No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

MARC ANTHONY COLON.,

Petitioner,

v.

NETHANJAH BREITENBACH, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals err in denying a Certificate of Appealability ("COA") consistent with the standards set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), to review the holding of the district court and the Nevada Supreme Court that trial counsel's failure to adequately conduct pretrial investigation and witness preparation concerning Mr. Colon's alibi witnesses, which led him to promise the jury a defense that he could not deliver, did not deprive him of due process and a fair trial due to ineffective assistance of trial counsel?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes and Rules

Other Authorities

I. PRAYER FOR RELIEF

Mr. Marc Anthony Colon respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his request for a Certificate of Appealability ("COA") from the denial of his habeas corpus petition under 28 U.S.C. § 2254. The basis of this petition is that the Ninth Circuit's denial of a COA is

(1) contrary to the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with the standards for a COA set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), and other Supreme Court cases cited herein, and

(2) contrary to the Sixth Amendment to the United States Constitution as determined by this Court's binding precedents under *Strickland v. Washington,* 466 U.S. 668 (1984) and *Lafler v. Cooper,* 566 U.S. 156 (2-12) and other prior and subsequent Supreme Court precedents requiring effective assistance of counsel in trial and plea bargaining, and

(3) as inexplicable as it was unexplained, in violation of this Court's authority in *Jackson v. Felkner,* 562 U.S. 594 (2011).

In the alternative, the state and federal courts below have decided an important question of federal law that has not been, but should be, settled by this Court.

II. OPINION BELOW

On July 18, 2024 a two-judge panel of the Ninth Circuit denied Mr. Colon's petition for a COA in an Order that was final and unpublished. *Colon v. R. Baker and Attorney General of the State of Nevada,* No. 23-4069 (9th Cir. July 18, 2024), *Appendix A.*

III. JURISDICTION

On July 18, 2024, a two-judge panel of the Court of Appeals for the Ninth Circuit issued an unpublished Order denying Mr. Colon's petition for a COA. *Appendix A.* This is the final judgment for which a writ of certiorari is sought.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

> No person shall be held to answer for a capital, or otherwise infamous crime…
> nor be deprived of life, liberty, or property, without due process of law….

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

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Facts Material to the Questions Presented

Background Facts

Since the issue in this petition for writ of certiorari is ineffective assistance of trial counsel, the following facts serve mostly as background of the underlying case.

On January 12, 2006, at about 7:30 a.m., Enrique Reyes went to the Villa Cordova apartments in Clark County, Nevada and began looking through a dumpster. He found the deceased body of a small child in the dumpster and immediately called 911. The child was ultimately identified as three-year-old Crystal Figueroa.

The child was fully dressed when found. The autopsy determined that she appeared malnourished, weighing twenty-three pounds; she had previously weighed twenty-five pounds, according to medical records. There were many bruises throughout her entire body. The injuries were probably inflicted at or within three days of the time of death. Crystal's duodenum had been completely severed. A

severed duodenum would possibly cause vomiting and lethargic behavior. Death occurred within twenty-four hours from the time of injury. Crystal died of blunt force trauma to the torso. The pathologist could not say whether the child would have lived if Gladys Perez had taken her daughter to a hospital.

On a box located in the dumpster and covering Crystal's face, fingerprints were located, but they did not match the prints of Marc Anthony Colon or Gladys Perez.

Jennifer Shreves was the manager at the Bargain Motel in Las Vegas. On January 9, 2006, Mr. Colon and Gladys Perez rented a room at the hotel and were accompanied by three little girls. The couple rented the room for a week but only stayed for three days. When Perez was leaving the motel, she told the manager that they had found a place to live; she appeared to have no expression.

Sharon Brock worked as a housekeeper at the Bargain Motel and lived there with her husband John Brock. In the apartment the defendants had rented, Ms. Brock continuously heard a female yelling and believed that the children were being mistreated. Ms. Brock heard the woman yelling all three nights. She even heard things being thrown around the room. However, she told the police she did not hear a male voice in the apartment. Ms. Brock remembered the woman did not sound scared but was yelling with anger and throwing things so hard it made the apartment vibrate. During this time, she would hear the children crying. Ms. Brock was so upset by what she heard that she reported it to Ms. Shreves. Later, at trial, it became unclear whether Ms. Brock heard the sounds from the Colon-Perez room or a different room.

At the time of the autopsy, Crystal Figueroa's identity was unknown. On February 22, 2006, homicide officers received a call from Detective Dwayne Cornett of the Tulare County Sheriff's Office, California, indicating that Ms. Lilia Perez had seen a flyer with the child's photograph and believed that it may be her granddaughter. Las Vegas Homicide Detectives went to Victorville to obtain a DNA sample from Lilia Perez. Lilia told the police that Gladys told her that Crystal got sick and she took her to the hospital and left her there. There, they also contacted Gladys Perez, who was in the hospital at the time.

Gladys had a black eye at the time the detectives interviewed her. Based on information received from Lilia and Gladys Perez, police flew to St. Paul, Minnesota to apprehend Mr. Colon. Detectives arrived at the residence of Jose Ruiz, Mr. Colon's uncle, searching for Mr. Colon. Mr. Colon had two daughters with him in Minnesota. Maxine and Marlene were at school when the police arrived at Mr. Ruiz's apartment. Jose Ruiz's daughter, Amy, agreed to get the children from school, for the detectives. Police interviewed Maxine and Marlene Colon at Mr. Ruiz's residence. Maxine, who was about 10 years old at the time, told the police that Marlene, Crystal and Lesley Perez along with both defendants drove two vehicles from California to Las Vegas. One vehicle was her mother's, and the other was a burgundy Intrepid. At first, they all stayed at the Stratosphere. They later left the Stratosphere to stay at the Bargain Motel.

Maxine remembered that Crystal was throwing up and coughing. Both Marlene and Lesley were asleep. Maxine said she called her dad who began cleaning up the

vomit. Maxine was worried so she did not go back to sleep. Mr. Colon left to get medicine after Crystal got sick. Maxine remembers her father giving Crystal Pepto-Bismol. Maxine told the police her father had cleaned up Crystal and given her a bath after she had thrown up. Maxine then fell back asleep. In the morning, Crystal wasn't there anymore. Gladys and Mr. Colon both told Maxine they had taken Crystal to her grandmother's house. Everyone except Crystal left the motel and drove to a casino where Gladys left her car behind.

Glady's work supervisor testified that her demeanor changed after the incident, and that she had black eyes and bruises.

At trial Maxine denied that her father ever hit Crystal. However, in an unrecorded statement, detectives claim that Maxine told them Mr. Colon caused the bruise to Crystal's back. Police claimed that Maxine said Daddy had punched Crystal, that he came out of the bathroom with his fist closed. Maxine said that she told the police her dad hit Crystal but only because the police had told her to say that. Maxine said the police told her that if she said her dad hit Crystal, everything would be alright, and her father would be released from jail. Maxine explained that the police didn't want to hear about Gladys but wanted to talk about her father.

At trial, Maxine remembered telling the Grand Jury that Crystal said "ow" after Gladys hit her at the hotel. In fact, Maxine only observed Gladys hit Crystal, the day before they left Las Vegas. When Gladys hit Crystal, Maxine cried because Crystal said "ow" and after that started throwing up. At that time, her dad was gone to get food. Maxine estimated this event occurred at approximately eight p.m.

Marlene Colon recalled that the police were nice but that they were trying to switch words around as if they were trying to make Maxine and Marlene "see something". Marlene recalled that Crystal was sick and throwing up when they were at the motel in Las Vegas. Everyone was at the motel when Crystal got sick except for Mr. Colon, who was getting food and medicine. Marlene believed someone called Mr. Colon from the motel to get medicine. The medicine was pink. The next morning, Crystal was gone. Then everyone packed up and left the motel. Marlene had seen a bruise on Crystal's back when she was taking a bath. She saw Mr. Colon hit Crystal on one occasion, on her back. Crystal only cried a little after Mr. Colon hit her. Marlene said during her trial testimony, "I don't think I saw him hit her, but that's what I think ..." Marlene explained that it happened a long time ago and she doesn't think she could remember if she saw Mr. Colon hit her. She added, though, that when Mr. Colon hit Crystal, it was just a little one, it wasn't that hard.

At trial, Lesley Figueroa was nine years old. Lesley's little sister Crystal was three years old when they came to Las Vegas. Lesley remembers Crystal throwing up at nighttime. Lesley recalls everyone being at the motel when Crystal got sick. Her mother cleaned up Crystal after she got sick. According to Lesley, Gladys took Crystal into the bathroom and gave her a shower. Lesley fell asleep and then the next morning she didn't know where Crystal was. Lesley did not see anybody hurt Crystal in Las Vegas. Lesley did not tell the police that Mr. Colon ever hit Crystal. Lesley remembers that Mr. Colon liked Crystal.

After leaving Las Vegas, the Defendants, Leslie, Maxine, and Marlene all went

to Oregon. Beatrice Ruiz, Mr. Colon's cousin, was living in Portland in January 2006. Mr. Colon, Gladys, and the three girls stayed at her residence. Gladys had no visible injuries when she arrived at Beatrice's residence. Gladys told Beatrice that Crystal's father had taken her.

During the time that Gladys and Mr. Colon spent with Beatrice, they were affectionate with each other. Beatrice described them as love birds. After leaving Beatrice's residence, the Defendants and the three girls went to stay with Nellie Rodriguez, Mr. Colon's cousin, in Portland. Nellie Rodriguez lived with her family at the time. Nellie also described the Defendants as affectionate towards each other. Nellie noticed a bruise on Gladys' face. Gladys explained she had been in a car wreck. On one occasion, Nellie observed Mr. Colon swipe the phone from Gladys and give her a little "knock" with it. Nellie explained, "it wasn't nothing major". Gladys told Nellie that Crystal was with her grandmother. They stayed with Nellie until her birthday, on February 13. Nellie observed Gladys come out of the bedroom with a black eye after hearing the Defendants argue and noticed that Gladys had bruises on her while she was staying with her.

The Defendants and the three girls left Oregon and went to St. Paul, Minnesota by train. They departed on February 13, 2006. They arrived in Minnesota on February 15, 2006. They stayed with Mr. Colon's nephew, Jose Ruiz. In Minnesota, Gladys was pregnant and often sick and throwing up. Ruiz received a phone call from law enforcement asking if Gladys Perez was at the residence. He told the police "No" because he knew Perez as Angelina Gomez. Gladys and Leslie were at

Mr. Ruiz's residence for approximately one week. Mr. Ruiz observed an argument between Mr. Colon and Gladys; he had to get in between them. Mr. Ruiz said that Gladys wore heavy makeup to possibly cover up bruises. Her eyes were red after the argument. Eventually, Mr. Ruiz drove Gladys and Mr. Colon to the bus station so that Gladys could take a bus home. Gladys stated she did not want to go home and called Mr. Ruiz after he and Mr. Colon left the bus station.

