testified that the grooming relationship is a deceptive relationship with the intent of sexual contact. Dr. Paglini testified that an uncle touching his niece's foot under a table, winking at her, calling her and talking about how pretty she was, pulling her close while walking, touching her feet and arm in a swimming pool, touching her thigh, kissing her, showing concern for her spending time with other suitors, telling her about a dream in which he undressed her, and inviting her to attend an out-of-town concert with him could be construed as grooming behavior. In particular, he noted that showing concern for her spending time with other boys acts to isolate her from other intimate relationships and telling her about the dream is a method of probing her resistance to engaging in sexual behavior. The ultimate goal of such behavior is to establish a trusting relationship that lowers the child's resistance to engaging in sexual activity. Dr. Paglini also testified that whether a victim discloses abuse "is based upon the relationship to the perpetrator, the impact on the family and also the perceptions of the alleged victim regarding the people they're being interviewed on." Dr. Paglini noted that grooming typically results in lower rates of abuse disclosure.

DISCUSSION

The issues raised in this appeal involve expert testimony on "grooming" behavior.[1] The term "grooming" describes when an offender prepares a child for victimization by "'getting close to [the] child, making friends with the child, becoming perhaps a confidant of the child, [and] getting the child used to certain kinds of touching, [and] play activities.'" *State v. Stafford*, 972 P.2d 47, 49 n.1 (Or. Ct. App. 1998) (quoting trial expert testimony). It can also include gifts, praises, and rewards, *id.*; *State v. Hansen*, 743 P.2d 157, 160 (Or. 1987), *superseded by statute on other grounds as stated in Powers v. Cheeley*, 771 P.2d 622, 628-29 n.13 (Or. 1989), as well as exposure to sexual items and language, *People v. Ackerman*, 669 N.W.2d 818, 825 (Mich. Ct. App. 2003). This conduct is undertaken to develop an emotional bond between the victim and offender, *Hansen*, 743 P.2d at 160; *Morris v. State*, 361 S.W.3d 649, 651 (Tex. Crim. App. 2011), and may even lead the victim to feel responsible for his or her own abuse, *Stafford*, 972 P.2d at 49 n.1. The offender engages in grooming activity to reduce the child's resistance to sexual activity and reduce the possibility that the victim will report the abuse. *Ackerman*, 669 N.W.2d at 824-25.

Expert qualification

Perez contends that the State failed to present sufficient evidence of Dr. Paglini's qualifications to testify as an expert. He

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[1]We invited the participation of amici curiae Nevada Attorneys for Criminal Justice (NACJ) and Nevada District Attorneys Association (NDAA) concerning the relevance and applicability of expert testimony about sex offender grooming.

therefore argues that the district court abused its discretion in allowing Dr. Paglini to testify as an expert on grooming activity.

"The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); *see* NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."). Expert testimony is admissible if it meets the following three requirements, which we have described as the "qualification," "assistance," and "limited scope" requirements:

> (1) [the expert] must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (second alteration in original) (quoting NRS 50.275); *see also Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 658 (2010). We review a district court's decision to allow expert testimony for an abuse of discretion. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. As explained below, we conclude that Dr. Paglini's testimony satisfied the three requirements identified in *Hallmark*.

Qualification requirement

Perez argues that there was nothing to indicate that Dr. Paglini had sufficient training or experience to assert an opinion as to the effect of grooming behaviors on the young victim. Further, Perez complains that this was the first time that Dr. Paglini had testified regarding grooming behaviors and he failed to establish that his findings were subjected to peer review or that he had received specialized training in the area of sex offender grooming behaviors. Amicus NACJ asserts that the record is insufficient to support a conclusion that Dr. Paglini was qualified to testify to grooming techniques as he had not published any scholarly articles or testified regarding grooming techniques in any proceeding prior to Perez's trial.

We have identified several nonexclusive factors that are useful in determining whether a witness "is qualified in an area of scientific, technical, or other specialized knowledge" and therefore may testify as an expert. *Hallmark*, 124 Nev. at 499, 189 P.3d at 650. Those factors include "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Id.* at 499, 189 P.3d at 650-51 (footnotes omitted).

