

No. _____

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN LEE NEWBERG, Petitioner,

v.

JACK PALMER; ATTORNEY GENERAL
FOR THE STATE OF NEVADA, Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Steven Lee Newberg requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Newberg has been granted leave to so proceed in the district court and in the United States Court of Appeals. Counsel for Mr. Newberg was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). *See also* Supreme Court Rule 39.1 (authorizing leave to proceed in forma pauperis). Accordingly, no affidavit is attached

Dated this 12th day of June, 2018

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a juror who viewed a newscast mid-trial labeling Mr. Newberg a “serial rapist” denied Mr. Newberg his constitutional right to due process and to an impartial and indifferent jury?

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Lee Newberg (Newberg) respectfully requests that a writ of certiorari issue to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit. *See Appendix A.*

OPINIONS BELOW

The appellate panel decision affirming the district court's denial of Newberg's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 issued its decision on March 14, 2018. *See Appendix; see also Appendix B* (district court decision).

JURISDICTION

The district court denied and dismissed Newberg's 2254 habeas petition on its merits on October 18, 2016. *Appendix B.* The Ninth Circuit affirmed and denied Newberg's appeal on March 14, 2018. *Appendix A.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *Accord* Sup. Ct. R. 13(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides, in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (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.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment right to a jury trial, applicable to the states through the Fourteenth Amendment, guarantees to the accused a fair trial by a panel of impartial, indifferent jurors. *See* U.S. Const. amend. VI & XIV. The Fifth Amendment, applicable to the states through the Fourteenth Amendment, guarantees due process and the right to a fair trial.

STATEMENT OF THE CASE

In *State of Nevada v. Steven Lee Newberg*, Case No. 02F05765X, following a jury convicted Newberg in a state district court of thirteen counts, including: attempt sexual assault with a minor under sixteen years of age; use of a minor in producing pornography; sexual assault with a minor under sixteen years of age; open or gross lewdness; and

possession of visual presentation depicting sexual conduct of person under sixteen years of age.

The trial court sentenced Newberg to: eight to twenty years in the Nevada Department of Corrections (NDOC) on the attempt sexual assault; life with the possibility of parole after five years in NDOC on each of the use of a minor in producing pornography charges, concurrent to each other, but consecutive to the attempt sexual assault; life with the possibility of parole after twenty years in NDOC on each of the sexual assault counts, concurrent with one another but consecutive to the attempted sexual assault and the pornography counts; twelve months for the lewdness counts concurrent to all counts; and twenty-eight to seventy-two months, concurrent, for the visual depiction count. The court also imposed a special sentence of lifetime supervision. *Appendix D*.

Newberg timely appealed to the Nevada Supreme Court, in docket number 41475. On appeal, Newberg raised several issues, only one of which is relevant here:

The trial court erred in refusing to excuse a juror who saw prejudicial material in violation of the court's order which was a violation of the defendant's right to due process.

The Nevada Supreme Court affirmed Newberg's conviction and sentence in its order of affirmance filed March 17, 2005. *See Appendix C.*

Newberg filed a timely state habeas petition and then proceeded to federal court, filing a timely petition pursuant to 28 U.S.C. § 2254. Following a stay in those proceedings to exhaust certain claims, Newberg returned to federal court and filed a second amended petition. The court dismissed the relevant claim on its merits in a decision dated October 18, 2016. *See Appendix B.* The court granted Newberg a certificate of appealability on ground one of his petition, namely whether his Fifth, Sixth, and Fourteenth Amendment rights were violated due to the trial court's failure to remove a juror who viewed prejudicial material during the trial.

Newberg timely appealed to the U.S. Court of Appeals for the Ninth Circuit, and that court also affirmed the denial of his petition. *Appendix A.* This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Steven Newberg was convicted by a jury that included a juror who witnessed extremely prejudicial media coverage of his trial. The juror admitted she knew the media coverage was about a trial in the same courtroom and that she had seen the headline banner describing Newberg as a “serial rapist.” The juror was not only exposed to prejudicial evidence of multiple prior bad acts committed by Newberg, but she was also exposed to evidence that Newberg had committed the same type of crime for which he was on trial before her, as his juror. The trial court’s refusal to remove the juror and replace her with a non-biased alternate juror violated Newberg’s Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair and impartial jury.

A. Supporting facts

In Ground One of the Second Amended Petition Newberg argued the trial court’s failure to remove a juror who viewed prejudicial material about Newberg during trial constitutes a violation of his federal constitutional right to a fair and impartial jury.

On the fifth day of trial and before jury deliberations, Juror 10, Mary Gifford, brought to the court’s attention the fact that she had been

exposed to outside information in violation of the court's prior admonishment.

Outside the presence of the rest of the jury, the court questioned Ms. Gifford about her concerns as follows:

Court: Ms. Gifford, you're troubled by something that occurred during the weekend, is that correct?

Ms. Gifford: On Friday night I walked into a room in my house where my husband had the television set on and I saw our courtroom.

...

He hit the mute button and I hadn't heard anything. Before he could hit the power button I saw words across the bottom of the screen and I thought the Court should know what I saw.

Court: And what were those words you saw?

Ms. Gifford: Those words were two words, **serial rapist**.

The Court: Okay. Did that give you an indication as to anything doing with this case? I mean it was this courtroom.

Ms. Gifford: No, no.

The Court: All right. You've seen those words. Do you have any type of problem of still being fair and impartial both to Mr. Newberg and to the State of Nevada on this matter?

Ms. Gifford: No, I see my job to (sic) look at the facts in this particular case without regard to, you know, anything that goes on around me.

The Court: Are you comfortable still sitting in here? In other words, if you were Mr. Newberg or you were these prosecutors, would you want someone with your state of mind as it is today sitting on the jury, whether you be a prosecutor or defense attorney or the defendant himself?

Ms. Gifford: I do.

...

My concern was, I did of course realize, that whether you know I thought this made a difference or not, that everyone needed to know that.

The Court: You understand that that's the reason we give that admonishment . . . so that if you do actually hear something, you brought it to Danny's attention, he brought it to my attention, now I brought to the lawyers' attention.

After inquiring of the parties whether they would like to further question the juror and being advised they did not, the court excused her and subsequently denied defense counsel's request to have her removed and the alternate juror seated.

On direct appeal, the Nevada Supreme Court found the juror's exposure to the newscast, including the description of Newberg as a "serial rapist," involved only "a brief exposure to extrinsic information." *See App. C.* Newberg's trial garnered a lot of publicity and many jurors

had been exposed to news reports about the case. Further, as soon as Juror 10 reported the incident the district court reminded that juror of its “admonitions” and that the juror was not to discuss the episode with other jurors.

Because defense counsel declined to question Juror 10, it was unclear whether she believed the newscast concerned Newberg or to what degree the exposure impacted her ability to remain impartial. “Therefore Newberg has failed to demonstrate reversible prejudice, and the district court did not err in denying his request to replace Juror No. 10.”

Newberg is entitled to relief because Juror 10 was tainted by news media reports that Newberg was a serial rapist, which added further prejudice to an already compromised jury.

In criminal trials, well-entrenched Supreme Court authority “absolutely” forbids “external causes tending to disturb the [jury’s] exercise of deliberate and unbiased judgment . . .at least until their harmlessness is made to appear.” *Mattox v. United States*, 146 U.S. 140, 149–50 (1892), *cited with approval in Tarango v. McDaniel*, 837 F.3d. 936, 945 (9th Cir. 2016).

To disqualify a juror for cause requires a showing of either actual or implied bias—“that is bias in fact or bias conclusively presumed as a matter of law.” *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) (quoting 47 Am. Jur.2d Jury § 266 (1995)). Because determinations of impartiality may be based in large part upon demeanor, this court typically accords deference to the district court's determinations, and reviews a court's findings regarding actual juror bias “for manifest error” or abuse of discretion. *See United States v. Alexander*, 48 F.3d 1477, 1484 (9th Cir. 1995). In contrast, implied bias presents a mixed question of law and fact which is reviewable de novo. *See Dyer v. Calderon*, 151 F.3d 970, 979 (9th Cir. 1998) (en banc).

On collateral review, trial errors—such as extraneous information that was considered by the jury—are generally subject to a “harmless error” analysis, namely, whether the error had “substantial and injurious” effect or influence in determining the jury's verdict. *See Jeffries v. Wood*, 114 F.3d 1484, 1491 (9th Cir. 1997) (en banc) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). The presence of a biased juror, however, is a structural error and not subject to the harmless error analysis. *See Estrada v. Scribner*, 512 F.3d 1227, 1235

(9th Cir. 2008). If one is found the defendant is entitled to a new trial. *See, e.g., Dyer*, 151 F.3d at 973 n. 2.