Amy Ruiz lived with her father Jose. Amy saw Mr. Colon tattooing the name C-R-Y-S-T-A-L on Gladys' back.

Mr. Colon was arrested in Minneapolis, where he registered Maxine and Marlene in school under their real names. After Mr. Colon's arrest, Maxine and Marlene continued to stay with Mr. Ruiz and converse with their father in jail. The jail phone calls were recorded. During one phone call, Marlene told Mr. Colon that she told the police that he had hit Crystal and Mr. Colon asked his daughter if she told the police that Gladys had hit Crystal.

Sara Jensen is Mr. Colon's sister. After Mr. Colon's arrest, Sara flew to St. Paul to bring Marlene and Maxine back to California. Sara Jensen relayed a conversation she had with Maxine. Jensen said that Maxine said Crystal was wrapped in a blue blanket and they were going to take her to the hospital.

Prior to leaving Minnesota, Marlene and Maxine were interviewed by Las Vegas Detectives. Detective Vaccaro said that Maxine indicated that the initial fight between the Defendants occurred because Crystal "was pooping her pants". Allegedly, Maxine told detectives that Mr. Colon hit Crystal in the back. After,

Crystal began "puking", Detective Vaccaro stated that Marlene told him "Daddy hit Crystal but not me or Maxine". These interviews were not tape recorded. Leslie told Detective Vaccaro that Mr. Colon had "socked" Crystal.

At the St. Paul jail, Detective Vaccaro began to interview Mr. Colon. Mr. Colon requested the interview not be tape recorded. He was asked who killed Crystal and he allegedly answered, "that's not my kid". Mr. Colon denied placing Crystal in the dumpster. He never admitted to killing Crystal. In fact, Mr. Colon denied hitting any of the children. Detective Vaccaro testified Mr. Colon stated, "I love that girl. She kissed me on the lips before she died".

In March of 2004, Mr. Colon received CPR training. On the evening of Crystal's death, Mr. Colon had asked Gladys to go get Pedialyte or Motrin from the Walgreens. Mr. Colon said that he gave Crystal a bath. Crystal threw up the medicine that Gladys obtained. Mr. Colon said they decided to take Crystal to the hospital because she got worse. Gladys dressed Crystal and they noticed she was not breathing. Mr. Colon attempted CPR on Crystal. He said he didn't think to call 911; he just wanted to take her to the hospital. Mr. Colon explained that he had been out gambling and he had lost money, which upset Gladys. Allegedly Mr. Colon stated, "Crystal's death was a result of domestic violence".

During trial, on September 17, 2007, Perez wrote Mr. Colon an explicitly graphic sex letter which was introduced by the State to demonstrate Perez's infatuation with Mr. Colon.

The jury found both Mr. Colon and Gladys Perez guilty, and Mr. Colon was

sentenced to life in prison without the possibility of parole.

Facts Relating to Ineffective Assistance of Trial Counsel

Trial counsel relied on an alibi defense. He informed the jury of this defense in opening statement:

> "'Ow." "Ow" is what Crystal said on January 11th 2006. She said, "Ow." And Maxine started to cry. Maxine started to cry because she saw Crystal cry. And she cried when she saw her say "ow." That's what Crystal said. She said, "Ow." That's what Maxine told the grand jury, that on January 11th, 2006, she saw Crystal struck, hit hard. It was almost dark. It was dark. It was 8:00 o'clock at night. That's what she thought. That's what she told the grand jury, and that's what she told Ms. Weckerly [the prosecutor]. Maxine Colon said that when Crystal was hit hard that she began to cry. She said that *her daddy had gone to get something to eat.* She didn't know why *Gladys Perez had hit her daughter Crystal*.

(emphasis added).

After establishing the time and date of the killing to the jury, and the fact that Mr. Colon was not present then, defense counsel went on to tell them it was Gladys that killed Crystal:

> And in fact the police ask[ed] Ms. Brock [who lived in the motel room below the defendants] they say to her, is it possible the woman was being abused by a man; and she says, oh, no, *I didn't hear a man, I heard a woman and she was angry. In fact, Sharon Brock concludes to the police that the woman is mistreating children in [room] 221,* right below her. She actually says it. And that's important, ladies and gentlemen. Remember that. 221, the apartment right below. This is where she listens to this. And she says, it wasn't just the last night, which would be January 11th, the night that Crystal lost her life, but she had heard it before, she had heard it, abuse going on by a female. And on the 11th she said she heard things being thrown against the wall while the female was yelling and screaming. She said -- Sharon Brock said that it made her apartment vibrate. *And she told the police that the woman was abusing the children.*

(emphasis added).

Defense counsel then told the jury about Mr. Colon's alibi, where he was when Gladys was killing Crystal:

> Now, what's interesting about this is that during the 11th—Appellant has a child with a woman named Alex Carbajal, okay. She's not a particularly (inaudible) person. She doesn't necessarily – doesn't remember her times accurate. But what we know about Alex Carbajal is that the State went and interviewed her, recorded a statement. And when I say the State, I mean even the prosecutors went out and interviewed her on June 4th of this year. And she describes how Mr. Colon was in fact over there, she thought between three and five hours. The prosecutors also interviewed some of her—Ms. Carbajal's relatives who also saw Mr. Colon there. They sort of dispute the time period. Maybe it's an hour and a half, maybe it's two hours, or maybe, like Ms. Carbajal says, it's three to five hours. *The point that you will see in this case is that on the 11th of January when this horrible event is happening he's not there. He's gone. He's at Alex Carbajal's house. And none of the parties will dispute that Mr. Colon is gone for a period of time on the 11th.*

(emphasis added).

Having set out his alibi defense for Mr. Colon in opening statement, defense counsel topped off the defense case by arguing that Gladys Perez had killed Crystal:

> And what you'll learn, the evidence will show you is from those letters that Ms. Perez is very jealous of Mr. Colon. She is. She's jealous of him, and that she knew that he was out seeing Alex Carbajal that night, and she didn't want that to happen, it made her angry, it made her furious, and that's why Maxine doesn't know why [Gladys] hit [Crystal], because it didn't make any sense to Maxine when she saw it. *And that's why the Brocks heard all the screaming and yelling, and that's when Gladys Perez killed her child.*

(emphasis added).

In short, defense counsel in opening statement pinned down the exact date and time of the killing, where and with whom Mr. Colon was at that time, who was screaming and abusing the children (only a woman's voice was heard), and who

killed Crystal and why—an insanely jealous Gladys Perez.

The problem is that Mr. Colon's sole defense witness, Alex Carbajal, did not support defense counsel's story to the jury. Ms. Carbajal testified that Mr. Colon visited her "around January 12" which was her uncle's birthday. But Carbajal's vague testimony unraveled the moment she was subjected to cross-examination:

> Q Ms. Carbajal, I want to ask you about the date, January 12th. Is January 12th your uncle's birthday?
>
> A Yes.
>
> Q And you believed that he came over to your grandmother's house, he, meaning Marc Anthony Colon, came over on your uncle's birthday or around your uncle's birthday?
>
> A Around. I don't think it was on his birthday because I would have remembered that, but around there.
>
> Q Could it have been the day after his birthday?
>
> A No. It was before.
>
> Q Was it the immediate day before?
>
> A I'm not sure.
>
> Q Could it have been within a week of your uncle's birthday?
>
> A It was close. It was close.
>
> Q Within a day or two?
>
> A I would say maybe.
>
> Q You're not exactly sure precisely—
>
> A No.
>
> Q –whether it was—you know for sure it was not on the 12th because you would remember that for sure?

A Right.

Q Could have been the 11th—

A Yeah.

Q –correct? Could it have been the 10th?

A I'm not sure.

Q Okay. You're not even sure if it was on the 9th; is that fair to say?

A Yes.

A Is it possible it was the 8th?

A I'm not sure.

Carbajal was the only defense witness called, and her testimony was the entire foundation of the defense.

Crystal died on the night of January 11-12, 2006. Carbajal was interviewed by and gave a voluntary statement to the State six months later on June 4, 2008. Defense investigators—without defense counsel present—interviewed her on July 18, 2006. In both statements, Carbajal identified several other relatives of hers, that were present when Mr. Colon visited her in January 2006; defense counsel did not ask her about them at trial. *In neither statement did she specify the date in January of that visit.*

In 2014, Mr. Colon's post-conviction attorney interviewed Carbajal. From that interview, Carbajal signed an affidavit for post-conviction counsel. It stated:

> 1. That your affiant is familiar with Petitioner, MARC ANTHONY COLON and is testifying under oath as to her recollection of the facts as stated herein.

2. That on October 2, 2008, your affiant testified at the trial of Petitioner, MARC COLON.

3. On one occasion prior to trial I talked to the investigator for Mr. COLON and gave him extensive information confirming that *Mr. COLON was with me on the date of the alleged incident and could not have committed the crime.*

4. At no time whatsoever prior to trial did I speak with Mr. COLON's trial counsel, Christopher Oram, Esq. or Peter S. Christiansen, Esq.

5. At no time whatsoever prior to trial was I ever prepped by the attorneys as to my testimony or prepared for any anticipated cross examination by the State of Nevada.

6. That because of these facts, my testimony was very disjointed and confusing and was of little benefit to Mr. COLON.

7. I was never given any of my prior statements that I had made to the police and the investigator for Mr. COLON's attorney to review prior to my testimony.

8. That a lot of the facts I had given to Mr. COLON's investigator were never asked of me at trial, and I believe that those facts, if presented, would have been beneficial to Mr. COLON.

9. That I am giving this affidavit of my own free will, I have not discussed this affidavit with Mr. COLON at any time. That this statement is given voluntarily, and if called upon to testify I will state the same facts under oath in court.

10. In my opinion, Mr. COLON's trial attorneys did not do a full, complete and/or adequate job in representing Mr. COLON to set forth a sufficient alibi defense to the jury at trial.

(emphasis added).

One of the investigators who interviewed Carbajal in 2014 also signed an affidavit. It said in pertinent part:

7. That as part of my investigation into this matter I interviewed a Ms. Alejandra Carbahal.

8. That present at that meeting were myself, Ms. Carbahal, and Mr. Arnold Weinstock.

. . .

10. That at that interview Ms. Carbahal related the following:

A. That she was interviewed by the counsel for Mr. Colon, as well as an investigator for Mr. Colon.[1]

B. That at no time did Mr. Colon's attorney or investigator give her a copy of any statements that she had made.

C. That at no time did Mr. Colon's attorney ask her to review any statements she had made for either accuracy or to help her refresh my memory.

D. That before she testified, Mr. Colon's attorney did not go over any questions that he was going to ask her.

E. That before she testified, Mr. Colon's attorney never gave her a copy of any statement that she had made.

E.[sic] That Mr. Colon's attorney did not ever tell her that the exact date of Mr. Colon's visit with her was crucial to his case.