We conclude that Dr. Paglini's academic career and professional experience were sufficient to qualify him to testify as an expert on grooming behaviors and the effects of such behaviors on victims of sexual abuse. Dr. Paglini was formally educated in psychology. He held a bachelor's degree in psychology and a doctorate degree in clinical psychology. For the ten years prior to trial, Dr. Paglini "worked with family courts [conducting] child custody evaluations, dealing with the

issues of domestic violence or sex abuse allegations." During the eight years prior to trial, he conducted over 1,000 psychosexual evaluations on sex offenders. In conducting those evaluations, Dr. Paglini considered "variables like sex offending history, substance abuse problems, previous criminal problems . . . [and] the relationship of the offender and the victim." Thus, he spent the better part of his career studying the relationships between victims and offenders. In looking at these relationships, Dr. Paglini studied whether grooming by the offender occurred. Based on his formal schooling and academic degrees and his employment and practical experience, Dr. Paglini possessed the knowledge or experience necessary to render an opinion on grooming behaviors and the effects of such behaviors on victims of sexual abuse. *See Morris*, 361 S.W.3d at 666-67 ("A person can, through his experience with child-sex-abuse cases gain superior knowledge regarding the grooming phenomenon."); *see also People v. Atherton*, 940 N.E.2d 775, 783, 790 (Ill. App. Ct. 3d 2010) (child welfare supervisor who had worked as a sexual abuse therapist for over six years qualified to testify about child-sexual-abuse-accommodation syndrome); *Ackerman*, 669 N.W.2d at 824, 825 (psychotherapist with master's degree in social work and who works with sex offenders and victims qualified); *State v. Quigg*, 866 P.2d 655, 661 (Wash. Ct. App. 1994) (expert with 13 years' experience in victims services unit, degree in child abuse and neglect, and numerous hours in intensive training and specialized workshops on child abuse, who had also conducted interviews with 3,000 victims qualified to testify about grooming). Other jurisdictions have concluded that witnesses with less academic preparation, *see Haycraft v. State*, 760 N.E.2d 203, 210-11 (Ind.

Ct. App. 2001) (detective with experience investigating sexual abuse cases and who attended training on sexual abuse was qualified as a "skilled witness" to discuss grooming); *People v. Petri*, 760 N.W.2d 882, 888 (Mich. Ct. App. 2008) (detective with 15 years of law enforcement experience and who received training in forensic interviews of children would have qualified to offer testimony about grooming), or less experience than Dr. Paglini, *see Atherton*, 940 N.E.2d at 790, were sufficiently qualified to offer expert testimony on grooming or the effect of abuse on child victims.

We next examine whether Dr. Paglini's grooming testimony satisfied the "assistance" requirement of NRS 50.275.

Assistance requirement

The "assistance" requirement asks whether the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. The "assistance" requirement has two components: whether the testimony is (1) relevant and (2) the product of reliable methodology. *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 ("An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." (footnote omitted)). Although Perez only challenged Dr. Paglini's qualifications, at our invitation, amici briefed the relevance of expert testimony about sex offender grooming.

Relevance

Evidence is relevant when it tends "to make the existence of any fact that is of consequence to the determination of the action more or less probable." NRS 48.015. Generally, all relevant evidence is admissible. NRS 48.025. However, relevant evidence is not admissible if

its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury, or if it amounts to needless presentation of cumulative evidence. NRS 48.035.

Amicus NACJ contends that Dr. Paglini's testimony was not particularly probative because the issue for the jury to decide was whether Perez committed the charged acts, not his intent during the purported grooming activity. Further, NACJ argues, what probative value the testimony may have had was outweighed by the danger of unfair prejudice as the testimony compared Perez's behavior to the known behavior of sex offenders and created a distinct impression that Perez was a sex offender.[2] Amicus NDAA argues against a broad rule that would prohibit expert testimony about sex offender grooming and instead urges a case-by-case approach.