In *Remmer v. United States (Remmer I)*, 347 U.S. 227 (1954), the Supreme Court held:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of the known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229.

While a direct or indirect instance of “communication, contact, or tampering,” may be necessary to trigger a presumption of prejudice, the Supreme Court has recognized that any sort of “extraneous influence” may violate the Sixth Amendment right to an impartial jury if it prejudiced the verdict. *See Mattox v. United States*, 146 U.S. 140, 149 (1892); *see also Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) (“Any

criminal defendant...being tried by a jury is entitled to the un-coerced verdict of that body.”).

Examples of such influences include the jury’s exposure to a newspaper article, *Mattox*, 146 U.S. at 142–43, the mere presence of an officer or bailiff during deliberations, *Mattox* at 150, and a juror’s job application submitted to the prosecutor’s office. *See Smith v. Phillips*, 455 U.S. 209, 212 (1982); *cf. Tinsley v. Borg*, 895F.2d 520 at 524 (9th Cir. 1990) (discussing the impact of a juror’s prior experience as rape counselor); *see also United States v. Rutherford*, 371 F.3d 634 at 643 (9th Cir. 2004) (reviewing an allegation that government agents “glared at” jurors during the trial).

It is not necessary to prove that the influence in question “relate[s] to the trial.” *Calinedo v. Warden*, 365 F.3d 691, 695 n.2 (9th Cir. 2004); *accord Turner v. Louisiana*, 379 U.S. 466, 473–74 (1965) (finding juror’s contact with prosecution witnesses prejudicial even absent evidence that they discussed the case with them)). The federal constitution guarantees a defendant “a jury capable and willing to decide the case solely on the evidence before it.” *Phillips*, 455 U.S. at 217.

A juror is considered to be impartial “only if he can lay aside his opinion and render a verdict based on the evidence presented in court.” *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000) (citing *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984)).

The trial court failed to remove Ms. Gifford and replace her with an available alternate juror. The tainted juror’s exposure to media coverage of Newberg’s case deprived him of the right to an impartial jury and a fundamentally fair trial.

The trial court’s inquiry into the extent that exposure biased said juror was inadequate. The juror’s brief statements to the court are not credible and often incoherent. She stated she walked in on her husband watching a news program of “our courtroom” the night before deliberations. The husband hit the mute button. Juror Ten saw the words “serial rapist” in a banner at the bottom. Then, after an undisclosed time viewing time, her husband turned the television off. Despite this, the juror denied that she presumed the newscast applied to Newberg.

Her testimony defies common sense. No reasonable finder of fact would believe that story. Why would the husband mute the television

when she walked in if the story was not about her trial? The news program was about a rape trial currently occurring in Newberg's courtroom which the juror conceded. The juror's equivocation about whether the news program concerned Newberg is questionable at best.

The information to which the juror was exposed suggested multiple prior bad acts. The words "serial rapist" cannot be understood to mean anything other than that Newberg had a history of committing rape. Moreover, the defense argued that the offense amounted to a sexual seduction because the act was consensual, whereas the term "rape" implies a forcible, non-consensual assault. Under these circumstances the juror's exposure to the extrajudicial information relating to alleged prior bad acts was prejudicial beyond a reasonable doubt.

Jury bias is analyzed under two theories—"actual bias and implied bias." *United States v. Mitchell*, 568 F.3d 1147, 1151 (9th Cir. 2009) (quoting *Estrada v. Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008)). Actual bias is, in essence, "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997)). Actual bias is found

where “a prospective juror states that he cannot be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view.” *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (en banc).

Juror No. 10 did not state a bias and stated she could “look at the facts in this particular case.” Hence the State has an argument that Newberg has not demonstrated actual bias. In fact, the lower court chastised Newberg for not questioning the juror to establish her actual bias. Yet neither the lower court nor the Nevada Supreme Court took the next step which is to evaluate whether the biased should have been implied.

Implied bias is “bias conclusively presumed as a matter of law.” *Gonzalez*, 214 F.3d at 1111 (quoting 47 Am. Jur.2d Jury § 266 (1995)). The inquiry here is “whether an average person in the position of the juror in controversy would be prejudiced.” *Id.* at 1112 (quoting *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1260-61 (10th Cir. 1999) (emphasis and internal quotation marks omitted)). Thus, a challenged juror's bias is presumed “where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely

that the average person could remain impartial in his deliberations under the circumstances.” *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)).

It is true that bias should be presumed only in “extreme” or “extraordinary” cases. *Tinsley*, 895 F.2d at 527 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 223 (1982) (O'Connor, J., concurring); accord *Fields*, 503 F.3d at 770 (holding that bias should be presumed only in “extreme situations”). Newberg’s situation represents that rare extreme and extraordinary circumstance.

- B. The lower court’s opinion acknowledging that “reasonable minds might differ as to the prejudicial impact” but affirming because the Nevada Supreme Court concluded the impact was “de minimis” should be reversed, because the Nevada Supreme Court’s opinion is not entitled to deference under 28 U.S.C. § 2254(d).**

As recognized by the Nevada Supreme Court and the district court, this jury had already been exposed to extraneous, prejudicial information about Newberg. *See* App. B (“The Nevada Supreme Court was correct that many prospective jurors had seen or read news reports about petitioner’s case before trial.”). Somewhat incredibly, both courts and the Court of Appeals held the jury was not compromised by the conclusion that Newberg was a “serial rapist” because the jury had already been

exposed to such prejudicial news reports. *Appendix A, B, and C*. Rather than gauge whether the average, objective, juror would have been biased by the report, the Nevada Supreme Court found instead that no one would be further biased because the damage had already been done. In other words, Newberg's jury was already hopelessly compromised so there was no point to protect him from additional prejudicial media coverage and bias.

This is illogical, unreasonable, and contrary to precedent. The material at issue is not casual or equivocal. Juror No. 10 was exposed to a conclusion, in a trial involving sexual assault of a minor, that Newberg was a repeat sexual offender. *See, e.g., United States v. Allsup*, 566 F.2d 68, 71–72 (9th Cir.1977) (holding that bias may be presumed from “potential for substantial emotional involvement”). It is hard to image extraneous information that could have been more prejudicial. *Cf. Coughlin v. Tailhook Assn.*, 112 F.3d 1052, 1062 (9th Cir. 1997) (explaining prejudice is presumed as “where the juror is apprised of such prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states he will”).

The Nevada Supreme Court’s decision that Juror No. 10 was not compromised by learning that Newberg was a serial rapist constitutes an unreasonable application of clearly established federal constitutional law. 28 U.S.C. § 2254(d)(1). And the court’s finding that “Juror No. 10 was not certain whether the words ‘serial rapist’ referred to Newberg” constitutes a clearly erroneous finding of fact. *See* 28 U.S.C. § 2254(d)(2); *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (detailing the test for challenging state court findings of fact).

CONCLUSION

Mr. Newberg respectfully requests that this Court grant his petition for a writ of certiorari and remand this case so that he may be retried by a fair and impartial jury.

Dated this June 12, 2018.

Respectfully submitted,

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APP. 001

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 14 2018

FOR THE NINTH CIRCUIT

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

STEVEN LEE NEWBERG,

Petitioner-Appellant,

v.

JACK PALMER; ATTORNEY GENERAL
FOR THE STATE OF NEVADA,

Respondents-Appellees.

No. 16-17109

D.C. No. 3:07-cv-00189

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Senior District Judge, Presiding

Argued and Submitted February 15, 2018
San Francisco, CA

Before: BEA and N.R. SMITH, Circuit Judges, and NYE,** District Judge.

Petitioner-Appellant Steven Lee Newberg (“Newberg”) appeals from the district court’s denial of habeas relief on his claim that juror bias deprived him of his rights under the Sixth and Fourteenth Amendments. This court reviews *de*

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

** The Honorable David C. Nye, United States District Judge for the District of Idaho, sitting by designation.

APP. 002

novo “allegations of juror misconduct and prejudicial impact in habeas cases.”

Caliendo v. Warden of California Men’s Colony, 365 F.3d 691, 694 (9th Cir. 2004). However, this court presumes state court findings of fact to be correct unless the petitioner rebuts them with clear and convincing evidence. *Id.* at 695 (citing 28 U.S.C. § 2254(e)(1)). We have jurisdiction under 28 U.S.C. § 2253 and we affirm.

