No. _____

In the Supreme Court of the United States

BILL DONAT, WARDEN; ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TODD M. HONEYCUTT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Catherine Cortez Masto
Attorney General of Nevada
Dennis C. Wilson
Counsel of Record
Senior Deputy Attorney General
555 E. Washington Ave. #3900
Las Vegas, NV 89101
(702) 486-3086
dwilson@ag.nv.gov

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

This Court has clearly established the rule that incriminating statements pertaining to pending charges are not admissible at the trial of those charges, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel. This Court, however, has also held that incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses. But this Court has never clearly established that the State violates an earlier-attached right to counsel when at lawfully-joined trials it offers into evidence lawfully-obtained, deliberately-elicited, cross-admissible statements pertaining to a later related crime to show 1) the defendant's guilt of the later related crime and/or 2) to show the defendant's consciousness of guilt in the earlier crime. The two questions presented are as follows:

1. Did the Ninth Circuit contravene 28 U.S.C. § 2254(d)(1) when it granted habeas relief even though there is no clearly-established Supreme Court precedent which holds that in Respondent's case the state violated the Sixth Amendment.

2. Whether the Ninth Circuit improperly disregarded its obligation under *Fry v. Pliler* and *Brecht v. Abrahamson* to review the state-court decision for harmless error when it applied a Ninth Circuit direct-review standard to determine that it would not reach the issue of harmless error because the State had waived it.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bill Donat, Warden of High Desert State Prison in Indian Springs, Nevada, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which, in an unpublished opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part and the dissenting opinion can be found at 2013 WL 3943148, August 01, 2013 (No. 09-16758). (App. 1-11). The unpublished order of the United States District Court for the District of Nevada denying habeas relief (App. 12-87) is unreported but can be found at 2009 WL 2177059, D.Nev., July 21, 2009 (NO. 2:06-CV-0634-RLH-RJJ. The order of the Nevada Supreme Court on direct appeal affirming the conviction is unreported. (App. 90-123).

JURISDICTION

The court of appeals entered judgment on August 1, 2013 and denied petitioner's timely petition for rehearing and rehearing en banc on September 12, 2013. App. 84-85. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * have the assistance of counsel for his defense."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant 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;
>
> * * *
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Nev. Rev. Stat. 48.045(2) states:

> Evidence 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

In violation of the limits Congress imposed in AEDPA, the Ninth Circuit granted habeas relief even though this Court has not clearly established the law which the Ninth Circuit imposed upon Petitioner. The Ninth Circuit erroneously concluded that Respondent's case was indistinguishable from *Maine v. Moulton*. The Ninth Circuit held that the Nevada Supreme Court unreasonably denied Respondent's *Massiah v. United Statesput*, 377 U.S. 201 (1964) claim when it affirmed the admission of Respondent's "deliberately-elicited" statements to incriminate him on earlier sexual assault charges. But this Court has never held that, where two separate trials (rape and solicitation to commit murder) are lawfully joined and tried together, the State violates the earlier rape-kidnapping right to counsel when it offers into evidence lawfully-obtained, deliberately-elicited, cross-admissible statements pertaining to the later related crime 1) to show the defendant's guilt of the later related crime and/or 2) to show the defendant's consciousness of guilt in the earlier crime. Further, no clearly-established Supreme Court precedent holds that the Sixth Amendment right

to counsel requires the State to separately try two such trials.

Additionally, the majority panel erroneously adopted the unprecedented position that since the State did not raise the issue of harmlessness in the Ninth Circuit, the panel's obligations to consider the harmful effect of the supposed constitutional error were waived. No case arising under § 2254 relieves the court of its obligations to consider harmless error. *Brecht* and *Fry* plainly impose the obligation to consider harmlessness whether or not one or both parties address the issue.

Based on the foregoing, the decision below should be reversed, either summarily or after briefing and argument.

In November of 1998, while in jail awaiting re-trial on the May 16, 1998 rape and kidnapping of Karen Bates, Respondent approached another inmate, David Paule, and told him he would pay $3,000 to have Karen Bates killed. On November 17, 1998, Respondent gave inmate Paule a piece of paper which contained the name, address, social security number and a detailed physical description of said Karen Bates and again told Paule he wanted her killed.