We conclude that expert testimony on grooming behaviors and its effect on child victims of sexual abuse may be relevant depending on the circumstances of the case. Dr. Paglini's testimony, under the circumstances in this case, was relevant. The victim testified that Perez engaged in seemingly innocuous flirtatious behavior and sexual discussions that finally escalated into more overt sexual contact, which is

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[2]The NACJ also contends that the State should not have been able to introduce an expert opinion as to Perez's *mens rea*. We disagree. *See* NRS 50.295 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); *Townsend*, 103 Nev. at 118, 734 P.2d at 708 (noting that an expert may give an opinion on issues that embrace the ultimate issue to be decided by the trier of fact so long as it is within scope of expertise).

not unlike a dating relationship. This trajectory of behavior seems to indicate even to the lay juror a definite design on engaging in sexual conduct with the victim and may suggest that expert testimony would be unnecessary to explain his designs. *See United States v. Raymond*, 700 F. Supp. 2d 142, 150-51 (D. Me. 2010) ("'Expert' testimony about matters of common sense is not helpful to a jury and carries the risk of unfair prejudice . . . ."). However, it was not immediately apparent how Perez's behavior affected the victim. Notably, the victim appeared to acquiesce to the abuse and later gave inconsistent reports about that abuse. The victim's conduct leading up to the abuse and her inconsistent reports after the abuse could have been influenced by Perez's prior fawning, the fear of Maria's reaction to the conduct, and later counseling. Therefore, Dr. Paglini's testimony that the goal of grooming is to reduce the resistance to the abuse as well as the likelihood of disclosure was beneficial to the jury in evaluating the evidence of abuse and assessing the victim's credibility. *See United States v. Hitt*, 473 F.3d 146, 158-59 (5th Cir. 2006) (finding no abuse of discretion by district court admission of expert grooming testimony to explain "return-to-the-abuser behavior"); *Jones v. United States*, 990 A.2d 970, 978 (D.C. 2010) ("The testimony helped to explain not only how a child molester could accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser."); *Howard v. State*, 637 S.E.2d 448, 451 (Ga. Ct. App. 2006) (admitting evidence of grooming, even if it incidentally places defendant's character in issue, to explain victim's unwillingness to disclose abuse); *Ackerman*, 669 N.W.2d at 825-26 (recognizing that most jurors lack knowledge of the conduct of sexual abusers and thus expert testimony

regarding grooming behavior was helpful); *State v. Berosik*, 214 P.3d 776, 782-83 (Mont. 2009) (admitting expert testimony about grooming as relevant to assessing victim credibility); *see also Smith v. State*, 100 Nev. 570, 572-73, 688 P.2d 326, 327 (1984) (holding that expert testimony about family dynamics related to sexual abuse is relevant to help the jury understand "superficially unusual behavior of the victim and her mother").

As to unfair prejudice, Dr. Paglini's testimony did not stray beyond the bounds set by this court and other jurisdictions for expert testimony. Dr. Paglini generally addressed how grooming occurs and its purpose. He then offered insight in the form of hypotheticals that were based on Perez's conduct and indicated that such conduct was probably grooming behavior. *See Shannon v. State*, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989) (providing that experts can testify to hypotheticals about victims of sexual abuse and individuals with pedophilic disorder). He did not offer an opinion as to the victim's credibility or express a belief that she had been abused. *See Townsend*, 103 Nev. at 118-19, 734 P.2d at 708-09. Dr. Paglini's testimony therefore meets the first component of the "assistance" requirement.

Reliability of methodology

This court has articulated five factors to use in evaluating the second component of the "assistance" requirement—whether an expert's opinion is the product of reliable methodology. These factors include

> whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on

> particularized facts rather than assumption, conjecture, or generalization.

Hallmark, 124 Nev. at 500-01, 189 P.3d at 651-52 (footnotes omitted). These "factors may be afforded varying weights and may not apply equally in every case." *Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 660 (2010).