Newberg’s habeas petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d). Under AEDPA, federal courts will not grant habeas relief

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim [in state court] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court’s decision is “contrary to” “clearly established federal law” if the state court “‘applies a rule that contradicts the governing law set forth in Supreme Court cases’ or . . . ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from our precedent.’” *Caliendo*, 365 F.3d at 695 (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)).

APP. 003

“[W]hen faced with allegations of improper contact between a juror and an outside party, courts apply a two-step framework.” *Godoy v. Spearman*, 861 F.3d 956, 959 (9th Cir. 2017). “At step one, the court asks whether the contact was ‘possibly prejudicial,’ meaning it had a ‘tendency’ to be ‘injurious to the defendant.’” *Id.* (quoting *Mattox v. United States*, 146 U.S. 140, 150 (1892)). If so, the court “proceeds to step two, where the ‘burden rests heavily upon the [state] to establish’ the contact was, in fact, ‘harmless.’” *Id.* (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)). Newberg argues that the Nevada Supreme Court’s¹ decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” because it denied Newberg’s claim at step one—that is, without deeming the juror contact presumptively prejudicial and proceeding to step two to shift the burden to the government to establish harmlessness.

The United States Supreme Court has observed that “it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). “Given this reality, if an unauthorized communication with a juror is *de minimis*, the defendant must show that the communication could have influenced the verdict before the burden

¹ “When reviewing a state court’s determination under AEDPA, we look to the last reasoned decision that finally resolves the claim at issue.” *Godoy*, 861 F.3d at 962 (quotation marks and citation omitted).

APP. 004

of proof shifts to the prosecution.” *Caliendo*, 365 F.3d at 696; *see also United States v. Olano*, 507 U.S. 725, 740 (1993) (declining to “presume prejudice” in “analyz[ing] outside intrusions upon the jury for prejudicial impact”); *Godoy*, 861 F.3d at 967 (citing *Caliendo* and noting that “[t]he contact must ‘raise a credible risk of influencing the verdict’ before it triggers the presumption of prejudice”). Therefore, step one of the two-step framework described in *Godoy* requires state courts to determine whether the alleged external contact was possibly prejudicial before proceeding to shift the burden to the government.

To that end, this court has identified five factors courts should consider “in determining whether the communication raised a risk of influencing the verdict”: (1) whether the communication concerned the case; (2) the length and nature of the contact; (3) the identity and role at trial of the parties involved; (4) evidence of actual impact on the juror; (5) the possibility of eliminating prejudice through a limiting instruction. *Caliendo*, 365 F.3d at 697–98. Here, the facts recited by the Nevada Supreme Court showed that the juror in question saw approximately 2–3 seconds of a television news story, without audio, which included a picture of the courtroom where Newberg’s trial was taking place and the words “serial rapist.” The juror stated that she did not associate this clip with Newberg’s trial. The external contact was accidental and brief. There was no suggestion the government played any role in producing the story on the television. Furthermore,

APP. 005

the external material was public; it was not directed to or intended for the juror personally. Newberg does not claim that the juror had any special interest in or sensitivity to the content of the external material. The juror promptly reported the incident to the court, and the court immediately investigated the matter and reminded the juror of her duty of impartiality. Finally, in answer to the court's question whether what she saw would affect her judgment of the case being tried, the juror reported that she would not look beyond "the facts in this particular case."

Reasonable minds might differ as to the prejudicial impact of the contact alleged here. However, on the facts presented to the Nevada Supreme Court, the *Caliendo* factors permit a reasonable court to find that the contact was *de minimis*. Applying AEDPA's deferential standard, we cannot say that the Nevada Supreme Court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

AFFIRMED.

APP. 006

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

STEVEN LEE NEWBERG,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:07-cv-00189-RCJ-RAM

ORDER

Before the court are the second amended petition for writ of habeas corpus (ECF No. 42), respondents' answer (ECF No. 64),¹ and petitioner's reply (ECF No. 70). The court finds that petitioner is not entitled to relief, and the court denies the second amended petition.

The second amended petition originally contained five grounds for relief, and ground 5 was divided into separate claims of ineffective assistance of trial counsel and appellate counsel. Petitioner admitted that ground 5(b) was not exhausted, and he dismissed it. The court has dismissed ground 2, the double-jeopardy claim in ground 4, and ground 5(c) as procedurally defaulted. Reasonable jurists would not find the court's conclusions on procedural default to be debatable or wrong, and the court will not issue a certificate of appealability for the procedurally defaulted grounds.

Congress has limited the circumstances in which a federal court can grant relief to a petitioner who is in custody pursuant to a judgment of conviction of a state court.

¹The answer is docketed incorrectly as "Errata."

APP. 007

1 An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
2 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—

3 (1) resulted in a decision that was contrary to, or involved an unreasonable application of,
4 clearly established Federal law, as determined by the Supreme Court of the United States; or

5 (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.

6 28 U.S.C. § 2254(d). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the
7 merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” Harrington v.
8 Richter, 562 U.S. 86, 98 (2011).

9 Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown
10 that the earlier state court’s decision “was contrary to” federal law then clearly established in
the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or
11 that it “involved an unreasonable application of” such law, § 2254(d)(1); or that it “was based
on an unreasonable determination of the facts” in light of the record before the state court,
12 § 2254(d)(2).

13 Richter, 562 U.S. at 100. “For purposes of § 2254(d)(1), ‘an unreasonable application of federal law
14 is different from an incorrect application of federal law.’” Id. (citation omitted). “A state court’s
15 determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists
16 could disagree’ on the correctness of the state court’s decision.” Id. (citation omitted).

17 [E]valuating whether a rule application was unreasonable requires considering the rule’s
18 specificity. The more general the rule, the more leeway courts have in reaching outcomes in
case-by-case determinations.

19 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

20 Under § 2254(d), a habeas court must determine what arguments or theories supported or, as
21 here, could have supported, the state court’s decision; and then it must ask whether it is
possible fairminded jurists could disagree that those arguments or theories are inconsistent
22 with the holding in a prior decision of this Court.

23 Richter, 562 U.S. at 102.

24 As a condition for obtaining habeas corpus from a federal court, a state prisoner must show
25 that the state court’s ruling on the claim being presented in federal court was so lacking in
justification that there was an error well understood and comprehended in existing law
26 beyond any possibility for fairminded disagreement.

27 Id. at 103.

APP. 008

1 In ground 1, petitioner claims that the trial court violated his rights under the Fifth, Sixth, and
2 Fourteenth Amendments when the trial court did not remove a juror who viewed a news report on
3 television. The Nevada Supreme Court described the facts and held:

4 On Monday, January 27, 2003, the fifth day of Newberg's trial, the district court held a
5 conference outside the presence of the jury, with the exception of Juror No. 10. The district
6 court addressed Juror No. 10, indicating that she had expressed that she was troubled by
7 something that had occurred over the weekend. The following dialogue transpired:

8 JUROR NUMBER 10: On Friday night I walked into a room in my house where my
9 husband had the television set on and I saw our courtroom.

10 THE COURT: Uh-huh.

11 JUROR NUMBER 10: He hit the mute button and I hadn't heard anything. Before
12 he could hit the power button I saw words across the bottom of the screen and I
13 thought the Court should know what I saw.

14 THE COURT: And what were those words you saw?

15 JUROR NUMBER 10: Those words were two words, serial rapist.

16 THE COURT: Okay. Did that give you an indication as to anything doing with this
17 case? I mean it was this courtroom.

18 JUROR NUMBER 10: No, No.

19 THE COURT: All right. You've seen those words. Do you have any type of
20 problem of still being fair and impartial both to Mr. Newberg and to the State of
21 Nevada on this matter?

22 JUROR NUMBER 10: No, I see my job to look at the facts in this particular case
23 without regard to, you know, anything that goes on around me.

24 THE COURT: Are you comfortable still sitting here? In other words, if you were
25 Mr. Newberg or you were the prosecutors, would you want someone with your state
26 of mind as it is today sitting on the jury, whether your be a prosecutor or defense
27 attorney or the defendant himself?

28

JUROR NUMBER 10: My concern was, I did of course realize, that whether you
know I thought this made a difference or not, that everyone needed to know that.

THE COURT: You understand that that's the reason we give that admonishment—

JUROR NUMBER 10: Right.