F. That Mr. Colon's lawyer did not do anything to prepare her for her testimony or cross-examination.

G. That she is willing to testify to these matters under oath.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously holding that "appellant has not made a 'substantial showing of the denial of a constitutional right." *Appendix A.*

[1] This portion is clearly erroneous, as the other documents cited above show that it was two investigators, not an investigator and an attorney, who interviewed Carbajal prior to trial.

Aev. Applicable Legal Standards For COAs

AEDPA permits the federal district courts and court of appeal to issue a COA on an issue when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2)-(3). The Ninth Circuit has explained what it takes under this Court's binding authorities to meet this standard:

> In *Barefoot [v. Estelle,* 463 U.S. 880 (1983)], the [Supreme] Court established several ways in which a petitioner can make the 'substantial showing of the denial of a constitutional right.' To meet this threshold inquiry, *Slack [v. McDaniel*, 529 U.S. 473,] 120 S. Ct. [1595] at 1604 [2000], the petitioner 'must demonstrate ***that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement*** to proceed further."… ***We will resolve any doubt about whether the petitioner has met the Barefoot standard in his favor.***…
> …At this preliminary stage, we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus. Indeed, the Supreme Court has cautioned that, in examining a petitioner's application to appeal from the denial of a habeas corpus petition, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor."… In non-capital as well as capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus….

Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (emphasis added; some citations omitted); *accord Buck v. Davis,* 580 U.S. 100 (2017); *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003); *Barefoot v. Estelle,* 463 U.S. 880 (1983); *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595 at 1604 (2000), The *Lambright* court went on to say that even "an issue apparently settled [against petitioner] by the law of our circuit remained debatable for purposes of issuing a COA." *Id.* at 1026. "[I]t is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to *reconsider* circuit law that apparently

forecloses relief." *Id.* (emphasis added).

The purpose of the COA requirement is not to set a much higher bar for habeas appeals than other criminal appeals, or to prevent the court of appeals from hearing argument on issues that may at first glance appear to lack merit, but to prevent the wasting of judicial resources on issues that are truly *frivolous*. See *id.* at 1025. Indeed, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Id. See also Tennard v. Dretke*, 542, U.S. 274, 282, 288 (2004); *Miller-El v. Cockrell*, *supra*; *Slack v. McDaniel*, *supra at* 483-84; *Barefoot v. Estelle, supra* at 893 & n. 4 (1983); 2 CEB, *Appeals and Writs in Criminal Cases*, § 4.190 (2d ed. 2003).

To put it another way, an applicant need not demonstrate that the appeal will likely succeed. *See Buck, supra* at 115 ("The COA inquiry is not coextensive with a merits analysis"). Indeed, this Court has noted that an issue can be "debatable" even if *all* jurists of reason would agree, after the COA has been granted and the case has received full briefing and consideration, that the petitioner will not prevail. *Id.* at 115 (relying on *Miller-El, supra*). The appellant must only present facially valid contentions that are not frivolous. *See id.* The threshold question should be decided *without* "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El, supra, a*t 336. It is improper to deny a COA request by determining that the litigant will likely lose on appeal. *Buck, supra* at 115 ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the

actual merits, it is in essence deciding an appeal without jurisdiction" (quoting *Miller-El, supra* at 336-337).

Thus, the COA inquiry is limited and very generous to the applicant.

As demonstrated below, the Ninth Circuit failed to meet this standard.

B. The Ineffective Assistance of Counsel Issue In This Case More Than Meets The Standard for a COA

Strickland v. Washington, 466 U.S. 668 (1984) governs claims of ineffective assistance of trial counsel and sets the standard applied to counsel's performance. Reversal is required if (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 687-94; *accord Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001).

Among other things, it is ineffective assistance for trial counsel to:

1. Fail to thoroughly and adequately investigate the case. *See, e.g., Strickland, supra* at 691; *Porter v. McCollum,* 558 U.S. 30, 39-40 (2009); *Wiggins v. Smith,* 539 U.S. 510, 524 (2003); *Sears v. Upton,* 562 U.S. 945, 951 (2010); *Cannedy v. Adams,* 706 F.3d 1148 (9th Cir. 2013).
2. Fail to adequately investigate an alibi defense, including failing to interview key witnesses, including defense witnesses. *Bemore v. Chappell,* 788 F.3d 1151, 1163 (9th Cir. 2015) (citing *Strickland,*

supra and *Bobby v. Van Hook,* 558 U.S. 4, 7 (2009)); *Browning v. Baker,* 874 F.3d 444, 472 (9th Cir. 2017).

3. Fail to adequately prepare an alibi witness, including to discover discrepancies in the alibi witness' testimony. *Bemore, supra* at 1164-64 (citing *Strickland, supra* at 689).
4. Fail to adequately prepare defense witnesses. *Rowlend v. Chappell,* 876 F.3d 1174, 1183, 1185 (9th Cir. 2017).
5. Fail to call a witness or present records that could have established the date and time of an alibi. *Alcala v. Woodford,* 334 F.3d 862, 870-71 (9th Cir. 2003) (citing *Strickland, supra*).
6. Fail to interview potential witnesses. *Crisp v. Duckworth,* 743 F.2d 580, 583 (9th Cir. 1984).
7. Fail to offer favorable evidence, or to call exculpatory witnesses, or witnesses with important evidence. *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003); *Williams v. Taylor,* 529 F.3d 914 (9th Cir. 2001); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Eggleston v. United States*, 798 F.2d 374 (9th Cir. 1986).
8. Give perfunctory performance at hearings. *Mayfield v. Woodford,* 270 F.3 915 (9th Cir. 2001).
9. Fail to function as the counsel guaranteed by the Sixth amendment. *Strickland,* 466 U.S. at 687.

The duty to investigate is also enshrined in the American Bar Association's Standards on Prosecution and Defense Function § 4.1:

> 4.1 Duty To Investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilty and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Failure to investigate, including failure to contact potentially corroborating witnesses, cannot be justified as a tactical decision, because obtaining the facts is an essential prerequisite of deciding to not investigate (or to limit the investigation). *United States v. Gray,* 878 U.S. 702 (3d Cir. 1989) (citing cases).

Preparing witnesses to testify is also an important duty of trial counsel. A lawyer may inform the witness of questions to be asked on direct examination, advise the witness of potential questions to be asked on cross-examination, describe the trial process, and caution against loquaciousness or excessively long narratives. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465, 471 (1999). A lawyer may tell a witness that his or her responses during a preparation session are misleading, confusing, unclear, or likely to be misinterpreted or misconstrued, may advise a witness to use powerful language and to avoid jargon, and may suggest other means to help the witness convey his or her meaning. *Id.*

In the case at bar, defense counsel failed to personally interview his sole and crucial witness. He failed to read and understand the two interview reports

available to him, one from the police and one from his own investigators—neither of which specified the date and time that Mr. Colon was with Carbajal. He failed to prepare his witness to testify appropriately on both direct and cross examination. He failed to even interview, let alone call as witnesses, the multiple other individuals who were present at the time that Mr. Colon visited Carbajal. And he set his client up in opening statement by staking everything on a defense that he *should have* known was not viable, at least not with only the one witness he investigated, had another person interview, and called at a potentially capital, and ultimately life in prison, trial.

Was there prejudice? In spades. Every trial lawyer knows that if you promise something in your opening statement, you better deliver it, because the jury will hold it against you if you don't. Here, trial counsel promised the jury an entire defense that he could not deliver.

Why was the State appellate court wrong? First, the state court of appeal concluded that "counsel interviewed the witness prior to trial." *Appendix C.* That is factually incorrect as demonstrated above. So is the state court's statement that counsel questioned the alibi witness at length regarding her recollection of events. He didn't question her at all before trial, and he apparently didn't read the reports his investigators and the police prepared, because if he had he would have known that he could not call her as a witness—and tell the jury in advance what she was going to say—without questioning her much more thoroughly first.

The state court also said that Mr. Colon did not demonstrate that his counsel

would have discovered favorable information had he undertaken reasonably diligent investigation regarding Carbajal or any additional potential alibi witnesses. But Carbajol provided a declaration stating that she would have provided exculpatory alibi information if she had been properly prepared (see above). And that means the other witnesses that trial counsel did not even bother to contact or interview could have done so too.

Moreover, suppose for the sake of argument that properly interviewing and preparing Carbajal would have shown that she was mistaken about the date and time of her lengthy meeting with Mr. Colon. In that case, defense counsel could have avoided the suicidal tactic of resting his entire defense on Carbajal's testimony *and telling the jury in advance that she would say things she was not going to say.*

Finally, the state court's opinion notwithstanding, the evidence of guilt was close. Why? Because the two young girls gave contradictory statements to the police, the grand jury, and the trial jury about whether Mr. Colon was even present at the motel the night of Crystal's death and whether he ever hit her, saying at some points that it was Gladys that was present and hit Crystal.

There is more than a reasonable probability that but for the ineffective assistance of trial counsel, the outcome of the trial would have been different for Mr. Colon—although quite possibly the same for Gladys Perez—and that he would be a free man today.

The federal district court also erred in upholding the state court's ruling, for the following reasons.

First, the district court misstates the timeline of events. *Appendix B.* As stated above, Mr. Colon's daughter testified at trial that the fatal blow was administered by Gladys Perez, not Mr. Colon, while Mr. Colon was gone, and that it occurred at approximately 8:00 pm. The district court then concluded that because Perez went to a Walgreens on January 12 at 3:45 pm, this meant that the fatal blow had to have occurred either during the late hours of January 11 or the early hours of January 12, when Mr. Colon was *not* with Carbajal, and that "even if his counsel had done a more proficient job of showing that [Mr.] Colon was away from the motel room on the evening of January 11, 2006, such a showing would not *prove* that [Mr.] Colon *could not have caused* C.F.'s fatal injuries." E.C.F. No. 75 at 12 (emphasis added).

This was an unreasonable determination of the facts in light of the evidence presented at trial. 28 U.S.C. § 2254(d)(2). As noted above, the coroner indicated that death occurred "within twenty-four hours" from the time of the injury. Thus, it is perfectly consistent with the trial testimony that the fatal blow was inflicted when Mr. Colon was not present, and that Perez went for medicine at 3:45 a.m. while the child was sick but had not yet succumbed to her injury. Not only did the district court err in concluding that the timeline ruled out Mr. Colon's alibi, it also erred in concluding that even if defense counsel had done a more proficient job of establishing the evening alibi, it would not have "proved" that Mr. Colon could not have caused the fatal injuries. The district court forgot that Mr. Colon was not required to "prove" anything. The issue was whether proper preparation and

strategy by trial counsel would have created enough doubt that there was a reasonable probability that the outcome would have been different—whether his ineffectiveness had a substantial and injurious effect in determining the jury's verdict. Not only did Mr. Colon's alibi, had it been properly investigated and demonstrated at trial, *substantially reduce* the time during which he could have inflicted the fatal blow by about five hours "in the nighttime," but it was actually supported by the testimony of the sole eye witness to the event, Maxine, who testified at trial that it occurred at about 8:00 p.m., and by Carbajal's declarations cited above.