Considering the applicable factors, we conclude that Dr. Paglini's opinion was the product of reliable methodology. In particular, Dr. Paglini practices in a recognized field of expertise, *see Ackerman*, 669 N.W.2d at 824, 825 (noting that psychotherapist who works with sex offenders is "clearly qualified in a recognized discipline"); *Morris*, 361 S.W.3d at 656 (recognizing study of behavior of sex offenders to be a legitimate field of expertise), and he testified about a phenomenon that courts have recognized as generally accepted in the scientific community, *see Morris*, 361 S.W.3d at 668 (concluding that grooming as a phenomenon exists); *see also State v. Stafford*, 972 P.2d 47, 54 (Or. Ct. App. 1998) (noting that observations about grooming behavior not drawn from testing or scientific methodology but derived from personal observations made in light of education, training, and experience constituted admissible evidence based on specialized knowledge); *Bryant v. State*, 340 S.W.3d 1, 9 (Tex. Crim. App. 2010) (same). Although he testified about the general nature of grooming, his testimony indicated that he had based this on specific facts observed in his practice and applied it to the specific circumstances of this case. However, the record does not indicate that Dr. Paglini's opinion had been subject to peer review or was testable or had been tested. While Dr. Paglini's methodology did not meet two of the *Hallmark* factors, those factors are not as weighty given the nature and

subject matter of his opinion testimony. *See Higgs*, 126 Nev. at ___, 222 P.3d at 660.

Finally, we must determine if Dr. Paglini's expert opinion was limited to the area of his expertise. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

Limited scope requirement

Perez argues that Dr. Paglini's testimony about neurological development was outside the scope of his proposed testimony and that the State failed to show that he had received neurological training. We agree. Dr. Paglini's testimony, for the most part, proceeded within the scope of his expertise. He testified about the phenomenon of grooming and its effect on the victim. However, during a digression, Dr. Paglini testified regarding adolescent neurological development. As Dr. Paglini had not demonstrated any specialized knowledge in neuroscience or adolescent neurological development, this part of his testimony exceeded the scope of his specialized knowledge. *See Kelly v. State*, 321 S.W.3d 583, 600-01 (Tex. Crim. App. 2010) (concluding that expert who lacked medical training was not qualified to testify about grooming when her testimony was predicated on detailed medical information). However, Perez did not object to this digression on the basis that it exceeded the scope of Dr. Paglini's qualifications. Because Dr. Paglini's digression was brief, as compared to the whole of his testimony, we conclude that it did not amount to plain error. *See Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (reviewing for plain error where party fails to object at trial), *abrogated on other grounds by Nunnery v. State*, 127 Nev. ___, ___ n.12, 263 P.3d 235, 253 n.12 (2011).

Vouching

Perez also contends that Dr. Paglini's testimony impermissibly bolstered the victim's testimony and therefore the district court abused its discretion in admitting it. We disagree.

A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness. *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). Although an expert may not comment on whether that expert believes that the victim is telling the truth about the allegations of abuse, *Townsend*, 103 Nev. at 118-19, 734 P.2d at 709; *see also Lickey*, 108 Nev. at 196, 827 P.2d at 827 (noting that expert commentary on the veracity of the victim's testimony invades the prerogative of the jury), Nevada law allows an expert to testify on the issue of whether a victim's behavior is consistent with sexual abuse, if that testimony is relevant, *see Townsend*, 103 Nev. at 118, 734 P.2d at 708; NRS 50.345 ("In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault.").

Dr. Paglini did not vouch for the victim's veracity. He offered a general opinion about the effect of grooming on a child victim of sexual abuse. He did not offer a specific opinion as to whether he believed that the victim in this case was telling the truth. "[T]he fact that such evidence is incidentally corroborative does not render it inadmissible, since most expert testimony, in and of itself, tends to show that another witness either is or is not telling the truth." *Davenport v. State*, 806 P.2d 655, 659 (Okla. Crim. App. 1991); *see Townsend*, 103 Nev. at 118-19, 734 P.2d at

709 (acknowledging that "expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness" but that relevant testimony by a qualified expert within that expert's field of expertise is admissible "irrespective of the corroborative or refutative effect it may have on the testimony of a complaining witness" so long as the expert does not "directly characterize a putative victim's testimony as being truthful or false"); *Bryant*, 340 S.W.3d at 10 ("The information about grooming could have influenced the jury's credibility determinations, but only in an indirect fashion."). Therefore, the district court did not abuse its discretion in admitting the testimony.