THE COURT: . . . so that if you do actually hear something, you brought it to
Danny's attention, he brought it to my attention, now I brought it to the lawyers'
attention.

APP. 009

1 The district court then inquired whether either side wanted to question Juror No. 10. Both
2 parties declined. Newberg then requested that Juror No. 10 be excused and replaced with the
3 one remaining alternate juror, on the basis that this episode was extremely prejudicial. The
4 State argued against her replacement, noting that there was no difference between Juror No.
5 10 and the many other jurors who had heard and read similar things about Newberg's trial
before becoming jurors. Furthermore, the State argued that Juror No. 10 indicated that she
could be fair and, that if she had ulterior motives, she would not have come forward. The
district court denied Newberg's challenge because it felt comfortable with Juror No. 10 and
confident that she would limit her judgment to what occurred in the courtroom

6 Newberg maintains that this error is clearly prejudicial and requires reversal of his
7 convictions. We disagree. "Whether a defendant is prejudiced by juror misconduct is a fact
8 question to be determined by the trial court, and its determination will not be disturbed on
9 appeal in the absence of a showing of an abuse of discretion." This court has noted that
10 whenever there is a reasonable probability that juror misconduct affected the verdict,
11 prejudice is shown. Not all exposure to extrinsic information is automatically prejudicial;
12 instead, this court will examine the nature of the information, analyzing it in the context of
13 the trial as a whole, to determine if there is a reasonable probability that the information
14 affected the verdict. This court has instructed that to determine whether there is a reasonable
15 likelihood that juror misconduct affected a verdict, the district court may consider numerous
16 factors, including how and when the extrinsic evidence was introduced, the length of time it
17 was discussed, and whether the evidence was material, cumulative, and admissible.
18 Furthermore, the district court "must determine whether the average, hypothetical juror
19 would be influenced by the juror misconduct."

20 In this case, the juror misconduct involved a brief exposure to extrinsic information, the
21 words "serial rapist" on the bottom of a television screen, which occurred on the fifth day of
22 trial, before the beginning of deliberations. As soon as this incident was reported, the district
23 court reminded Juror No. 10 of its admonitions, and it appeared clear that she understood not
24 to discuss that episode with other jurors, lessening the likelihood that the evidence was
25 introduced to other jurors. In fact, Juror No. 10 was not certain whether the words "serial
26 rapist" referred to Newberg or whether they had anything to do with his case. In light of all
27 these circumstances, this court finds that an average hypothetical juror would not have been
28 affected by this extraneous information, and there is little probability that Juror No. 10's
exposure affected the jury's verdict. Therefore, Newberg has failed to demonstrate reversible
prejudice, and the district court did not err in denying his request to replace Juror No. 10.

Ex. 66, at 2-5 (footnotes omitted) (ECF No. 28-13, at 3-6).

The constitutional standard of fairness requires that a defendant have "a panel of impartial,
'indifferent' jurors." . . . Qualified jurors need not, however, be totally ignorant of the facts
and issues involved.

To hold that the mere existence of any preconceived notion as to the guilt or
innocence of an accused, without more, is sufficient to rebut the presumption of a
prospective juror's impartiality would be to establish an impossible standard. It is
sufficient if the juror can lay aside his impression or opinion and render a verdict
based on the evidence presented in court.

At the same time, the juror's assurances that he is equal to this task cannot be dispositive of
the accused's rights, and it remains open to the defendant to demonstrate "the actual
existence of such an opinion in the mind of the juror as will raise the presumption of
partiality." Ibid.

APP. 010

1 Murphy v. Florida, 421 U.S. 794, 799-800 (1975) (quoting Irvin v. Dowd, 366 U.S. 717, 722, 723
2 (1961)). Questioning is the means by which a party can demonstrate that a juror should be excused
3 because of bias. Wainwright v. Witt, 469 U.S. 412, 423 (1985). The Nevada Supreme Court was
4 correct that many prospective jurors had seen or read news reports about petitioner's case before the
5 trial. Petitioner had been charged in one case with sexual misconduct of three victims—a few
6 months before the trial at issue now, the state district court severed the charges so that the trial only
7 involved the charges regarding petitioner's crimes against his minor cousin—and undoubtedly at
8 least some of those news reports noted the multiple victims. The Nevada Supreme Court reasonably
9 could have concluded that news report that Juror No. 10 saw was no more harmful to her
10 impartiality than the news reports that the prospective jurors saw. Petitioner had the opportunity to
11 ask Juror No. 10 more questions to bring out any possible bias, but he declined. Under these
12 circumstances, the Nevada Supreme Court reasonably could have concluded that Juror No. 10
13 remained impartial and that the trial court did not err in denying the motion to remove her from the
14 panel. Ground 1 is without merit.

15 Reasonable jurists might find this conclusion to be debatable, and the court will issue a
16 certificate of appealability for ground 1.

17 Ground 3 is a claim that the trial court erred in its denial of a motion to compel a
18 psychological examination of the victim. The Supreme Court of the United States has not clearly
19 established that a criminal defendant has a constitutional right to compel a psychological evaluation
20 of a victim. See Gilpin v. McCormick, 921 F.2d 928, 931-32 (9th Cir. 1990). Petitioner argues that
21 the denial of the examination made the trial fundamentally unfair.² Gilpin answers this argument:
22 There is no clearly established law on point, and thus the court cannot grant relief for that reason.
23 See Carey v. Musladin, 549 U.S. 70, 77 (2006). Petitioner also argues that Nevada does have a
24 procedure for compulsory psychological examinations, and thus the due process clause governs the
25 denial of his request. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Griffin v. Illinois, 351 U.S. 12,
26 18 (1956). Griffin held, and Lucey reinforced, that although the constitution does not require a state
27

28 ²The court is taking petitioner's arguments out of the order in which he presented them.

APP. 011

1 to create a system of appeals from a criminal justice, constitutional concepts of due process apply to
2 such a system if a state creates it. The Supreme Court has not clearly extended that principle to state
3 laws that allow compulsory psychological examinations. Furthermore, even if that principle applied,
4 it would not mean that the state district court must have granted petitioner's motion. In Koerschner
5 v. State, 13 P.3d 451 (Nev. 2000), upon which petitioner relied in his direct appeal and which the
6 Nevada Supreme Court modified in another case while petitioner's direct appeal was pending, the
7 Nevada Supreme Court explained the factors for granting a motion to compel a psychological
8 examination. However, the Nevada Supreme Court also held that the district court did not err in
9 denying Koerschner's motion. Likewise, in petitioner's direct appeal, the Nevada Supreme Court
10 evaluated petitioner's argument for a compulsory psychological examination in light of the facts of
11 the case, and determined that petitioner had not demonstrated a compelling need for a psychological
12 examination. Ex. 66, at 6-7 (ECF No. 28-13, at 7-8). In the absence of any clearly established
13 federal law on the issue, this court defers to the Nevada Supreme Court's determination of an issue
14 of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Ground 3 is without merit.

15 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will
16 not issue a certificate of appealability for ground 3.

17 Ground 4 is a claim that the trial court erred in refusing to issue an advisory verdict to the
18 jury that petitioner should be found not guilty of some counts. Over the course of litigation in state
19 court and federal court, this claim has changed. The charges relevant to this ground are six counts of
20 sexual assault with a minor under sixteen years of age (counts 3, 4, 5, 6, 11, and 12), and three
21 counts of open or gross lewdness (counts 7, 8, and 9). Ex. 29 (ECF No. 23-6). The jury found
22 petitioner guilty of all these counts. On appeal, petitioner argued:

23 The videotape of the sexual encounters between the Defendant and [the victim] and trial
24 testimony document three sexual acts—first fellatio, then sexual intercourse, and then an
25 additional act of fellatio. Based on those acts, the state charged the Defendant with nine
26 counts of sexual misconduct. The state's rationale for the three additional counts of Sexual
Assault on a Minor is that a new count should be added each time the Defendant stopped
briefly to adjust the video camera.

27 Ex. 53, at 27 (ECF No. 27-15, at 32) (emphasis added). In other words, petitioner argued on direct
28 appeal that there were only three acts of sexual assault, assuming that petitioner was guilty of sexual

APP. 012

1 assault. Petitioner did not make any argument regarding the charges of open and gross lewdness.