The district court also erred in stating that during their law enforcement interviews, the children told the police that Mr. Colon hit Crystal. In fact, the children testified at trial that if he hit her, it wasn't hard, and that it was Perez, not Mr. Colon, who struck the hard, and fatal, blow.

As for Mr. Colon's statement that Crystal's death was caused by domestic violence, he actually was asked who was responsible for the child's death and why he didn't hit her, and he replied "that's not my kid." That points to the child's mother as the person who hit Crystal, when taken in context.

And all of this also ignores the fact that there are many ways in which ineffective assistance can result in prejudice to a defendant even if no other evidence on that matter could have been obtained with proper diligence on the part of the attorney. For example, basing a defense on facts that could not be proved, or making promises to the jury that cannot and will not be kept as to the very nature

and viability of the chosen defense, could both create overwhelming prejudice to a defendant so incompetently represented—even if no additional evidence existed to be found with better investigation.

Here, defense counsel did not know more than two months before trial exactly what Carbajal would say, yet *at trial* he called her to testify as his sole alibi witness, and promised the jury that she would provide an alibi for Mr. Carbajal at the relevant date and time—which he helpfully pinned down for the jury.

So which was it—either trial counsel called Carbajal as his sole witness and promised the jury that she would exculpate Mr. Colon *without knowing* what she would say—probably because he failed to interview her between the filing of the Notice of Alibi and the trial, or he called her as his sole witness and told the jury that she would exculpate him *knowing* that it was not true. Either one is ineffective assistance. Neither one could have any possible tactical purpose. And either one would have created extreme prejudice to Mr. Colon. A defendant can avoid conviction by poking holes in the prosecution's case and standing on the burden of proof and his constitutional right not to present any affirmative defense. But a conviction will be guaranteed if defense counsel promises the jury an affirmative defense and then fails to deliver it. Neither the state court nor the district court adequately addressed, let alone rebutted, this gross case of ineffective assistance.

As for whether the evidence was overwhelming, the young minor witnesses gave conflicting testimony about who, if anyone, struck the fatal blow, or when it was administered. Mr. Colon's conviction was actually based on police officers' hearsay

testimony about a single unrecorded interview of two very young children who, when placed on the witness stand under oath when they were three years older, expressly denied saying what the police said they said. It was only Mr. Colon's counsel's failure to properly give the jury, as promised, the only hard evidence of his innocence—the fact that he was with Carbajal at the time Crystal was fatally struck by her mother—that led to his conviction. The prejudice from trial counsel's failure was overwhelming.

The bigger picture is this. It was Mr. Colon who cared for Crystal when she was sick and throwing up, and who tried to help her. It was he who said he loved Crystal, and he who gave her CPR. It was only his trial counsel's incompetence that caused him to be convicted.

Jurists of reason could easily disagree about that. Mr. Colon presented facially valid contentions that are not frivolous, and which deserve encouragement to proceed further. Under the generous standards for certificates of appealability established by the case law discussed above, and with all doubts resolved in favor of Mr. Colon as is required, this case more than met the standard for a certificate of appealability, and the Ninth Circuit erred in denying one. Mr. Colon should therefore have the chance to present his claim on appeal.

C. Failure To Explain

Finally, by denying a COA in a *one sentence Order, Appendix A,* without any meaningful explanation, the Ninth Circuit ruling was "as inexplicable as they were unexplained," contrary to this Court's rule in *Jackson v. Felkner,* 562 U.S. 594 (2011).

VII. CONCLUSION

For the foregoing reasons, petitioner Marc Anthony Colon respectfully requests that this petition for writ of certiorari be granted.

Dated: August 20, 2024

Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT
Counsel for Petitioner
MARC ANTHONY COLON

APPENDIX A

Unpublished Order of the Ninth Circuit Court of Appeals,
July 18, 2024

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARC ANTHONY COLON,

Petitioner - Appellant,

v.

R. BAKER and ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents - Appellees.

No. 23-4069

D.C. No. 3:18-cv-00490-MMD-CLB
District of Nevada,
Reno

ORDER

Before: S.R. THOMAS and SILVERMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) 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.

APPENDIX B

Judgment and Opinion of the U.S. District Court for the District of Nevada,
November 16 and 17, 2023

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARC ANTHONY COLON,

Petitioner,

v.

NETHANJAH BREITENBACH, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Case No. 3:18-cv-00490-MMD-CLB

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

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

__X__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this the second amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 60) is denied.
IT IS FURTHER ORDERED that a certificate of appealability is denied.
IT IS FURTHER ORDERED that judgment is hereby entered accordingly, and this case is closed.

Date: November 17, 2023

CLERK OF COURT

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

MARC ANTHONY COLON,

Petitioner,

v.

NETHANJAH BREITENBACH,[1] *et al.*,

Respondents.

Case No. 3:18-cv-00490-MMD-CLB

ORDER

I. SUMMARY

Petitioner Marc Anthony Colon was sentenced in Nevada state court to, *inter alia*, life without the possibility of parole after being found guilty of child abuse resulting in substantial bodily harm and first-degree murder. (ECF No. 68-11.) This matter is before this Court for adjudication of the merits of Colon's counseled second amended petition for writ of habeas corpus under 28 U.S.C. § 2254, which alleges that his trial counsel failed to adequately conduct pre-trial investigations and preparations concerning an alibi witness. (ECF No. 60 ("Petition").) For the reasons discussed below, the Court denies the Petition and denies a certificate of appealability.

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[1]The state corrections department's inmate locator page states that Colon is incarcerated at Northern Nevada Correctional Center. Nethanjah Breitenbach is the current warden for that facility. At the end of this order, this Court directs the clerk to substitute Nethanjah Breitenbach as a respondent for Respondent R. Baker. *See* Fed. R. Civ. P. 25(d).

II. BACKGROUND

A. Factual background[2]

Enrique Reyes testified that on the morning of January 12, 2006, while looking in a dumpster at an apartment complex in Las Vegas, Nevada, he found the body of a little girl. (ECF No. 67-24 at 134-37.) Dr. Gary Telgenhoff, a forensic pathologist with the Clark County Coroner's Office, performed an autopsy of the girl, who was found to be three years old, and determined that she was malnourished and dehydrated. (ECF No. 67-26 at 21, 25, 32.) According to Dr. Telgenhoff, the girl's eyes were sunken within the sockets, she was gaunt, and "[s]he appeared to lack soft tissue in her extremities." (*Id*. at 32.) Dr. Telgenhoff reported that the girl had (1) "bitten or torn" fingers, (2) "many, many different bruises on [her] entire body, in particular, the back, the chest or torso area, the buttocks and to a lesser extent the head," (3) marks indicating that she had been "very roughly grab[bed] under her arms," (4) "a large amount of blood in the abdominal cavity," (5) a torn "duodenum, which is the first part of the small intestine," (6) a tear in her pancreas, and (7) fractured ribs. (*Id*. at 40, 44, 46, 57, 60.) A torn duodenum is caused by something "enter[ing] the abdomen and creat[ing] a substantial amount of force" and, unless successfully treated, would cause a person to die within 24 hours. (*Id*. at 58, 64.) Dr. Telgenhoff determined the girl's cause of death to be blunt-force trauma to the torso. (*Id*. at 67.)

Law enforcement got "[a] huge number" of tips regarding the possible identity of the girl, but none of those tips panned out. (ECF No. 67-26 at 133, 144.) Eventually, on February 22, 2006, the mother of Colon's girlfriend and co-defendant, Gladys Perez, contacted law enforcement in California about her missing granddaughter, C.F. (ECF No. 67-31 at 189.) After law enforcement in California contacted law enforcement in Las Vegas, Perez's mother was able to confirm that the girl was C.F. (*Id*. at 189, 191.)

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[2]The Court makes no credibility or other factual findings regarding the truth or falsity of this trial evidence before the state court. The Court's summary is merely a backdrop to its consideration of the issue presented in the Petition.

In January 2006, Colon and Perez went on a trip from California to Las Vegas with Colon's two daughters, M.C. and M.C., and Perez's two daughters, C.F. and L.F. (ECF No. 67-36 at 31-32.) On January 8, 2006, Colon, Perez, and the four girls stayed at the Stratosphere. (ECF No. 67-39 at 62.) On January 9, 2006, Colon, Perez, and the four girls checked into the Bargain Motel and stayed for three nights. (ECF No. 67-30 at 6, 8, 10.) L.F., who was nine years old at the time of the trial in September 2008, testified that while they were at the Bargain Motel, C.F. was sick and vomited. (ECF No. 67-36 at 76, 83.) During the night, L.F. heard Colon and her mother arguing about C.F., and the next morning when L.F. woke up, C.F. was gone. (*Id*. at 86, 94-95.) Similarly, M.C., Colon's older daughter who was twelve years old at the time of the trial, testified that while staying at the Bargain Motel, C.F. "started coughing, and then like a few minutes later she started throwing up." (*Id*. at 122, 130.) According to M.C., C.F. "thew up many times." (*Id*. at 132.) The next morning, C.F. was gone, and Colon and Perez told M.C. that they had "dumped [C.F.] off at her grandma's house." (*Id*. at 136.) M.C., Colon's younger daughter who was ten years old at the time of the trial, testified that Colon hit C.F. once on her back "in the middle on the side." (*Id*. at 189, 213.) M.C. was also told that C.F. was with her grandma. (*Id*. at 199.)

Colon, Perez, M.C., M.C., and L.F. then drove to Oregon and eventually took a train to Minnesota to stay with Colon's uncle. (ECF No. 67-36 at 47, 54.) After some time, Perez and L.F. left Minnesota to go back to California. (*Id*. at 90.) Law enforcement interviewed M.C. and M.C. at Colon's uncle's house in the presence of Colon's uncle's daughter, A.R. (ECF No. 67-37 at 49.) During her law enforcement interview, M.C., the older sister, stated that Colon "made the bruise on [C.F.]'s back" by punching her. (ECF No. 67-38 at 97-98.) M.C. explained that C.F. started vomiting after Colon hit her, and Colon said "that [C.F.] made too much drama in their lives." (*Id*. at 97.) According to M.C., Colon had his hand in a fist and "was very angry."[3] (*Id*. at 98.) And during her law

[3]M.C.'s trial testimony varied from her law enforcement interview statements, and she testified at the trial that the police told her to lie and say that Colon had hit C.F. (ECF

enforcement interview, M.C., the younger sister, told law enforcement that Colon hit C.F. (*Id*. at 102.) Law enforcement also interviewed L.F., and she said that Colon "socked" C.F. (*Id*. at 132.)