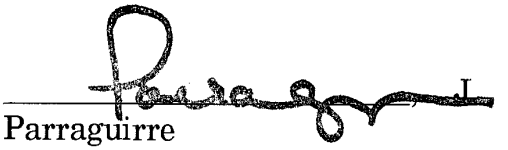
Sufficiency of expert witness notice

Last, Perez contends that the State's notice of expert testimony was inadequate and therefore the district court should have precluded the State from calling Dr. Paglini. We disagree.

The State filed its notice of witnesses over one month before the start of trial. *See* NRS 174.234(2) (requiring State to provide notice of expert witnesses at least 21 days prior to trial). To comply with NRS 174.234(2), the notice had to include: "(a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy of all reports made by or at the direction of the expert witness." The State's notice in this case indicated that Dr. Paglini would "testify as to grooming techniques used upon children" and included his curriculum vitae. Dr. Paglini's curriculum vitae indicated that he had conducted sexual offender assessments on adult offenders and sexual offense and violence risk assessments on juveniles. The State did not

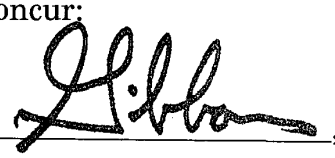
submit any reports produced by Dr. Paglini because he did not prepare any reports related to the litigation. Perez's brief argument does not allege that the State acted in bad faith or that his substantial rights were prejudiced because the notice did not include a report or more detail about the substance of Dr. Paglini's testimony. *See Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Under the circumstances, we discern no abuse of discretion in allowing Dr. Paglini to testify. *See id.* ("This court reviews a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion.").

Having rejected Perez's challenges to the admission of Dr. Paglini's testimony, we affirm the judgment of conviction.[3]

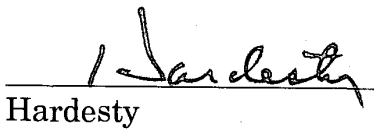


Parraguirre, J.

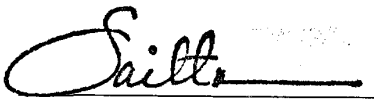
We concur:



Gibbons, J.



Hardesty, J.



Saitta, J.

[3]We deny Perez's motion to strike NACJ's request for a remand for additional supplementation of the record as moot.

DOUGLAS, J., with whom PICKERING, C.J., and CHERRY, J., agree, concurring in part and dissenting in part:

I concur with the majority's conclusion that the admissibility of expert testimony about grooming should be decided on a case-by-case basis under NRS 50.275 and *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). However, such testimony should be admitted in rare circumstances, and I disagree that this case warrants its admission. The State did not introduce sufficient specific evidence that Dr. Paglini was qualified to discuss grooming of child victims by sex offenders, and his testimony did not assist the jury in understanding the victim's actions and unfairly prejudiced Perez. I also disagree with the majority's conclusion that the expert-witness notice was sufficient.

Admission of expert testimony

Expert testimony is admissible if it meets three requirements, which we have described as the "qualification," "assistance," and "limited scope" requirements:

> (1) [the expert] must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark, 124 Nev. at 498, 189 P.3d at 650 (second alteration in original) (quoting NRS 50.275); *see also Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 658 (2010). As I explain below, the State failed to put forth sufficient

evidence to demonstrate that Dr. Paglini was qualified to offer expert testimony and the testimony that he provided failed to assist the jury.

Expert qualifications

The majority concludes that Dr. Paglini's academic career and professional experience were sufficient to qualify him to offer the testimony on the grooming phenomenon. It notes that Dr. Paglini is a clinical psychologist who had conducted child custody evaluations, pretrial competency evaluations, death penalty evaluations, and psychosexual evaluations. However, Dr. Paglini did not identify how many of his prior evaluations involved child victims of sexual abuse or grooming, and he had not written any treatises or articles on the phenomenon.

Dr. Paglini's principal qualification, according to his testimony, was his work preparing "risk assessments" for use in sentencing convicted sex offenders. "[I]t's my job as a psychologist . . . to educate the judge on the history of the defendant, what their violent history and sex offender history is" so the court can "understand what the risk of reoffending is towards a community" in sentencing. Continuing, Dr. Paglini testified, "You're looking at certain variables like sex offending history . . . . Was there grooming involved, and what was the grooming?" Notably absent from Dr. Paglini's testimony about his qualifications was any reference to work with victims of grooming. Rather, the focus was—and remained—on what sex offenders do that can constitute grooming.