2 Petitioner based this argument upon Townsend v. State, 734 P.2d 705 (Nev. 1987). Townsend held:

3 We conclude, however, that two sexual assaults did not occur. Townsend simply began
4 lubricating the victim's vaginal area, took his hand away, put more lubricating substance on
5 his finger and then penetrated the child's vagina. Such a hypertechnical division of what was
essentially a single act is not sustainable. The instant case is not analogous to [Wicker v.
State, 603 P.2d 265 (Nev. 1979)] or [Deeds v. State, 626 P.2d 271 (1981)].

6 Townsend, 734 P.3d at 710. In petitioner's case, the Nevada Supreme Court held:

7 Finally, Newberg claims that the district court improperly denied his motion for an advisory
8 verdict, which Newberg requested pursuant to NRS 175.381, on the last day of trial. In
9 construing NRS 175.381, this court has said, "[t]he granting of an advisory instruction to
10 acquit rests with the sound discretion of the court." At trial, Newberg contended that under
11 Townsend v. State the district court should give an advisory verdict that the jury consider
12 only three counts of sexual assault of a minor under the age of 16. Newberg further
13 requested a jury instruction on the matter, which the district court agreed to give to the jury.
Newberg argued that the evidence depicted only three sexual acts: fellatio, sexual
intercourse, and an additional act of fellatio. Newberg argued that the jury should not
consider each distinct sexual act as a separate offense. Newberg contended it was improper
to consider three additional separate charges of sexual assault, each instituted anew when
Newberg was engaged in a single act of sexual conduct, stopped to adjust the recorder, and
resumed the conduct.

14 In this case, the jury listened to the testimony of the witness and viewed the videotape
15 Newberg made of the sexual assault. During closing argument the State explained in detail
16 the factual basis for each specific count of sexual assault. The explained why the duration of
17 the breaks in the sexual conduct justified the imposition of separate counts. Then the jury,
18 having received the instruction from Townsend, which clearly informed the jury that a brief
19 interruption of a sexual assault will not support two separate charges, weighed the evidence
and found Newberg guilty on all counts. Based on the evidence before the jury, on the
instruction from Townsend, and the discretionary nature of advisory verdicts, the district
court did not abuse its discretion by refusing to issue an advisory verdict. We believe that the
jury was entitled to determine, on its own, whether the evidence demonstrated the three
additional counts of sexual assault alleged by the State.

20 Ex. 66, at 7-9 (ECF No. 28-13, at 8-10).

21 On direct appeal, petitioner did not present this claim as a violation of federal law. Petitioner
22 mentioned no provision of federal law, petitioner cited no case that applied federal law, and the
23 Nevada Supreme Court did not resolve the issue as a matter of federal law. The issue only was
24 whether the trial court erred in refusing to give an advisory verdict to acquit under Nev. Rev. Stat.
25 § 175.381.

26 In ground 4 of the second amended petition (ECF No. 42), the claim changed. First,
27 petitioner argued that the multiple counts of sexual assault and open and gross lewdness were
28 redundant. It was unclear what specific counts were redundant, and the claim of redundancy for the

APP. 013

1 counts of open and gross lewdness was new. Second, petitioner argued that the conviction on
2 multiple counts violated the Double Jeopardy Clause of the Fifth Amendment, and petitioner had not
3 presented such an argument to the state courts. The court held that the double-jeopardy aspect of
4 ground 4 was unexhausted. After a procedural bar in state court, the court held that the double-
5 jeopardy aspect of ground 4 was procedurally defaulted.

6 The reply (ECF No. 70) has both clarified and created new problems with ground 4. First,
7 petitioner has returned to the argument that the convictions for sexual assault on counts 4, 6, and 12
8 are redundant to the convictions for sexual assault on counts 3, 5, and 11. Petitioner has dropped
9 any arguments regarding the counts of open or gross lewdness. This is similar to the argument that
10 he made on direct appeal. Second, petitioner now frames ground 4 as a claim that the evidence was
11 insufficient to support the convictions for counts 4, 6, and 12, citing, among other cases, Jackson v.
12 Virginia, 443 U.S. 307 (1979), and In re Winship, 397 U.S. 358 (1970). Third, petitioner now
13 argues that the state district court should have given a directed verdict on counts 4, 6, and 12.

14 Petitioner did not argue in the second amended petition that the evidence was insufficient to
15 support the verdicts of three counts of sexual assault. The reply brief is not the correct method to
16 introduce a new claim, and the court will not consider it. See Cacoperdo v. Demosthenes, 37 F.3d
17 504, 507 (9th Cir. 1994).

18 What remains of ground 4 is a state-law claim that the trial court abused its discretion. This
19 has two fatal defects. First, if petitioner's change of phrase from "advisory verdict" to "directed
20 verdict" is not inadvertent, then no violation of state law occurred. Nevada law does not allow a
21 directed verdict in criminal proceedings. State v. Combs, 14 P.3d 520, 521 (Nev. 2000). Second,
22 even if there was an error, errors in state law are not addressable in federal habeas corpus. Pulley v.
23 Harris, 465 U.S. 37, 41 (1984). Ground 4 is without merit.

24 Reasonable jurists would not find the court's conclusion to be debatable or wrong, and the
25 court will not issue a certificate of appealability for ground 4.

26 Three claims of ineffective assistance of counsel remain in ground 5. "[T]he right to counsel
27 is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 &
28 n.14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the

APP. 014

1 defense attorney's representation "fell below an objective standard of reasonableness," Strickland v.
2 Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced
3 the defendant such that "there is a reasonable probability that, but for counsel's unprofessional
4 errors, the result of the proceeding would have been different," id. at 694. "[T]here is no reason for
5 a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to
6 address both components of the inquiry if the defendant makes an insufficient showing on one." Id.
7 at 697.

8 Establishing that a state court's application of Strickland was unreasonable under § 2254(d)
9 is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly
10 deferential," . . . and when the two apply in tandem, review is "doubly" so The
11 Strickland standard is a general one, so the range of reasonable applications is substantial.
12 Federal habeas courts must guard against the danger of equating unreasonableness under
13 Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is
14 not whether counsel's actions were reasonable. The question is whether there is any
15 reasonable argument that counsel satisfied Strickland's deferential standard.

13 Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citations omitted).

14 In ground 5(a), petitioner argues that trial counsel failed to file a motion for a new trial on the
15 grounds that jurors were exposed to news reporters prior to deliberations. After the verdict,
16 petitioner filed a proper-person motion for a new trial. Ex. 47 (ECF No. 27-9). At the sentencing
17 hearing, the trial court denied the motion without prejudice. Ex. 48, at 22 (ECF No. 27-10, at 23).
18 Counsel did not file a motion for a new trial. On this issue, the Nevada Supreme Court held:

19 Seventh, appellant claimed that his trial counsel were ineffective for failing to move the
20 district court for a new trial after the jury was exposed to news reporters in the hallway prior
21 to their deliberations. Appellant failed to demonstrate that his trial counsels' performance
22 was deficient or that he was prejudiced. Appellant previously submitted a similar claim to
23 this court in his direct appeal. On the fifth day of appellant's trial, a juror came forward
24 admitting that she had been exposed to extrinsic evidence. The juror was questioned by both
25 sides, and the district court, confident that the juror could perform her duties aptly, denied
26 appellant's challenge for her removal. On direct appeal, this court held that, in light of all the
27 circumstances, the brief exposure to extrinsic evidence would not have affected the
28 hypothetical juror of the jury's verdict, and the district court did not err in denying the
29 challenge to replace the juror. Unlike that claim, in this claim appellant did not specify what
30 the jury allegedly heard that would have influenced their deliberations or that had counsel
31 moved for a new trial, the motion would have been successful, especially given that the
32 district court had just previously found no prejudice where the exposure to extrinsic evidence
33 was specifically particularized. Thus, the district court did not err in denying this claim.

27 Ex. 83, at 7-8 (ECF No. 28-30, at 8-9). Petitioner did not allege in his proper-person motion what
28 the jury actually heard, if anything. Furthermore, the jurors knew that news reporters were covering

APP. 015

1 the case. At the start of jury selection, the judge pointed out to the potential jurors a number of
2 news reporters and a television camera. Ex. 32, at 12-13 (ECF No. 24, at 13-14). The Nevada
3 Supreme Court's determination that petitioner had failed to demonstrate deficient performance and
4 prejudice was reasonable given the lack of facts alleged.

5 Reasonable jurists would not find the court's conclusion to be debatable or wrong, and the
6 court will not issue a certificate of appealability for ground 5(a).