Paule then contacted Detective Hanna who sent Detective Preusch to the jail to pose as a hit man. During a taped undercover conversation, Respondent communicated to Detective Preusch that he would pay him $5,000 to kill Karen Bates, with $500 up front. Detective Preusch asked no questions about the earlier rape and Respondent made no incriminating statements about the earlier rape.

On February 24, 1999, the grand jury returned an indictment which charged Respondent with solicitation to commit murder. The trial court granted the State's motion to join the solicitation trial with the rape/kidnapping trial. The court also granted the State's motions to admit evidence of the solicitation to show Respondent's consciousness of guilt and to admit evidence of the rape/kidnapping to show Respondent's motive to solicit to the victim's murder. The Ninth Circuit would later agree that the joinder of the rape and the solicitation charges was proper, and that evidence of the rape was cross-admissible with the evidence of the solicitation.

None of Detective Preusch's testimony at the joined trial discussed the rape or kidnapping. His testimony only presented evidence relating to the solicitation to commit murder.

The jury found Respondent guilty of Count 1 First Degree Kidnapping, Counts 2 and 3 Sexual Assault, and Count 4 Solicitation to Commit Murder. The Nevada Supreme Court affirmed. (App. 90)

The federal district court (App. 64-65) applied the rule that the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation and found that at the time Respondent made the incriminating statements about the solicitation to Detective Preusch, the State had not yet charged him with solicitation, therefore, his offense-specific right to counsel had not attached, and pursuant to footnote 16 in *Moulton*, the incriminating statements were admissible at the solicitation trial. The court noted that because Respondent's right to counsel had

attached to the rape and kidnapping charges, the State could not have deliberately elicited incriminating statements regarding those charges.

The Ninth Circuit ruled that: 1) the joinder of the two trials did not violate Petitioner's due process rights or render his trial fundamentally unfair; 2) evidence of the sexual assault/kidnapping was cross-admissible with the evidence of the solicitation; 3) the Sixth Amendment did not bar the State's investigation of the solicitation charge, even though Petitioner was previously charged with the related offenses of sexual assault and kidnapping; and 4) the Sixth Amendment did not bar the government from using Petitioner's deliberately-elicited statements as evidence of guilt on the solicitation charge.

The Ninth Circuit, however, also found that the Sixth Amendment forbade the government from using the deliberately elicited statements to incriminate the Respondent on the rape/kidnapping charges to which the right of counsel had already attached. The majority panel concluded that Respondent's case was indistinguishable from *Moulton* because the state elicited incriminating statements through an informant (and undercover agent) while the defendant was under indictment [on rape and kidnapping], the state "knew that [the defendant] would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel", and the incriminating statements led to a new charge being filed against Respondent. The Court should reverse the decision below either summarily or after briefing and argument, based on the following.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit improperly imposed legal rules which this Court has not clearly established when it ruled that the state high court's decision that the State did not violate the Sixth Amendment was objectively unreasonable.

The Ninth Circuit's analysis, unlike the federal district court's analysis, failed to take into account that the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). *Kansas v. Ventris*, 556 U.S. 586 (2009), confirms in pertinent part that "the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of interrogation. That, we think, is when the 'Assistance of Counsel' is denied." The Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. *Maine v. Moulton,* 474 U.S. 159, 176 (1985). The majority panel correctly found that the Sixth Amendment did not bar the State from using Petitioner's deliberately-elicited statements as evidence of guilt on the solicitation charge because the right to counsel had not attached. However, instead of focusing on whether the undercover agents in counsel's absence secretly interrogated Respondent about the rape, the panel erroneously ruled that the Sixth Amendment forbade the government from using Detective Preusch's deliberately-elicited statements at trial to incriminate

the Respondent on the rape/kidnapping charges to which the right of counsel had previously attached.

The record shows, however, that the undercover officer's questions only related to the investigation of the solicitation to commit murder to which the right to counsel had not attached; consequently there was no *Massiah* violation. Further, the undercover officer's trial testimony mentioned nothing about the rape/kidnapping. *McNeil v. Wisconsin,* 501 U.S. 171 (1991), allowed the detective to investigate the solicitation to commit murder. The undercover officer did not secretly interrogate Respondent about the rape/kidnapping, he was lawfully investigating the solicitation to commit murder.