Grooming testimony is permissible in certain child-sex-abuse cases, normally to explain the impact the grooming had on the victim's behavior in terms of delayed reporting and the like. *See* NRS 50.345 ("expert testimony is not inadmissible" in sexual assault cases when

offered to show "the behavior or condition of a victim of sexual assault"). But here, the record does not show Dr. Paglini's qualification to address the impact on the victim of grooming activity. He thus did not demonstrate with sufficient specificity that his formal schooling, employment experience, or practical experience qualified him to testify about grooming and its impact on the victim in this case. *See Hallmark*, 124 Nev. at 499, 189 P.3d at 650-51; *see also* NRS 50.275; *Jones v. United States*, 990 A.2d 970, 975, 978-80 (D.C. 2010) (former FBI agent who studied 400 to 500 cases of sexual abuse involving teenage victims as well as published writing in manuals on sexual abuse and the behavior of child molesters qualified); *Morris v. State*, 361 S.W.3d 649, 668 (Tex. Crim. App. 2011) (recognizing that law enforcement officer "with a significant amount of experience with child sex abuse cases may be qualified" to discuss grooming).

Although this court has not specified the requirements for admitting expert testimony about grooming, I would have preferred a more thorough record for reviewing the district court's exercise of discretion, including the link between his expertise and the subject matter of the testimony being offered to assist the jury in this case.

Assistance

The record further fails to demonstrate that Dr. Paglini's testimony was sufficiently relevant to have assisted the jury. *See* NRS 50.275 (requiring that expert testimony assist the jury to "understand the evidence or to determine a fact in issue"); *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (requiring that expert testimony be "relevant and the product of reliable methodology" (footnote omitted)). The majority notes that

Perez's behavior and conduct with the victim began as mildly flirtatious and escalated to the point of being overtly sexual. I agree with the majority that Perez's actions needed no expert explanation in and of themselves as his designs for engaging in sexual conduct with the victim were evident from the escalating nature of his actions. However, I part from the majority's conclusion that expert testimony was necessary to explain the effect of Perez's actions on the victim.

The testimony was not of assistance because the victim could, and in fact did, explain how Perez's conduct allayed her resistance to his abuse. The victim, who was 14 years old at the time of trial, testified about events that occurred only the year before, described how the grooming activity made her feel, and acknowledged that she developed feelings for Perez. Further, she did not resist Perez's physical advances because of these feelings. In addition, she explained her hesitance to fully and accurately disclose the nature of Perez's abuse. Remarkably, her resistance to disclosing the abuse turned on fear of her aunt's reaction, not the effects of Perez's grooming. Because the victim explained during her testimony that Perez's conduct ingratiated himself to her and, to some extent, beguiled her, *see Morris*, 361 S.W.3d at 652, 667 (describing grooming behavior as "really no different from behavior that occurs in high school dating"), the expert testimony was unnecessary, *see United States v. Raymond*, 700 F. Supp. 2d 142, 152 (D. Me. 2010) (noting that expert testimony on motivation of child victim is not required when victim can testify about her motivations); *State v. Braham*, 841 P.2d 785, 790 (Wash. Ct. App. 1992) ("Surely, expert opinion is not necessary to explain that an adult in a 'close relationship' with a child will have greater

opportunity to engage in the alleged sexual misconduct."). While this court tolerates expert testimony that *incidentally* bolsters another witness's testimony, *see Townsend v. State*, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987) (recognizing that expert testimony may have a corroborative effect on the complaining witness's testimony), the testimony here *primarily* served to augment the victim's testimony.

As the expert testimony was not probative with regard to the victim's actions, it became unfairly prejudicial in how it characterized Perez's behavior. Unnecessary expert testimony carries the risk of unduly influencing the jury:

> Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged.