7 At trial, the prosecution introduced into evidence a videotape showing petitioner committing
8 sexual acts against the victim. Ground 5(d) is a claim that appellate counsel failed to raise on appeal
9 an argument that the trial court erred in denying petitioner's motion to suppress the videotape. In
10 the motion to suppress, petitioner argued three issues. First, the contradiction among the testimonies
11 of the police officers regarding the search showed that they did not follow police department policy
12 and that they could not account for the chain of custody. Second, the police mishandled the
13 evidence and broke the chain of custody. Third, before opening the briefcase in which the videotape
14 was found, the police did not determine whether the briefcase belonged to petitioner; petitioner's
15 girlfriend used the same bedroom as petitioner, and another person lived in another bedroom. Ex. 28
16 (ECF No. 23-5). In the state habeas corpus petition and in the federal second amended petition,
17 petitioner also argues that appellate counsel failed to argue that the search warrant was overbroad
18 and that the evidence provided to police could not form the basis for the search warrant.

19 In the appeal from the denial of the state habeas corpus petition, the Nevada Supreme Court
20 held:

21 Second, appellant claimed that his appellate counsel was ineffective for failing to argue that
22 the district court erred in denying the suppression of the mini-cassettes found in appellant's
23 briefcase. Appellant failed to demonstrate that appellate counsels' performance was deficient
24 or that he was prejudiced. As discussed above, the search warrant was not overly broad and
25 was supported by probable cause. Testimony from police officers at the scene of the search
26 established the chain of custody of the tapes recovered from appellant's briefcase. Thus,
27 appellant failed to demonstrate that this issue had a reasonable probability of success on
28 appeal and therefore, the district court did not err in denying this claim.

Ex. 83, at 10-11 (ECF No. 28-30, at 11-12). The Nevada Supreme Court was referring to its ruling
earlier in the order that trial counsel did not provide ineffective assistance. There, the Nevada
Supreme Court held:

APP. 016

1 First, appellant claimed that his trial counsel were ineffective for failing to attack or challenge
2 the search warrant as overbroad. Appellant appeared to be claiming that a videotape of
3 appellant allegedly sexually assaulting unidentified women did not establish probable cause
4 sufficient to justify a search warrant.

5 The Fourth Amendment to the United States Constitution provides:

6 The right of the people to be secure in their persons, houses, papers, and effects,
7 against unreasonable searches and seizures, shall not be violated, and no Warrants
8 shall issue, but upon probable cause, supported by Oath or affirmation, and
9 particularly describing the place to searched, and the persons or things to be seized.

10 “Probable cause” requires trustworthy facts and circumstances which would cause a person
11 of reasonable caution to believe that it is more likely than not that the specific items to be
12 searched for are seizable and will be found in the place to be searched.

13 Appellant failed to specify why the search warrant was overbroad or not supported by
14 probable cause. Police officers had received information from appellant’s ex-girlfriend,
15 Sharon Santoro, that she suspected that her former boyfriend was raping women and filming
16 it. Officers obtained a VHS videotape which showed appellant involved in what appeared to
17 be sexual assault on more than one woman. Further, Santoro supplied officers with the
18 names of two women who alleged that appellant had sexually assaulted them and filmed the
19 acts. There was probable cause to believe that Newberg was in possession of further
20 videotapes either in his residence or his vehicle. Thus, the search warrant was not overbroad
21 and was supported by probable cause. The warrant specified the place to be searched and the
22 items to be seized, and appellant failed to demonstrate that the warrant was not supported by
23 probable cause. Appellant failed to demonstrate that had counsel challenged the search
24 warrant as overbroad that the challenge would have been successful or the outcome of the
25 trial would have been different. Thus, the district court did not err in denying this claim.

26 Ex. 83, at 2-4 (ECF No. 28-30, at 3-5) (footnotes omitted). At one of petitioner’s first appearances
27 in court, the prosecutor noted, “Essentially, what you have here is a guy that we come to discover a
28 number of videotapes all of which depict different women only three of whom have been identified,
two original women as well as the 14 year old.” Ex. 4, at 3 (ECF No. 21-5, at 2). In other words,
police found the evidence of sexual assaults against the two women who were identified by Santoro
and who confirmed what Santoro had said. Police also found in the course of that search evidence
that petitioner had committed sexual crimes against other women, including the minor victim in this
case. The trial on the charges involving the other two women occurred later. The Nevada Supreme
Court reasonably could have concluded that there was no reasonable probability that the direct
appeal would have reached a different result had appellate counsel raised these issues on appeal.

On the issue of the chain of custody, the Nevada Supreme Court held:

Second, appellant claimed that his trial counsel were ineffective for failing to challenge the
chain of custody of evidence seized. This claim is belied by the record. Trial counsel did file
a motion to suppress evidence of a mini-cassette that contained the taped assault of the minor

APP. 017

1 victim based on a break of the chain of custody. The district court determined that the chain
2 of custody had appropriately been established. Appellant failed to demonstrate that had
3 counsel persisted with the chain of custody challenge that the challenge would have been
4 successful or there would have been a different outcome in his trial. Thus, the district court
5 did not err in denying this claim.

6 Ex. 83, at 4 (ECF No. 28-30, at 5) (footnotes omitted). The case that petitioner cited in his motion
7 to suppress, Geary v. State, 544 P.2d 417 (Nev. 1975), abrogated on other grounds by Hannon v.
8 State, 207 P.3d 344 (Nev. 2009), actually was persuasive authority for the prosecution. In Geary,
9 The mortician had drawn three vials of the murder victim's blood. By the time of the trial, two vials
10 were missing with no explanation. The prosecution sought admission of the remaining vial into
11 evidence. Geary challenged the admission because tampering could be inferred by the missing vials,
12 and thus the chain of custody was broken. 544 P.2d at 423-24. In rejecting the argument, the
13 Nevada Supreme Court noted, "It is not necessary to negate all possibilities of substitution or
14 tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand; it is
15 sufficient to establish only that it is reasonable certain that no tampering or substitution took place,
16 and the doubt, if any, goes to the weight of the evidence." Id. at 424 (quoting Sorce v. State, 497
17 P.2d 902, 903 (Nev. 1972)). In short, under Nevada law, a break in the chain of custody is an issue
18 of the weight that the jury should give to the evidence. A break in the chain of custody is not an
19 issue of the admissibility of the evidence. The Nevada Supreme Court reasonably could have
20 concluded that appellate counsel did not perform deficiently in deciding not to raise this argument on
21 appeal.

22 Petitioner's argument regarding the ownership of the briefcase has no merit. If the briefcase
23 was his, then it fell within the scope of the search warrant. If the briefcase was not his, then he had
24 no legitimate expectation of privacy in the briefcase, and he could not claim Fourth Amendment
25 protection for its contents. See United States v. Payner, 447 U.S. 727, 731 (1980).

26 Reasonable jurists would not find the court's conclusions to be debatable or wrong, and the
27 court will not issue a certificate of appealability for ground 5(d).
28

APP. 018

1 In ground 5(e), petitioner argues that appellate counsel failed to raise the issue of the trial
2 court's error in denying petitioner's motion for self-representation. On this issue, the Nevada
3 Supreme Court held:

4 First, appellant claimed that his appellate counsel was ineffective for failing to argue that the
5 district court erred in denying appellant's motion to represent himself prior to sentencing.
6 Appellant failed to demonstrate that his appellate counsels' failure to raise this claim
7 prejudiced him. A trial court may deny a request for self-representation that is untimely,
8 equivocal, or if the defendant abuses the right by disrupting the judicial process. Appellant
failed to demonstrate that he unequivocally requested self-representation. Therefore, the
district court did not err in denying appellant's request to represent himself. Thus, appellant
failed to demonstrate that this issue had a reasonable probability of success on appeal, and the
district court did not err in denying this claim.

9 Ex. 83, at 10-11 (ECF No. 28-30, at 11-12) (footnote omitted). Petitioner's motion for self-
10 representation consisted of a citation to Faretta v. California, 422 U.S. 806 (1975), and a statement
11 that the district court has the discretion to appoint advisory counsel. Nevada does not recognize a
12 right of a person representing himself to have advisory counsel. Harris v. State, 942 P.2d 151, 155
13 (Nev. 1997) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)). The Nevada
14 Supreme Court reasonably could have concluded that petitioner had presented an equivocal motion
15 for self-representation. Consequently, the Nevada Supreme Court reasonably could have concluded
16 that appellate counsel did not perform deficiently, and that petitioner suffered no prejudice, from not
17 raising this issue on appeal, because petitioner did not have a reasonable likelihood of success.
18 Ground 5(e) is without merit.