Respondent's lawfully-obtained, deliberately-elicited statements about the solicitation were obtained before the solicitation right to counsel attached and were admissible to show his guilt at the trial of the solicitation charges. In *McNeil*, the defendant admitted involvement in a murder after he had been arrested and the court had appointed counsel on a robbery charge. This Court found that the attachment of the right to counsel in the robbery charge did not bar, at the murder trial, his admissions about the murder because they were made before his right to counsel had attached in the murder case. In *Texas v. Cobb*, 532 U.S. 162 (2001), after Cobb had been indicted for burglary and the court had appointed counsel, Cobb confessed that he had murdered the victims from the same burglary. This Court found that even though the uncharged murder was "closely related to" or "inextricably intertwined with" the charged burglary, the attachment of the right to counsel in the

burglary charge did not bar, at the murder trial, his admissions about the murder because the admissions were made before his right to counsel had attached in the murder case.

Similarly, Respondent's deliberately-elicited statements were admissible at his solicitation trial, even though the solicitation and rape trials were tried together. No clearly-established federal law prohibits the admission of the testimony about the solicitation because it was tried with the rape case. The Court should summarily reverse the lower court because Detective Preusch's undercover interrogation did not violate Respondent's right to counsel which had attached to the rape charges.

Additionally, this Court has not clearly ruled that using deliberately-elicited incriminating statements lawfully obtained in a later case to show consciousness of guilt in an earlier case is a violation of the previously-attached right to counsel. Although the State at trial under State evidentiary law lawfully used the undercover statements to show Respondent's consciousness of guilt of the rape, it was not the police's goal at the time of the surreptitious questioning to obtain the statements for that purpose. The police sent in the undercover officer because they had a duty to investigate inmate Paule's claim that Respondent wanted the victim killed, not because they were looking for more evidence to incriminate him on the rape/kidnapping. To rule that surreptitiously obtaining evidence of the solicitation inherently involved obtaining incriminating evidence of the previously-charged rape because by its nature it shows consciousness of guilt, would bar the police from

obtaining evidence of new crimes when they are related to prior crimes.

The majority panel also erroneously concluded that Respondent's case was indistinguishable from *Moulton* because 1) the state elicited incriminating statements through an informant (and undercover agent) while Respondent was under indictment [on rape and kidnapping], 2) the State knew that [the defendant] would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel, 3) the incriminating statements led to a new charge being filed against Respondent, and 4) the State used Respondent's deliberately-elicited statements to incriminate him on the rape charges.

In *Moulton*, this Court concluded that the State knew that Moulton would make statements he had a constitutional right not to make and had knowingly circumvented Moulton's right to counsel based upon the facts that the police wired the co-defendant informant for the specific purpose of obtaining incriminating statements about Moulton's pending charges, the police admitted that they knew that Moulton and the co-defendant were meeting for the express purpose of discussing the pending charges and planning a defense for the trial, and the co-defendant wore the wire during a lengthy meeting with Moulton where he repeatedly asked Moulton to remind him about the details of the incident which caused Moulton to make numerous incriminating statements about the pending charges. While Moulton had previously talked about killing a witness, the wired conversation showed that he quickly dropped the idea. The State did not charge Moulton with solicitation and did not introduce

any evidence of the solicitation. The State only used the deliberately-elicited statements to prove the charges pending against Moulton and the crimes he committed at the same time as the previously-charged crimes.

As noted in the dissenting opinion, none of the above types of facts exist in Respondent's case. Respondent's case is clearly distinguishable because in his case 1) the police lawfully used the undercover officer to investigate the solicitation to commit murder, not the rape/kidnapping, 2) the police had no reason to expect details or evidence about the rape to come out during the investigation of the solicitation and, in fact, no details about the rape did come out during the investigation, 3) the police did not send the undercover officer into the jail to obtain incriminating statements about the pending rape/kidnapping charges, 4) the undercover officer asked no questions about the rape/kidnapping, 5) Respondent made no incriminating statements about the rape/kidnapping, and 6) the police charged Respondent with solicitation and used the incriminating statements to convict him of the solicitation.