United States v. Montas, 41 F.3d 775, 784 (1st Cir. 1994); *see also Raymond*, 700 F. Supp. 2d at 150 (noting that expert witness testimony about matters in the jury's common sense "invites a toxic mixture of purported expertise and common sense"). Although expert insight into the effect of grooming behavior, *i.e.*, the victim's emotional dependence on the abuser, may have appeared relevant to understanding the victim's reluctance to come forward, testimony about the defendant's prior bad acts, which may have fostered that emotional dependence, did not explain the victim's behavior and carried a significant risk of unfair prejudice to the defendant by characterizing his prior actions as similar to those of

other sex offenders. *See State v. Hansen*, 743 P.2d 157, 160-61 (Or. 1987), *superseded on other grounds by* Or. Evidence Code R. 103, *as stated in Powers v. Cheely*, 771 P.2d 622, 628 n.13 (Or. 1989). Thus, where expert testimony addresses a defendant's prior bad acts, "[c]are must be taken in order that prior acts evidence is not bundled into an official-sounding theory and coupled with expert testimony in order to increase its apparent value in demonstrating a 'plan' or malevolent intent by the defendant." *State v. Coleman*, 276 P.3d 744, 750 (Idaho Ct. App. 2012).

Apart from his testimony about the impulsivity of adolescents due to lack of cortical function in the frontal lobes of the brain—testimony the majority correctly concludes Dr. Paglini was not qualified to give—Dr. Paglini said very little about grooming's impact on victim behavior that, left unexplained, would confuse the jury. Rather, Dr. Paglini was asked to define grooming and then to answer a series of purported hypotheticals, such as, "You have a situation of a 13-year-old niece who had known her 33-year-old uncle her whole life and had seen him on a regular basis, would the following conduct over about a three and four month period potentially constitute grooming activity? First touching the niece's foot under the table at family parties or winking at the niece." There follows a series of hypothetical questions, each one identifying something the defendant did in relation to the victim, such as calling her, objecting to her having boyfriends, and concluding it might be grooming. Such testimony

> exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case. [It] went beyond explaining victim behavior that might be beyond the ken of a

> jury, and had the prejudicial effect of implying that the expert found the testimony of this particular claimant to be credible.

People v. Williams, 987 N.E.2d 260, 263 (N.Y. 2013); *see State v. McCarthy*, 283 P.3d 391, 394-95 (Or. App. 2012).

Here, Dr. Paglini focused on Perez's uncharged bad (and, in some instances, perhaps innocent) acts and characterized them as motivated purely by his intent to sexually abuse his niece. The testimony carried a significant risk that the jury would "make the quick and unjustified jump from his expert testimony about behavioral patterns to guilt in a particular case that shows similar patterns." *Raymond*, 700 F. Supp. 2d at 150; *see also Hansen*, 743 P.2d at 161 (noting that where probative value is lacking, "the danger of unfair prejudice to defendant from the unwarranted inference that, because defendant engaged in acts that sexual child abusers engage in, she, too, is a sexual child abuser is simply too great"). Thus, even if the testimony had some limited probative value, NRS 48.015, that value was substantially outweighed by the danger of unfair prejudice, NRS 48.035(1).

Considering that the State failed to elicit sufficient information regarding Dr. Paglini's qualifications and the victim was able to articulate how Perez's prior conduct affected her, I would conclude that the district court abused its discretion in admitting this testimony. I reiterate that I am not opposed to the use of expert testimony on grooming in all cases. It certainly becomes more relevant where the grooming activity in question is not clearly apparent or the child witness is of such an age that he or she could not plainly express how that activity affected

him or her. Nevertheless, in that situation, the State must make a sufficient showing that the expert has sufficient academic or professional experience specifically related to grooming of child sexual assault victims.

Expert-witness notice

I further disagree with the majority's conclusion that the expert-witness notice was adequate to inform the defendant of the extent of testimony that the State sought to elicit. NRS 174.234(2) requires pretrial disclosure of experts in cases involving gross misdemeanor or felony charges. The disclosure must, at minimum, give "[a] brief statement regarding the subject matter on which the expert witness is expected to testify *and the substance of the testimony*." NRS 174.234(2)(a) (emphasis added). The State's expert-witness disclosure designated Dr. Paglini and stated he would "testify as to grooming techniques used upon children," nothing more. This notice was far too brief, and while it identified the subject matter of the testimony in the broadest of terms, it did not sufficiently address the substance of that testimony. As noted above, most of Dr. Paglini's direct testimony involved his opinion of hypothetical scenarios posed by the prosecutor that mirrored the specific facts of this case. The notice did not inform Perez that the State sought Dr. Paglini's opinion on these matters. Further, the notice did not inform the defense that Dr. Paglini had reviewed materials specific to this case, including the victim's statements, reports, and transcripts of other hearings. Therefore, Dr. Paglini's testimony about the specific conduct at issue in this case ambushed Perez with expert testimony he was not warned to be prepared to defend against.