Law enforcement interviewed Colon, and when asked if he was responsible for C.F.'s death, Colon replied, "that's not my kid." (ECF No. 67-38 at 114.) Colon was asked who put C.F. in the dumpster, and he responded, "I never left the apartment." (*Id*.) Colon was also asked if he ever hit any kids, and he stated, "I never hit *my* kids." (*Id*. at 116 (emphasis added).) Colon explained that C.F. was sick the night of January 11 into January 12, 2006, and he and Perez decided to take her to the hospital. (*Id*. at 117-118.) Perez got C.F. dressed, and it was then that they noticed that C.F. was not breathing. (*Id*. at 118.) Colon told law enforcement that C.F.'s "death was a result of domestic violence." (*Id*. at 120.) In a letter written to Perez after his arrest, Colon stated "'20 minutes, Gladys. All that shit happened in 20 minutes and nobody heard nothing. None of the girls were up.'" (*Id*. at 141.)

B. Procedural background

The jury found Colon guilty of child abuse resulting in substantial bodily harm and first-degree murder committed during the perpetration or attempted perpetration of child abuse. (ECF No. 67-47.) The jury sentenced Colon to life in prison without the possibility of parole. (ECF No. 68-1.) Colon appealed, and the Nevada Supreme Court affirmed Colon's judgment of conviction on September 29, 2011. (ECF No. 68-41.) Colon moved for rehearing and for en banc reconsideration, but the Nevada Supreme Court denied both requests. (ECF Nos. 68-45, 68-49.) Remittitur issued on March 20, 2012. (ECF No. 68-50.)

Colon petitioned for state postconviction relief. (ECF Nos. 69-1, 69-13.) The state court denied Colon relief without an evidentiary hearing on April 19, 2016. (ECF No. 69-

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No. 67-36 at 149-150.) Notably, Colon's sister, who flew with M.C. and M.C. back to California from Minnesota, testified that once M.C. learned "what could potentially happen to her father, her story changed." (ECF No. 67-37 at 96.)

21.) Colon appealed, and the Nevada Court of Appeals affirmed on September 13, 2017. (ECF No. 69-46.) Remittitur issued on October 10, 2017. (ECF No. 69-47.)

Colon commenced this federal habeas corpus action on or about September 4, 2018. (ECF No. 1.) This Court appointed counsel for Colon, and counsel filed an amended petition on July 15, 2019. (ECF Nos. 9, 15.) Colon's counsel withdrew, and this Court appointed Colon new counsel on May 12, 2022. (ECF No. 38, 44, 46.) Colon's new counsel filed this Petition on June 5, 2023. (ECF No. 60.) Respondents answered the Petition on October 2, 2023, and Colon replied on October 30, 2023. (ECF Nos. 73, 74.)

III. GOVERNING STANDARD OF REVIEW

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

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

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to

the facts of the prisoner's case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation omitted).

The Supreme Court has instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a "difficult to meet" and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

IV. DISCUSSION

In his sole ground for relief, Colon argues that his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments were violated by his trial counsel's failure to adequately conduct pre-trial investigations and preparations concerning his alibi defense. (ECF No. 60 at 13.) Specifically, Colon alleges that his counsel was deficient in: (1) failing to prepare his alibi witness for cross-examination; (2) offering an alibi defense during opening statements that counsel failed to deliver during trial; and (3) failing to interview and present other alibi witnesses. (*Id*.)

A. Background information

Before the trial, on July 18, 2006, two defense investigators interviewed Alejandra Carbajal, Colon's ex-girlfriend who lived in Las Vegas and had custody of their son. (ECF No. 69-13 at 163.) During that interview, Carbajal stated Colon "had showed up to [her] Nana's house to visit [her] and Josiah, his son" in January of 2006. (*Id*. at 170.) Carbajal

explained that this two-hour visit took place at "night time" and the following people were present: Nick Platt, Aaron Buck, Nicki Buck, and Anthony Buck. (*Id*. at 164-65.) Colon came back the following day at "nighttime" for 3 to 4 hours, and the same people were present. (*Id*. at 165.)

Before the trial, Colon's counsel filed a "reservation of right to claim alibi." (ECF No. 66-36.) During his opening statement at the trial, Colon's counsel summarized Colon's defense as follows: "the evidence will show you that it's actually [Perez] that killed her child when [Colon] was gone." (ECF No. 67-24 at 132.) In support of this defense, Colon's counsel told the jury that M.C. told the grand jury that: (1) Perez had hit C.F. while "her daddy had gone to get something to eat[;]" and (2) the person residing in the motel room above Colon and Perez at the Bargain Motel stated that she heard a woman mistreating children and "didn't hear a man." (*Id*. at 123-124.) Regarding Carbajal, Colon's counsel explained the following:

> [W]hat we know about Alex Carbajal is that the State went and interviewed her, recorded a statement. . . . And she describes how Mr. Colon was in fact over there, she thought between three and five hours.
>
> The prosecutors also interviewed some of her - - Ms. Carbajal's relatives who also saw Mr. Colon there. They sort of dispute the time period. Maybe it's an hour and a half, maybe it's two hours, or maybe, like Ms. Carbajal says, it's three to five hours. The point that you will see in this case is that on the 11th of January when this horrible event is happening[,] he's not there. He's gone. He's at Alex Carbajal's house. And none of the parties will dispute that Mr. Colon is gone for a period of time on the 11th.

(*Id*. at 129-130.)

Colon called Carbajal as a witness at the trial. (ECF No. 67-39 at 47.) Carbajal testified on direct examination that she saw Colon for "[a]bout two hours" in Las Vegas "on [her] uncle's birthday, around the 12th" of January 2006. (*Id*. at 48, 50, 51.) During Carbajal's cross-examination, the following colloquy occurred:

> Q. And you believed that he came over to your grandmother's house, he, meaning Marc Anthony Colon, came over on your uncle's birthday or around your uncle's birthday?
> A. Around. I don't think it was on his birthday because I would have remembered that, but around there, I think.
> Q. Could it have been the day after his birthday?
> A. No. It was before.

Q. Was it the immediate day before?
A. I'm not sure.
Q. Could it have been two days before?
A. I'm not sure.
Q. Could it have been within a week of your uncle's birthday?
A. It was close. It was close.
Q. Within a day or two?
A. I would say maybe.
Q. You're not exactly sure precisely - -
A. No.
Q. - - whether it was - - you know for sure it was not on the 12th because you would remember that for sure?
A. Right.
Q. Could have been the 11th - -
A. Yeah.
Q. - - correct? Could it have been the 10th?
A. I'm not sure.
Q. Okay. You're not even sure if it was the 9th; is that fair to say?
A. Yes.
Q. Is it possible it was the 8th?
A. I'm not sure.

(*Id*. at 55-57.) During cross-examination, Carbajal also testified that when she saw Colon, he told her that he was staying at the Stratosphere, indicating that she likely saw Colon on January 8, 2006. (*Id*. at 61.) Regarding the timing of Colon's visit, Carbajal stated that it was approximately from 6:00 p.m. until 8:00 p.m. (*Id*. at 63-64.)

During closing arguments, Colon's counsel made the following comments regarding Carbajal:

> Now I want to talk about Alex Carbajal because I told you in opening argument he's gone seeing Alex Carbajal. Well, put her on the witness stand. And what did she say? She said, I remember he was there because it was my uncle's birthday. It was like January 12th. And then she said, I remember he said he was going to Stratosphere. So [the prosecutor] showed that the Stratosphere was on the wrong day. It couldn't be the 11th, right? And she - - I would have to argue to you that she's probably just saying something. Okay. Do you know what? It proves something. It proves something. Do you know how easy it would be to, let's say, coach somebody to come in here and say, I remember my uncle's birthday was on the 12th of January and I remember it was distinctly - - it was the night before? How hard would that be? That's not what she said, is it?
>
> She came in. She told the truth. She came in, she tried to tell you the best she could. So can I now argue to you it was the 11th? I would contend, ladies and gentlemen, from the evidence that you should consider that it was the 11th? Can I show you that it was proved? No, because I think [the prosecutor] did an excellent job showing that it could be another day, specifically the date of Stratosphere.

(ECF No. 67-44 at 24-25.)

During Colon's state postconviction proceedings, a private investigator interviewed Carbajal. (ECF No. 69-13 at 229.) During that interview, Carbajal stated the following: (1) "at no time did Mr. Colon's attorney or investigator give her a copy of any statements that she had made," (2) "at no time did Mr. Colon's attorney ask her to review any statements she had made," (3) "before she testified, Mr. Colon's attorney did not go over any questions that he was going to ask her," (4) "Mr. Colon's attorney did not ever tell her that the exact date of Mr. Colon's visit with her was crucial to his case," and (5) "Mr. Colon's lawyer did not do anything to prepare her for her testimony or cross-examination." (*Id*. at 229-230.)

B. Legal standard for ineffective assistance of counsel

In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for analysis of claims of ineffective assistance of counsel requiring the petitioner to demonstrate: (1) that the attorney's "representation fell below an objective standard of reasonableness[;]" and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Additionally, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Where a state district court previously adjudicated the claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable

is especially difficult. *See Richter*, 562 U.S. at 104-05. In *Richter*, the United States Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is doubly so. *See id*. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) ("When a federal court reviews a state court's Strickland determination under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme Court's description of the standard as doubly deferential.") (internal quotation marks omitted). The Supreme Court further clarified that, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

C. State court determination

In affirming the denial of his state habeas petition, the Nevada Court of Appeals held:

> Colon argues his trial counsel failed to adequately investigate Colon's alibi witness or prepare the witness to testify at trial. Colon further argues counsel should have investigated additional witnesses to support his alibi. Colon fails to demonstrate the district court erred by denying these claims.
>
> During the trial, Colon's alibi witness testified Colon attended a party during his visit to Las Vegas, but was unsure of the exact date. The alibi witness acknowledged she had previously stated the party was on the same day the victim died, but when confronted with further information regarding Colon's whereabouts during his time in Las Vegas, she recognized the party might not have been on the same day as the victim's death.
>
> The district court concluded counsel interviewed the witness prior to trial and questioned the alibi witness at length regarding her recollection of events. The district court found Colon failed to demonstrate counsel acted in an objectively unreasonable manner regarding the alibi witness. In addition, the district court found Colon did not demonstrate counsel would have discovered favorable information had counsel undertaken reasonably diligent investigation regarding the alibi witness or any additional potential alibi witnesses, given the overwhelming evidence of Colon's guilt produced at trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). The record before this court supports the district court's conclusion in this regard.