19 Reasonable jurists would not find the court's conclusions to be debatable or wrong, and the
20 court will not issue a certificate of appealability for ground 5(e).

21 IT IS THEREFORE ORDERED that the second amended petition (ECF No. 42) is
22 **DENIED**. The clerk of the court shall enter judgment accordingly and close this action.

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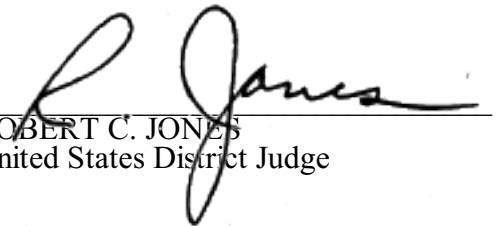
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APP. 019

1 IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** on whether the
2 court was correct in its determination that ground 1 lacked merit. On all other issues, a certificate of
3 appealability is **DENIED**.

4 DATED: This 18th day of October, 2016.

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7 ROBERT C. JONES
United States District Judge
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APP. 020

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN NEWBERG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41475

FILED

MAR 17 2005

ORDER OF AFFIRMANCE

ANNE E. M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction issued pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant, Steven Newberg, appeals from a judgment of conviction, pursuant to a jury verdict, of one count of attempted sexual assault with a minor under the age of sixteen, two counts of use of a minor in producing pornography, six counts of sexual assault with a minor under the age of sixteen, three counts of open or gross lewdness, and one count of possession of visual presentation depicting sexual conduct of a person under the age of sixteen. Newberg was sentenced to: (1) a prison term of 96 months to 240 months for attempted sexual assault; (2) two concurrent terms of life, with eligibility for parole after 5 years for use of a minor in producing pornography, to run consecutive to (1); six concurrent life terms, with eligibility for parole after 20 years, to run consecutive to (1) and (2); three concurrent terms of 12 months for open or gross lewdness to run concurrent to (1), (2) and (3); and a prison term of 28 months to 72 months for possession of visual presentation depicting sexual conduct of a person under the age of 16, to run concurrent with (1), (2), and (3) of the conviction. The district court also imposed a special sentence of lifetime supervision.

APP. 021

On appeal, Newberg claims that the district court improperly: (1) denied him due process by refusing to excuse a juror who saw prejudicial material in violation of the district court's admonitions; (2) denied Newberg's motion for a psychological evaluation of Newberg's victim; and (3) denied Newberg's motion for an advisory verdict.

On Monday, January 27, 2003, the fifth day of Newberg's trial, the district court held a conference outside the presence of the jury, with the exception of Juror No. 10. The district court addressed Juror No. 10, indicating that she had expressed that she was troubled by something that had occurred over the weekend. The following dialogue transpired:

JUROR NUMBER 10: On Friday night I walked into a room in my house where my husband had the television set on and I saw our courtroom.

THE COURT: Uh-huh.

JUROR NUMBER 10: He hit the mute button and I hadn't heard anything. Before he could hit the power button I saw words across the bottom of the screen and I thought the Court should know what I saw.

THE COURT: And what were those words you saw?

JUROR NUMBER 10: Those words were two words, serial rapist.

THE COURT: Okay. Did that give you an indication as to anything doing with this case? I mean it was this courtroom.

JUROR NUMBER 10: No, No.

THE COURT: All right. You've seen those words. Do you have any type of problem of still being fair and impartial both to Mr. Newberg and to the State of Nevada on this matter?

APP. 022

JUROR NUMBER 10: No, I see my job to look at the facts in this particular case without regard to, you know, anything that goes on around me.

THE COURT: Are you comfortable still sitting in here? In other words, if you were Mr. Newberg or you were these prosecutors, would you want someone with your state of mind as it is today sitting on the jury, whether you be a prosecutor or defense attorney or the defendant himself?

....

JUROR NUMBER 10: My concern was, I did of course realize, that whether you know I thought this made a difference or not, that everyone needed to know that.

THE COURT: You understand that that's the reason we give that admonishment—

JUROR NUMBER 10: Right.

THE COURT: - - so that if you do actually hear something, you brought it to Danny's attention, he brought it to my attention, now I brought it to the lawyers' attention.

The district court then inquired whether either side wanted to question Juror No. 10. Both parties declined. Newberg then requested that Juror No. 10 be excused and replaced with the one remaining alternate juror, on the basis that this episode was extremely prejudicial. The State argued against her replacement, noting that there was no difference between Juror No. 10 and the many other jurors who had heard and read similar things about Newberg's trial before becoming jurors. Furthermore, the State argued that Juror No. 10 indicated that she could be fair and, that if she had ulterior motives, she would not have come forward. The district court denied Newberg's challenge because it felt comfortable with Juror No. 10 and confident that she would limit her judgment to what occurred in the courtroom.

APP. 023

Newberg maintains that this error is clearly prejudicial and requires reversal of his convictions. We disagree. "Whether a defendant is prejudiced by juror misconduct is a fact question to be determined by the trial court, and its determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion."¹ This court has noted that whenever there is a reasonable probability that juror misconduct affected the verdict, prejudice is shown.² Not all exposure to extrinsic information is automatically prejudicial; instead, this court will examine the nature of the information, analyzing it in the context of the trial as a whole, to determine if there is a reasonable probability that the information affected the verdict.³ This court has instructed that to determine whether there is a reasonable likelihood that juror misconduct affected a verdict, the district court may consider numerous factors, including how and when the extrinsic evidence was introduced, the length of time it was discussed, and whether the evidence was material, cumulative, and admissible.⁴ Furthermore, the district court "must determine whether the average, hypothetical juror would be influenced by the juror misconduct."⁵

In this case, the juror misconduct involved a brief exposure to extrinsic information, the words "serial rapist" on the bottom of a television screen, which occurred on the fifth day of trial, before the

¹Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 942-43(1989).

²Meyer v. State, 119 Nev. 554, 564, 80 P. 3d 447, 455 (2003).

³Id. at 563-66, 80 P.3d at 456.

⁴Id. at 566, 80 P.3d at 456.

⁵Id.

APP. 024

beginning of deliberations. As soon as this incident was reported, the district court reminded Juror No. 10 of its admonitions, and it appeared clear that she understood not to discuss that episode with other jurors, lessening the likelihood that the evidence was introduced to other jurors. In fact, Juror No. 10 was not certain whether the words "serial rapist" referred to Newberg or whether they had anything to do with his case. In light of all of these circumstances, this court finds that an average hypothetical juror would not have been affected by this extraneous information, and there is little probability that Juror No. 10's exposure affected the jury's verdict. Therefore, Newberg has failed to demonstrate reversible prejudice, and the district court did not err in denying his request to replace Juror No. 10.

On December 23, 2002, Newberg submitted a motion, to which the State replied, requesting an independent psychological examination of his victim. Newberg alleged that there was no corroborating evidence to the sexual assault claim besides the victim's testimony because it was clear from the videotape that Newberg made of the incident that he was not physically forcing her into having sex. Additionally, Newberg asserts that a reasonable basis existed for believing that the victim's mental or emotional state may have affected her veracity because she had been treated by a psychologist and had exhibited suicidal behavior. On January 3, 2003, the district court held a hearing and denied the motion; however, the reason for the district court's denial is not evident from the record.

Initially, we note that the district court has the discretion "to grant or deny a defendant's request for a psychological examination of a child-victim" and absent an abuse of discretion, the court's decision will

APP. 025

not be set aside.⁶ Notably, in the recent case of State v. Dist. Ct. (Romano), this court revisited the issue of what a defendant must show in order to be entitled to an independent psychological examination of an alleged sexual assault victim.⁷ In that case, this court determined that the test previously applied under Koerschner v. State, did “not always adequately balance the needs of the victim and the defendant.”⁸ To achieve this goal, this court modified Koerschner and held that “a defendant is entitled to a psychological examination of an alleged sexual assault victim only where: (1) the State notifies the defendant that it intends to examine the victim by its own expert, and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination.”⁹

To determine whether a compelling need exists, the trial court needs to consider the following: “(1) whether little or no corroboration of the offense exists beyond the victim’s testimony, and (2) whether there is a reasonable basis for believing that the victim’s mental or emotional state may have affected his or her veracity.”¹⁰ In addition, this court provided that trial courts must set forth a particularized factual finding stating the reasons why an examination is warranted.¹¹ Importantly, in Richmond v.