Harmless error

I further conclude that the error in admitting Dr. Paglini's testimony was not harmless. *See Fields v. State*, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009) (reviewing erroneous admission of evidence for harmless error). In considering whether the erroneous admission of evidence had a "'substantial and injurious effect or influence in determining the jury's verdict,'" *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), this court considers "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

This case is impacted by all three factors. First, the question of guilt or innocence is close. The testimony supporting the charges was inconsistent. The victim's testimony was inconsistent with her initial reports to hotel security and the police. Perez's wife, whose initial reports to hotel security and the police supported the allegations of abuse, testified consistently with Perez's admission that he kissed the victim. No physical evidence supported the allegations. Second, the character of the error was particularly damaging in this case. Expert testimony which rationalized the inconsistencies in the victim's testimony had a significant impact on the jury's determination of guilt. The problem was exacerbated by the emphasis Dr. Paglini and the State placed on Dr. Paglini's work conducting "risk assessments" on known sex offenders. Proceeding act by act through hypothetical questions concerning the flirtations that preceded the Las Vegas assault portrayed Perez as a sex offender, on a par with the 1,000 other convicted sex offenders of risk to the community Dr.

Paglini had evaluated. But Perez was not on trial for grooming over a three to four month period in California. The charges he faced involved a single incident in a Las Vegas hotel room that occurred in the space of time it took Perez's wife, the victim's aunt, to take a shower in the room's adjacent bathroom. Lastly, Perez was charged with serious sexual offenses against a minor, for which he has been sentenced to multiple life sentences, with the possibility of parole after 35 years. *See* NRS 200.366(3)(c); NRS 201.230(2).

Accordingly, I would reverse the judgment of conviction and remand for a new trial.

Douglas, J.

I concur:

Pickering, C.J.

Cherry, J.

EXHIBIT G

EXHIBIT G

JOC

FILED
MAR 19 2010
CLERK OF COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NOE ORTEGA PEREZ
#2684517

Defendant.

CASE NO. C253754

DEPT. NO. XII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 2 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 3 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 4 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 5 – SEXUAL ASSAULT WITH A

MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 6 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 7 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 8 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 9 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230, and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 2 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 3 – NOT GUILTY; COUNT 4 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 5 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 6 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 7 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; COUNT 8 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 9 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230; thereafter, on the 9TH day of March, 2010, the Defendant was present in court for sentencing with his counsel, DAVID L. PHILLIPS, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee and a $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 5 - TO LIFE with a MINIMUM Parole Eligibility after THIRTY-FIVE (35) YEARS; AS TO COUNT 8 - TO LIFE with a MINIMUM Parole Eligibility after THIRTY-FIVE (35) YEARS, COUNT 8 to run CONCURRENT with COUNT 5; AS TO COUNT 1 - TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 1 to run CONCURRENT with COUNT 8; AS TO COUNT 2 – TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 2 to run CONCURRENT with COUNT 1; AS TO COUNT 4 - TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 4 to run CONCURRENT with COUNT 2; AS TO COUNT 6 - TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 6 to run CONCURRENT with COUNT 4; AS TO COUNT 7 - TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 7 to run CONCURRENT with COUNT 6; AS TO COUNT 9 - TO LIFE with a MINIMUM Parole Eligibility after TEN (10) YEARS, COUNT 9 to run CONCURRENT with COUNT 7; AS TO COUNT 3 – DISMISSED; with FIVE HUNDRED FORTY-ONE (541) DAYS credit for time served.

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 16 day of March, 2010.

MICHELLE LEAVITT
DISTRICT JUDGE

SD