> Moreover, we note the Nevada Supreme Court has already concluded the question of Colon's guilt in this matter was not close, *Colon v. State*, Docket No. 53019 (Order of Affirmance, September 29, 2011), and our review of the record demonstrates there was significant evidence of Colon's guilt produced at trial, particularly in light of the statements to the police made by Colon's daughters, asserting Colon hit the victim and was at the hotel room the night the victim died. Given the significant evidence of Colon's guilt, Colon fails to demonstrate a reasonable probability of a different outcome at trial had counsel further investigated alibi witnesses or prepared the alibi witness to testify at trial. Therefore, we conclude the district court did not err in denying these claims.

(ECF No. 69-46 at 4-5.)

D. Analysis

As the Nevada Court of Appeals reasonably concluded, Colon fails to demonstrate prejudice regarding his counsel's alleged deficiency. Indeed, due to the timeline of events, Colon's alibi defense was tenuous. And even if Colon's counsel had done a better job of presenting Colon's alibi defense—by either: (1) further supporting the defense with testimony from other witnesses regarding Colon's visit with Carbajal on January 11, 2006; or (2) preventing the damaging evidence produced during cross-examination that Colon's visit with Carbajal was actually on January 8, 2006—Colon's alibi defense would still have been weak. *See Murtishaw v. Woodford*, 255 F.3d 926, 940 (9th Cir. 2001) ("[I]n order to determine whether counsel's errors prejudiced the outcome of the trial, it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently.") (internal quotation marks omitted); *Hernandez v. Chappell*, 923 F.3d 544, 554 (9th Cir. 2019) ("The strength of the evidence of Hernandez's intent to rape and kill contrasts sharply with the relatively weak evidence that might have been presented had counsel acted differently.") (internal quotation marks omitted).

In a letter Colon wrote to Perez after his arrest, he indicated that the fatal abuse of C.F. happened at night when "[n]one of the girls were up." (ECF No. 67-38 at 141.) There was then evidence that Perez went to a Walgreens on January 12, 2006, at 3:45 a.m. and bought "Pedialyte and baby medicine for a sick baby." (ECF No. 67-37 at 4, 8, 9.)

C.F. was found in the dumpster less than four hours later at 7:30 a.m. (ECF No. 67-24 at 149.) Dr. Telgenhoff testified that "most likely timing" regarding "the life expectancy of somebody with a severed duodenum" is "a number of hours." (ECF No. 67-26 at 64.) Based on this aggregate evidence, C.F.'s duodenum was likely severed sometime during the late hours of January 11 or the early hours of January 12, 2006. Consequently, even if Colon's visit with Carbajal occurred on January 11, 2006, as he asserted, it appears from the record that the visit took place before the fatal abuse of C.F. In fact, Carbajal testified that Colon's visit took place from approximately 6:00 p.m. until 8:00 p.m. (ECF No. 67-39 at 63-64.) As such, even if his counsel had done a more proficient job of showing that Colon was away from the motel room on the evening of January 11, 2006, such a showing would not prove that Colon could not have caused C.F.'s fatal injuries.

Moreover, as the Nevada Court of Appeals reasonably concluded, there was significant evidence of Colon's guilt produced at the trial. Law enforcement officers testified that M.C., M.C., and L.F. all stated during their law enforcement interviews that Colon had hit C.F. (*See* ECF No. 67-37 at 97-98, 102, 132.) Moreover, during his law enforcement interview, Colon did not outright deny causing C.F.'s death and admitted to being present in the motel room at the time of the fatal abuse, explaining that he "never left the apartment" and C.F.'s "death was a result of domestic violence." (ECF No. 67-38 at 114, 120.)

Accordingly, the Nevada Court of Appeals' determination that Colon failed to demonstrate a reasonable probability of a different outcome at trial had his counsel further investigated alibi witnesses or prepared Carbajal to testify at trial constituted an objectively reasonable application of *Strickland*'s prejudice prong and was not based on an unreasonable determination of the facts. Colon is not entitled to federal habeas relief.

V. CERTIFICATE OF APPEALABILITY

This is a final order adverse to Colon. Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability ("COA"). This Court has *sua sponte* evaluated the claims within the petition for suitability for the

issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Under 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). Applying this standard, this Court finds that a certificate of appealability is unwarranted.[4]

VI. CONCLUSION

It is therefore ordered that the second amended petition for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 60) is denied.

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

The Clerk of Court is directed to: (1) substitute Nethanjah Breitenbach for Respondent R. Baker; (2) enter judgment accordingly; and (3) close this case.

DATED THIS 16th Day of November 2023.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

[4]Colon requests that this Court conduct an evidentiary hearing. (ECF No. 60 at 23.) Colon fails to demonstrate that he is entitled to an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). Further, this Court has already determined that Colon is not entitled to relief, and neither further factual development nor any evidence that may be proffered at an evidentiary hearing would affect this Court's reasons for denying relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Colon's request for an evidentiary hearing is denied.

APPENDIX C

Order of the Court of Appeal of Nevada on Habeas Appeal,
September 13, 2017

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC ANTHONY COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70276

ORDER OF AFFIRMANCE

Marc Anthony Colon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Colon argues the district court erred in denying the claims of ineffective assistance of trial counsel raised in his June 29, 2012, petition and September 2, 2015, supplement.[1] To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*,

[1]The record before this court does not contain copies of Colon's postconviction petition or his supplemental petition as required by NRAP 30(b)(2), (b)(3). We remind Colon it is his burden as the appellant to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009).

17-901895

466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, Colon argues his trial counsel should have ensured bench conferences were transcribed. Colon fails to demonstrate the district court erred by denying this claim.

Bench conferences should be memorialized, "either contemporaneously or by allowing the attorneys to make a record afterward," but the appellant must demonstrate meaningful appellate review of any alleged error was precluded by the failure to memorialize the bench conference. *Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014). Here, many of the bench conferences were transcribed and counsel made a record regarding a number of issues that were discussed at a bench conference, which were the actions of objectively reasonable counsel. Further, assuming there were issues that were discussed at a bench conference that were not later memorialized, the district court found Colon failed to demonstrate any unrecorded bench conference had significance or meaningful appellate review was precluded by any failure to memorialize a bench conference. The district court found Colon's bare allegation regarding this issue was insufficient to demonstrate he is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). The district court also found Colon failed to demonstrate a reasonable probability of a different outcome had counsel objected when a bench conference was not transcribed or caused every bench conference to be memorialized. The record before this court supports the district court's findings and we conclude the district court did not err in denying this claim.

Second, Colon argues his trial counsel failed to adequately investigate Colon's alibi witness or prepare the witness to testify at trial. Colon further argues counsel should have investigated additional witnesses to support his alibi. Colon fails to demonstrate the district court erred by denying these claims.

During the trial, Colon's alibi witness testified Colon attended a party during his visit to Las Vegas, but was unsure of the exact date. The alibi witness acknowledged she had previously stated the party was on the same day the victim died, but when confronted with further information regarding Colon's whereabouts during his time in Las Vegas, she recognized the party might not have been on the same day as the victim's death.

The district court concluded counsel interviewed the witness prior to trial and questioned the alibi witness at length regarding her recollection of events. The district court found Colon failed to demonstrate counsel acted in an objectively unreasonable manner regarding the alibi witness. In addition, the district court found Colon did not demonstrate counsel would have discovered favorable information had counsel undertaken reasonably diligent investigation regarding the alibi witness or any additional potential alibi witnesses, given the overwhelming evidence of Colon's guilt produced at trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). The record before this court supports the district court's conclusion in this regard.

Moreover, we note the Nevada Supreme Court has already concluded the question of Colon's guilt in this matter was not close, *Colon v. State*, Docket No. 53019 (Order of Affirmance, September 29, 2011), and

our review of the record demonstrates there was significant evidence of Colon's guilt produced at trial, particularly in light of the statements to the police made by Colon's daughters, asserting Colon hit the victim and was at the hotel room the night the victim died. Given the significant evidence of Colon's guilt, Colon fails to demonstrate a reasonable probability of a different outcome at trial had counsel further investigated alibi witnesses or prepared the alibi witness to testify at trial. Therefore, we conclude the district court did not err in denying these claims.

Third, Colon argues his trial counsel should have objected to introduction of letters written by his codefendant and should have sought a limiting instruction regarding the letters. Colon fails to demonstrate the district court erred by denying these claims.

Colon and the victim's mother were codefendants and were tried together. During the trial, the State introduced letters the victim's mother wrote to Colon during their incarceration while awaiting trial. In the letters, the victim's mother wished Colon a happy Father's Day, said she was proud of him, called him a handsome man, and described sexual fantasies she had about Colon. The State introduced the letters to demonstrate the victim's mother maintained a romantic relationship with Colon and she therefore did not feel threatened or controlled by Colon.

The district court concluded counsel acted in a reasonable manner by declining to object to introduction of the letters because the letters undermined a contention that Colon was abusive or controlling. The district court concluded the letters were not used as evidence of Colon's guilt, but rather to negate a duress defense used by the victim's mother and, for those reasons, Colon did not demonstrate counsel acted in an objectively unreasonable manner by failing to object to the letters' introduction at trial.

The district court further concluded Colon made only bare claims regarding the letters and bare claims, such as this one, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Substantial evidence supports the district court's findings and Colon fails to demonstrate the district court erred by denying these claims.

Next, Colon argues the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Colon argues his appellate counsel should have asserted the district court erred by failing to record bench conferences. Colon fails to demonstrate the district court erred in denying this claim. As explained previously, many of the bench conferences during trial were transcribed. The district court found Colon did not demonstrate he suffered prejudice from any unrecorded bench conferences or that meaningful appellate review was precluded by any failure to memorialize a bench conference. Accordingly, the district court concluded Colon failed to demonstrate his appellate counsel acted in an objectively unreasonable manner or a reasonable probability he would have had success on appeal had counsel

raised this issue. The record before this court supports the district court's findings and we conclude the district court did not err in denying this claim.

Second, Colon argues his appellate counsel should have investigated his alibi witness or other potential alibi witnesses. Colon fails to demonstrate the district court erred in denying this claim. The district court concluded Colon did not demonstrate his counsel could have discovered information regarding his alibi witness that would have produced helpful information and substantial evidence supports this conclusion. *See Molina*, 120 Nev. at 192, 87 P.3d at 538. Accordingly, the district court properly concluded Colon failed to demonstrate a reasonable probability of success on appeal had his counsel sought further information regarding the alibi witness or other potential alibi witnesses. Therefore, we conclude the district court did not err in denying this claim.

Third, Colon argues his appellate counsel should have asserted the district court erred by admitting of letters written by his codefendant and by failing to issue a limiting instruction regarding the letters. Colon fails to demonstrate the district court erred in denying these claims. As stated previously, the district court concluded the letters were not used as evidence of Colon's guilt, but rather to negate a duress defense used by the victim's mother and, for those reasons, Colon did not demonstrate counsel acted in an objectively unreasonable manner by declining to raise a claim concerning admission of the letters on direct appeal. The district court further concluded Colon made only bare claims regarding the letters and bare claims, such as these, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Substantial evidence supports the district court's findings and Colon fails to demonstrate the district court erred by denying these claims.