⁶Chapman v. State, 117 Nev. 1, 4, 16 P.3d 432, 434 (2001).

⁷120 Nev. ___, ___, 97 P.3d 594, 600 (2004).

⁸Id.

⁹Id.

¹⁰Id. (citing Koerschner v. State, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000)).

¹¹Id. at ___, 97 P.3d at 600-601.

APP. 026

State, this court adopted the federal retroactivity rule, stating, "we will apply a new rule to all cases on direct appeal regardless of whether the new rule is based on the Federal Constitution or state law."¹² Therefore, this court will apply the newly adopted test enunciated in Romano to determine if Newberg was entitled to an independent psychological examination of the victim.

In the instant case, the district court properly denied Newberg's request for an examination. Importantly, as a threshold matter, the State did not rely on an expert in psychiatry or psychology in this case. In addition, Newberg failed to present a compelling reason for the examination. First, the evidence against Newberg was overwhelming. Not only did the victim testify to the specific acts of sexual assault committed by Newberg, but Newberg taped one such incident and that tape was played for the jury. Second, the mere fact that the victim had been seeing a psychiatrist and had exhibited self-destructive behavior did not provide, in and of itself, a reasonable basis for believing that her mental or emotional state may have affected her veracity. As a result, this court rejects Newberg's claims regarding his right to an independent psychological examination of the victim.

Finally, Newberg claims that the district court improperly denied his motion for an advisory verdict, which Newberg requested pursuant to NRS 175.381, on the last day of trial. In construing NRS 175.381, this court has said, "[t]he granting of an advisory instruction to

¹²118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

APP. 027

acquitt rests within the sound discretion of the court.”¹³ At trial, Newberg contended that under Townsend v. State¹⁴ the district court should give an advisory verdict that the jury consider only three counts of sexual assault of a minor under the age of 16. Newberg further requested a jury instruction on the matter, which the district court agreed to give to the jury. Newberg argued that the evidence depicted only three sexual acts: fellatio, sexual intercourse, and an additional act of fellatio. Newberg argued that the jury should not consider each distinct sexual act as a separate offense. Newberg contended it was improper to consider three additional separate charges of sexual assault, each instituted anew when Newberg was engaged in a single act of sexual conduct, stopped to adjust the recorder, and resumed the conduct.

In this case, the jury listened to the testimony of the witnesses and viewed the videotape Newberg made of the sexual assault. During closing argument the State explained in detail the factual basis for each specific count of sexual assault. The State explained why the duration of the breaks in the sexual conduct justified the imposition of separate counts. Then the jury, having received the instruction from Townsend,¹⁵

¹³Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

¹⁴103 Nev. 113, 734 P.2d 705 (1987).

¹⁵In Townsend, the defendant began lubricating the victim’s vaginal area, stopped to put more lubricant on his finger, and then penetrated the child’s vagina with his finger. Id. at 116, 734 P.2d at 707. Townsend was charged with two counts of sexual assault. Id. at 120, 735 P.2d at 710. This court overturned the conviction on one count observing that “Townsend’s actions were continuous and did not stop between the different acts.” Peck v. State, 116 Nev. 840, 848, 7 P.3d 470, 475 (2000).

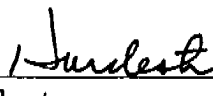
APP. 028

which clearly informed the jury that a brief interruption of a sexual assault will not support two separate charges, weighed the evidence and found Newberg guilty on all counts. Based on the evidence before the jury, on the instruction from Townsend, and the discretionary nature of advisory verdicts, the district court did not abuse its discretion by refusing to issue an advisory verdict. We believe that the jury was entitled to determine, on its own, whether the evidence demonstrated the three additional counts of sexual assault alleged by the State.

Accordingly, we order the judgment of conviction AFFIRMED.


_____. J.
Rose


_____. J.
Gibbons


_____. J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

APP. 029

ORIGINAL

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1 JOCP

2 DAVID ROGER

3 Clark County District Attorney

4 Nevada Bar #002781

5 200 South Third Street

6 Las Vegas, Nevada 89155-2211

7 (702) 455-4711

8 Attorney for Plaintiff

FILED

May 21 3 41 PM '03

Shirley A. Longoria
CLERKDISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

STEVEN NEWBERG,
#1366850

Defendant.

Case No: C184795

Dept No: XVII

JUDGMENT OF CONVICTION (JURY TRIAL)

The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category B Felony); COUNTS 2 & 10 - USE OF MINOR IN PRODUCING PORNOGRAPHY (Category A Felony); COUNTS 3, 4, 5, 6, 11 & 12 - SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category A Felony); COUNTS 7, 8 & 9 - OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210) and COUNT 13 - POSSESSION OF VISUAL PRESENTATION DEPICTING SEXUAL CONDUCT OF A PERSON UNDER THE AGE OF 16 (Category B Felony), in violation of NRS 193.330; 200.364; 200.366; 200.700, 200.710; 200.730; 200.750 and 200.210, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime(s) of COUNT 1 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16; COUNTS 2 & 10 - USE OF MINOR IN PRODUCING PORNOGRAPHY; COUNTS 3, 4, 5, 6, 11 & 12 - SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16; COUNTS 7, 8 & 9 - OPEN OR GROSS LEWDNESS; and

RECORDED

MAY 14 2003

COUNTY CLERK

COUNTY CLERK

MAY 21 2003

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APP. 030

1 COUNT 13 - POSSESSION OF VISUAL PRESENTATION DEPICTING SEXUAL
2 CONDUCT OF A PERSON UNDER THE AGE OF 16; and thereafter on the 22nd day of
3 April, 2003, the Defendant was present in Court for sentencing with his counsel, STEPHEN
4 IMMERMANN, Deputy Public Defender, and STACEY ROUNDTREE, Deputy Public
5 Defender, and good cause appearing therefor,

6 THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the
7 jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee and a \$150.00
8 DNA Analysis Fee and \$500.00 Psycho-Sexual Analysis fee, the Defendant is sentenced as
9 follows:

10 COUNT I - to a MINIMUM of NINETY-SIX (96) MONTHS and a MAXIMUM of TWO
11 HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC) and
12 to a term of LIFETIME supervision commencing upon completion of any grant of probation,
13 term of imprisonment or period of release on parole;

14 COUNTS II & X - for each count, to a term of LIFE, with eligibility for parole when a
15 MINIMUM of FIVE (5) YEARS has been served and to a term of LIFETIME supervision
16 commencing upon completion of any grant of probation, term of imprisonment or period of
17 release on parole, Count X CONCURRENT with Count II and Count II CONSECUTIVE to
18 Count I;

19 COUNTS III, IV, V, VI, XI & XII - for each count, to a term of LIFE, with eligibility for
20 parole when a MINIMUM of TWENTY (20) YEARS has been served and to a term of
21 LIFETIME supervision commencing upon completion of any grant of probation, term of
22 imprisonment or period of release on parole, Count III CONSECUTIVE to Counts I & II and
23 Counts IV, V, VI, XI and XII CONCURRENT with Count III;

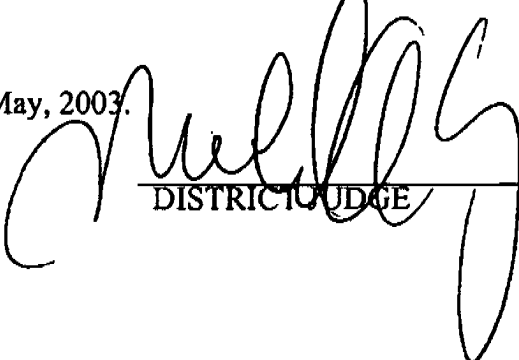
24 COUNTS VII, VIII & IX - for each count, to a term of TWELVE (12) MONTHS in the
25 Clark County Detention Center (CCDC), Counts VIII & IX CONCURRENT with Count VII
26 and Count VII CONCURRENT with Counts I, II & III; and

27 COUNT XIII - to a MINIMUM of TWENTY-EIGHT (28) MONTHS and a MAXIMUM of
28 SEVENTY-TWO (72) MONTHS in NDC, to be served CONCURRENTLY with Counts I,

APP. 031

1 II, III & VII. Defendant to receive THREE HUNDRED EIGHTY-NINE (389) DAYS credit
2 for time served. Defendant shall register as a sex offender within 48 hours of sentencing or
3 release from custody.

4 DATED this 21 day of May, 2003.


DISTRICT JUDGE

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