Finally, Colon argues the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. The district court concluded Colon failed to demonstrate counsel committed any errors, and accordingly, there were no errors to cumulate. The record before this court supports the district court's findings and we conclude the district court did not err in denying this claim.

Having concluded Colon is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
The Law Office of Dan M. Winder, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: October 10, 2017
Supreme Court Clerk, State of Nevada
By D Richards Deputy

APPENDIX D

Order of the Supreme Court of Nevada on Direct Appeal,
September 29, 2011

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC ANTHONY COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53019

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of child abuse resulting in substantial bodily harm and first-degree murder. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The charges against appellant Marc Colon and his girlfriend, Gladys Perez, stemmed from the child abuse and murder of Perez's three-year-old daughter, C.F. A jury convicted Colon on both charges. Colon now appeals the judgment of conviction. On appeal, Colon assigns the following errors: (1) the district court abused its discretion in denying his motion for severance, (2) the district court erred in restricting his cross-examination of Perez's expert, and (3) cumulative error warrants reversal of his convictions.[1]

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this

[1]Colon also asserts that the State's second amended superseding indictment was fatally flawed and that the district court gave several erroneous jury instructions. We have carefully considered each of Colon's arguments and conclude that they are without merit.

case, we do not recount them further except as necessary for our disposition.

DISCUSSION

The district court did not abuse its discretion in denying Colon's motion for severance

Colon argues that the district court abused its discretion in denying his motion to sever his trial from that of Perez because they had antagonistic defenses and several of the district court's evidentiary rulings prejudiced him due to his joint trial.[2] We disagree.

We review a district court's decision to grant or deny a motion for severance for an abuse of discretion. Marshall v. State, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). We also review the district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

If two or more defendants participated in the same unlawful act or transaction, the State may charge the defendants in the same indictment or information. NRS 173.135. But, "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." NRS 174.165(1).

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[2]Colon also argues that each of the district court's evidentiary rulings constituted independent abuses of discretion. Because the evidentiary rulings are subsumed within the broad issue of severance, we take up each of Colon's evidentiary challenges in our discussion of severance.

"[C]o-defendants jointly charged are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir. 1978). Joinder promotes judicial economy and tends to prevent inconsistent verdicts. Marshall, 118 Nev. at 646, 56 P.3d at 379. Thus, joinder is "prefer[able] as long as it does not compromise a defendant's right to a fair trial." Id. "The decisive factor in any severance analysis remains prejudice to the defendant." Id. at 646, 56 P.3d at 378. Some form of prejudice often exists in a joint trial, and therefore, establishing that "joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Id. at 647, 56 P.3d at 379. In particular, severance is required "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" Id. (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Antagonistic defenses

Colon asserts that severance was warranted because the theory of his defense was antagonistic to Perez's defense theory.

"'[M]utually antagonistic defenses are not prejudicial per se.'" Id. (quoting Zafiro, 506 U.S. at 538). Rather, such defenses are a relevant consideration in a severance analysis "but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial." Id. at 648, 56 P.3d at 379.

Colon's defense theory was that Perez abused C.F. and caused the injuries that killed her. In contrast, Perez's defense was that Colon abused C.F., causing her death, and that Perez was prevented from intervening to render aid because she was acting under the duress caused

by Colon. Colon's and Perez's defenses were therefore antagonistic because acceptance of Colon's defense tended to preclude the jury from accepting Perez's; likewise, acceptance of Perez's defense tended to preclude the jury from accepting Colon's.

Although these defenses were antagonistic, such defenses are, in themselves, insufficient to establish prejudice. Id. at 648, 56 P.3d at 379; see Zafiro, 506 U.S. at 538. Moreover, even if there were some risk of prejudice, the district court properly instructed the jury that the State had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged. The jury was also instructed that "[s]tatements, arguments, and opinions of counsel are not evidence." In addition, the jury was instructed that "[e]ach charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offenses charged." These instructions sufficed to cure any prejudice associated with Colon and Perez's antagonistic defenses. See Zafiro, 506 U.S. at 540-41 (the risk of prejudice due to antagonistic defenses can be cured with proper instructions nearly identical to those identified above). Thus, although we agree with Colon that he and Perez had antagonistic defenses, we disagree that this, standing alone, necessitated severance.

Evidentiary rulings

Testimony that Perez suffered from battered-spouse syndrome

Colon argues that the district court should not have permitted Perez's expert, Dr. Paglini, to testify that Perez suffered from battered-spouse syndrome because this testimony vilified Colon and portrayed Perez as an innocent victim. He asserts that this evidence was irrelevant,

was improperly used as a conduit to introduce Perez's hearsay statements, and shows that his motion for severance should have been granted.

In general, "[a]ll relevant evidence is admissible." NRS 48.025(1). "'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Hearsay is not admissible unless it falls within an exception. NRS 51.065. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035.

An expert witness is permitted to rely upon hearsay statements to form the opinions that the expert presents at trial, provided that those statements are the type of evidence "relied upon by experts in forming opinions [on] the subject." NRS 50.285(2). An expert witness may not, however, be used as a mere conduit to introduce the statements of a nontestifying individual. See, e.g., McCathern v. Toyota Motor Corp., 23 P.3d 320, 327 (Or. 2001) (while experts may rely upon hearsay in forming their opinion, that "does not render otherwise inadmissible evidence admissible merely because it was the basis for the expert's opinion").

Here, Dr. Paglini's testimony regarding the effect of battered-spouse syndrome on Perez's mental state was relevant to Perez's defense. To form his medical opinion that Perez's mental state was the result of battered-spouse syndrome, Dr. Paglini relied upon tests that he performed on Perez, testimony presented at trial, and Perez's out-of-court allegations that Colon abused her. Although these allegations were hearsay, Dr. Paglini was permitted to rely upon these hearsay statements under NRS 50.285(2) because clinical psychologists in the field rely upon such statements to form their medical opinions and diagnoses of their patients.

The hearsay statements that Perez made to Dr. Paglini were not introduced at trial. The district court meticulously prevented Dr. Paglini from introducing any such statements and firmly cautioned Dr. Paglini before he testified that he could not testify as to the statements that Perez made to him. Although Dr. Paglini's testimony was, of course, somewhat prejudicial to Colon, this does not mean that one of Colon's specific trial rights was violated. See Zafiro, 506 U.S. at 540 ("[A] fair trial does not include the right to exclude relevant and competent evidence."). Therefore, we conclude that the district court did not abuse its discretion by admitting Dr. Paglini's testimony.[3] Concomitantly, because admission of this evidence did not violate any of Colon's specific trial rights or create an unreliable verdict given the overwhelming evidence against Colon, this evidentiary ruling does not demonstrate that severance was warranted.

Colon's bad acts

Colon contends that the district court should not have admitted evidence of his bad acts—namely, that (1) while they were in Oregon, Colon hit Perez with a cell phone and Perez came out of a bedroom with a black eye following an argument with Colon; (2) while they were in Minnesota, Colon argued with Perez and Perez wore heavy makeup to cover up bruises; and (3) Colon previously had controlled,

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[3]Colon recycles his severance argument regarding Dr. Paglini's testimony and asserts that this testimony violated his right to confrontation. Because Dr. Paglini did not introduce any of Perez's hearsay statements, his testimony did not violate Colon's right to confrontation. See U.S. v. Mitchell, 502 F.3d 931, 966 (9th Cir. 2007) ("The Confrontation Clause does not apply to non-hearsay.").

isolated, and threatened Perez. Colon asserts that this evidence was improperly used to show that he acted in conformity with these bad acts.

NRS 48.045(2) prohibits the admission of evidence of a person's "other crimes, wrongs or acts" for the purpose of proving that he or she "acted in conformity therewith." Such evidence, however, "is admissible if relevant for some other purpose." Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993).

Bad act evidence is presumptively inadmissible. Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1280-81 (2005). To overcome this presumption, the district court must hold a Petrocelli[4] hearing, outside the presence of the jury, to determine "that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

Failure to conduct a Petrocelli hearing is reversible error, "unless '(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" Rhymes, 121 Nev. at 22, 107 P.3d at 1281 (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

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[4]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

The district court did not hold a Petrocelli hearing regarding the bad act evidence at issue. Nonetheless, we conclude that the evidence was admissible under the test for admissibility set forth in Tinch.

Testimony regarding Colon's abuse of Perez was not introduced to prove that he acted in conformity with those acts. Rather, it was used to show that, following the murder of C.F., he attempted to cover up the crime and was abusing and controlling Perez because he feared that she might disclose the crime. Thus, the State properly used this testimony to show Colon's consciousness of guilt. See Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979) ("The conduct of an accused which shows consciousness of guilt is admissible, even though it may in itself be criminal.").

Colon's abuse of Perez was proven by clear and convincing evidence. Colon's cousin, who permitted Colon and Perez to stay with her in Oregon, testified that she witnessed Colon strike Perez with a phone. Colon's uncle, who permitted Colon and Perez to stay with him in Minnesota, testified that Perez wore heavy makeup and that he had to get between a heated argument between Perez and Colon. Colon's cousin and uncle were both subject to cross-examination, and Colon failed to present evidence rebutting their testimony.

Next, this evidence was highly relevant to show Colon's consciousness of guilt, as manifested in his attempts to cover up the crime by abusing Perez and restricting her ability to communicate. In addition, the district court offered to give an instruction informing the jury of the limited use of Colon's bad acts, but Colon made a tactical decision to have the district court not give the instruction. See Chavez v. State, 125 Nev.

328, 345, 213 P.3d 476, 488 (2009) (a limiting instruction can alleviate the danger associated with the admission of bad act evidence).

Finally, contrary to Colon's claims, the district court did not admit testimony that Colon had previously controlled, isolated, and threatened Perez. Instead, Dr. Paglini testified that Perez's mental condition was consistent with someone who had been a victim of battered-spouse syndrome. This was proper expert testimony. See Boykins v. State, 116 Nev. 171, 176, 995 P.2d 474, 477-78 (2000) ("Under Nevada law, the effect of domestic violence on beliefs, behavior, and perception of a defendant is admissible to show the defendant's state of mind." (internal quotations omitted)). Perez introduced this evidence to show that she acted under duress, not to show that Colon acted in conformity with his prior bad acts. Accordingly, we conclude that the district court did not abuse its discretion by admitting evidence of Colon's bad acts. Furthermore, because this evidentiary ruling did not compromise any of Colon's specific trial rights, it did not warrant severance.

Perez's bad acts

Colon argues that the district court should not have excluded evidence that Perez hit her other daughter, L.F., during a Thanksgiving gathering and while they were in Oregon. He asserts that evidence that Perez hit L.F. while they were in Oregon was admissible to show Perez's consciousness of guilt.

Although all relevant evidence generally is admissible, NRS 48.025(1), it may be excluded "if its probative value is substantially outweighed by the danger of . . . confusion of the issues or of misleading the jury." NRS 48.035(1). In addition, under NRS 48.045(2), "[e]vidence of

other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

Any probative value of evidence that Perez hit L.F. during a Thanksgiving gathering was substantially outweighed by the danger of misleading the jury. Colon and Perez's guilt or innocence was at issue, not whether Perez was a good or bad mother. Moreover, Colon introduced this evidence to show that Perez acted in conformity with these bad acts, and Colon points to no other purpose for introducing this evidence.

When Perez hit L.F. in Oregon, she was disciplining L.F. for reasons unrelated to concealing the murder of C.F., and therefore, such evidence was not admissible to demonstrate consciousness of guilt. We therefore conclude that the district court did not abuse its discretion by excluding evidence that Perez hit L.F. during a Thanksgiving gathering and while they were in Oregon. Because this evidence would also have been inadmissible as improper character evidence at a separate trial, Colon fails to show any prejudice from the district court's denial of his motion for severance.[5] Colon cannot show any prejudice flowing from his

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[5]Colon also claims that the district court should not have excluded evidence that Perez was an illegal alien and had an altercation with a coworker's wife. Evidence that Perez was an illegal alien had no bearing on the issues at trial. In fact, it had a substantial danger of confusing the jury because it was so attenuated from the issues at trial. Similarly, evidence that Perez had an altercation with a coworker's wife was not relevant because it occurred a considerable amount of time before C.F.'s murder. In addition, Colon introduced this evidence to show that Perez acted in conformity, and he fails to point to any permissible purpose for its admission. Thus, we conclude that the district court did not abuse its discretion by excluding evidence that Perez was an undocumented alien and had an altercation with a coworker's wife.

joint trial because this evidence also would have been excluded in a separate trial, as it would have been irrelevant.

Perez's first statement to police

Colon contends that the district court should not have excluded certain statements made by Perez in her first voluntary statement[6] to police. Specifically, he asserts that he should have been allowed to introduce Perez's statements to police that (1) C.F. had a large bruise on her back due to an accidental fall that occurred before the night of the murder, (2) she spanked C.F. the night before the murder, and (3) she was previously investigated by Child Protective Services (CPS) and worried she would be investigated again. Colon claims that these statements were against Perez's penal interest and thus fell within a hearsay exception.

NRS 51.345(1) provides that statements that are against the declarant's interest are admissible. This court has explained that under this hearsay exception, a statement is admissible, provided:

> (1) at the time of its making, the statement tends to subject the declarant to civil or criminal liability; (2) a reasonable person in that position would not have made the statement unless he believed it to be true; and (3) the declarant is unavailable as a witness at the time of trial.

Walker v. State, 116 Nev. 670, 675, 6 P.3d 477, 480 (2000).

"If the statement is offered to exculpate an accused, however, an additional requirement exists: corroborating circumstances must

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[6]Perez made two voluntary statements to the police, both of which were excluded by the district court.

clearly indicate the trustworthiness of the statement." Id. (emphasis added). The test for determining the admissibility of such a statement is "whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." Id. at 676, 6 P.3d at 480.

Here, Perez's statement that C.F. got a bruise on her back from an accidental fall was offered by Colon to prove that C.F.'s injury was accidental and that he was not responsible. Perez's statement that she spanked C.F. the night before the murder was offered by Colon to prove that Perez did, in fact, spank C.F. and that it was therefore more likely that it was Perez who delivered the fatal blows to C.F. The statement that Perez had previously been investigated by CPS was offered to prove that she indeed had been investigated by CPS and was the type of mother who would beat her children. Thus, because Perez's statements were each offered to prove the truth of the matters asserted, they were hearsay.[7]

Perez's statement that C.F.'s bruise came from an accidental fall was not against her interests and thus was not admissible under the hearsay exception contained in NRS 51.345. But her statements that she had spanked C.F. and that she was worried about CPS arguably tended to subject her to criminal liability. At the time Perez made these statements,

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[7]We note that these statements were not exempt from the hearsay rule as party admissions under NRS 51.035(3)(a) because Colon was not a party adverse to Perez. See Weber v. State, 121 Nev. 554, 577, 119 P.3d 107, 123 (2005) (explaining that under NRS 51.035(3)(a), "statements by a party opponent" are exempt from the hearsay rule (emphasis added)). Thus, only the State, not Colon, could introduce these statements under the hearsay exemption contained in NRS 51.035(3)(a).

she had just been arrested and was being questioned by the police about the murder of C.F. Thus, a reasonable person in such a situation would not have made such statements unless they believed them to be true. Finally, Perez was unavailable as a witness because she exercised her constitutional right to not testify. See Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997) (explaining that a defendant who chooses not to testify is considered "unavailable" because the prosecution is constitutionally precluded from compelling him or her to testify).

Colon offered these statements to exculpate himself by shifting blame onto Perez, and thus, under NRS 51.345, these statements were admissible only if the totality of the circumstances clearly indicated that they were trustworthy or that they were not fabricated.

The trustworthiness of Perez's first statement was undermined by subsequent statements that she made to police. In her first statement, Perez indicated that the bruise on C.F.'s back was caused by an accidental fall, but in her subsequent statement, she indicated that she had lied in her first statement and that the bruise was caused by Colon. Thus, the trustworthiness of Perez's statement was suspect. See generally Walker v. State, 113 Nev. 853, 862, 944 P.2d 762, 768 (1997) (statements with inconsistencies are not admissible under NRS 51.075, the general exception to the rule against hearsay for statements containing special assurances of accuracy). Accordingly, we cannot conclude that the district court abused its discretion by excluding Perez's first statement to police. Severance would not have produced a different result because the evidence would still be inadmissible hearsay in a separate trial. Therefore, this evidentiary ruling does not show that Colon's joint trial prejudiced him.

Because none of the district court's evidentiary rulings constituted abuses of discretion, Colon concomitantly fails show that any of his specific trial rights were violated by the district court's denial of his motion for severance. The lack of prejudice to Colon is evinced by the fact that the district court's evidentiary rulings would likely have been identical at a separate trial. Moreover, the reliability of the jury's verdict about Colon's guilt or innocence was not compromised by his joint trial because the State presented overwhelming evidence of his guilt in the form of eyewitness accounts, his own admissions, and his consciousness of guilt as displayed by his flight and attempts to conceal the crime. Accordingly, we conclude that the district court did not abuse its discretion in denying Colon's motion for severance.

The district court did not err in restricting Colon's cross-examination of Perez's expert

Colon recasts his argument regarding the district court's exclusion of Perez's statements to police and contends that his right to confront witnesses was violated when the district court restricted his ability to cross-examine Dr. Paglini. In particular, with regard to Perez's first voluntary statement to police, Colon asserts that he should have been permitted to contradict Dr. Paglini's testimony by cross-examining him regarding evidence that Colon drove Perez and C.F. to the hospital but that Perez did not want to get out of the vehicle because she was frightened that she would be implicated in C.F.'s death. Colon asserts that this would have shown that contrary to Dr. Paglini's testimony on direct examination, he did not control Perez. We disagree.

"Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de

novo." Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006). The right to cross-examination is included within the right to confrontation. Id. This right, however, does not include "limitless cross-examination." U.S. v. Bridgeforth, 441 F.3d 864, 868 (9th Cir. 2006). In United States v. Larson, 460 F.3d 1200, 1207 (9th Cir. 2006), the Ninth Circuit Court of Appeals explained:

> [To] evaluate a claim that the trial court has violated the Confrontation Clause by excluding evidence[, courts should consider]: (1) whether the excluded evidence was relevant; (2) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness.

Evidence that Perez did not want to take C.F. into the hospital was marginally relevant to proving that she was not controlled by Colon. But Colon offered Perez's statement for its truth—that is, to show that Perez did, in fact, refuse to go into the hospital with C.F. Therefore, this statement was hearsay. See NRS 51.035. Thus, Colon was attempting to use cross-examination as a backdoor to introduce inadmissible hearsay. See generally Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999) ("Cross-examination is not . . . a 'universal solvent' that somehow renders all evidence admissible. Substantive evidence introduced during cross-examination must comply with the same requirements as evidence introduced during direct examination." (citation omitted)). Moreover, the reliability of the statements that Colon sought to introduce was questionable because, as previously noted, Perez later indicated that these statements were not accurate. We therefore conclude

that Colon's interest in presenting this evidence was outweighed by legitimate interests in excluding it.

Finally, Colon was not precluded from calling Dr. Paglini's credibility into question on cross-examination. Colon took this opportunity to point out that Dr. Paglini was paid by Perez and had an interest in giving favorable testimony to Perez. Colon cross-examined Dr. Paglini at length and was also able to elicit from Dr. Paglini that although Perez suffered from battered-spouse syndrome, she could make independent choices. Thus, while Colon's cross-examination of Dr. Paglini was not as extensive as Colon would have liked, the jury was left with sufficient information to assess Dr. Paglini's credibility. See Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) ("'[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986))). Accordingly, we conclude that the district court did not err in restricting Colon's cross-examination of Perez's expert.

Cumulative error does not warrant reversal

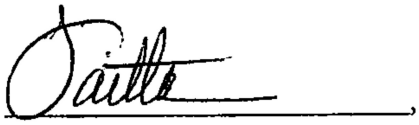
Finally, Colon argues that cumulative error warrants reversal of his convictions. We disagree.

In addressing a claim of cumulative error, this court considers: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Although the crimes with which Colon was charged are serious, as discussed above, Colon failed to demonstrate that there were errors at trial and the question of his guilt is not close.

Therefore, we conclude that cumulative error does not warrant reversal of Colon's convictions.

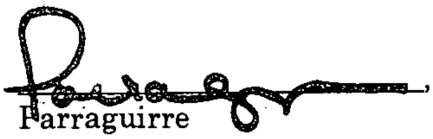
For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



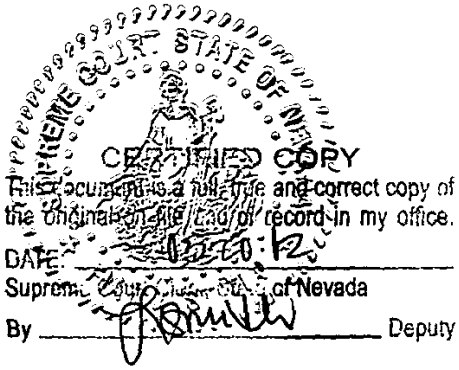
_____, C.J.
Saitta

_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk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Supreme Court Clerk, State of Nevada
By
Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC ANTHONY COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 53019
District Court Case No. C220720

FILED
MAR 26 2012
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 29 day of September, 2011.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing Denied."

Judgment, as quoted above, entered this 27 day of December, 2011.

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CCJA
NV Supreme Court Clerks Certificate/Judgr
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