Respondent's case is further distinguishable because *Moulton* does not address whether using lawfully-obtained deliberately-elicited incriminating statements from a later case to show consciousness of guilt in a prior related case violates the right to counsel which attached in the earlier case, does not address whether the Sixth Amendment requires mandatory severance of lawfully joined cases involving deliberately-elicited statements and different attachment-of-counsel dates, and does not address violations of the right to counsel where the evidence in

one case is cross-admissible with evidence of another. Based on the foregoing, the Ninth Circuit erroneously ruled that Respondent's case was indistinguishable from the facts of *Moulton*.

As a result of the foregoing, the Ninth Circuit's decision improperly imposed legal rules which this Court has not clearly established. This Court has explained that "'it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). Even though at a separate trial of Respondent's rape and kidnapping charges, evidence of Respondent's solicitation to commit the victim's murder would be admissible to show his consciousness of guilt of the rape, the Ninth Circuit held that the government violated the Sixth Amendment because it used the statements Detective Preusch lawfully and deliberately elicited from Respondent regarding the solicitation to commit murder investigation to incriminate him on the rape/kidnapping charges. As described by the dissenting panel member, the majority panel improperly established a new automatic-severance rule which holds that anytime a second, separate crime shows consciousness of guilt of a previously charged crime, those two crimes cannot be tried together without violating the right to counsel. The decision also establishes the rule that lawfully-obtained, deliberately-elicited statements pertaining to a later crime which show consciousness of guilt of a previously charged crime cannot be admitted as evidence in a separate trial of said previously charged crimes

without violating the earlier-attached right to counsel. This Court should reverse the lower court because neither *Moulton* nor any other federal law clearly establishes these rules.

II. The Ninth Circuit improperly disregarded its obligation under AEDPA, *Fry v. Pliler* and *Brecht v. Abrahamson* to review the state-court decision for harmless error.

Neither the state high court nor the federal district court addressed the issue of harmless error because they ruled that the State did not commit any error when it introduced into evidence Respondent's deliberately-elicited statements. Although the Ninth Circuit ordered the parties to brief the issue of harmless error, it decided not to reach the issue because it ruled that the government waived it when it failed to raise it. Both courts and the Ninth Circuit did address harmless error in the context of prosecutorial misconduct and found that in light of the entire record the prosecutor's misconduct was harmless.

This Court should reverse the lower court because it erroneously ruled that Petitioner waived the issue of whether the violation of Respondent's *Massiah* right was harmless error. The majority panel found that Respondents had the burden to establish harmless error and had waived the issue when they failed to raise it. The ruling was erroneous because no Supreme Court law makes clear whether the state has the burden of demonstrating the error was harmless, whether the prisoner has the burden of showing that the error was not harmless, or whether the reviewing court has the burden of conducting its own review even if the state high court did not consider harmless error

because it found there was no error, or because the state did not intentionally waive it.

One recent district court decision commented that "the Supreme Court of the United States and several circuits have been divided about whether the harmlessness or harmfulness of a trial error should be considered part of the petitioner's prima-facie case, an affirmative defense, or the subject of independent inquiry by the trial court." *Saldano v. Cockrell*, 267 F. Supp. 2d 635, 645 (2003) (collecting cases). As that court found, the state should not be held to have waived harmless error analysis where the matter was not addressed but the existence of underlying, constitutional error was disputed. *Id*. at 644.

In *Fry v. Pliler*, 551 U.S. 122 (2007), this Court held that in § 2254 proceedings federal habeas courts must apply the *Brecht* "substantial and injurious" standard whether or not the state appellate court recognized the error and reviewed it for harmlessness. *Brecht v. Abrahamson*, 507 U.S. 619 (1993)

In *Bond v. Beard*, 539 F.3d 256 (C.A.3 2008), the Third Circuit stated that "*[F]ry* instructs us to perform our own harmless error analysis under *Brecht v. Abrahamson,* (citation omitted), rather than review the state court's harmless error analysis under the AEDPA standard. *See Fry,* 127 S.Ct. at 2328."

In *Johnson v. Acevedo* 572 F.3d 398 (C.A.7 2009), the Seventh Circuit determined that when the state court does not conduct a harmless-error analysis, the federal court must make an independent decision applying the *Brecht* standard to determine whether the error was harmless.

While the state "normally" bears the burden of persuasion as to the question of harmlessness, who bears that burden is "irrelevant" because relief cannot be granted without such a finding. *Belmontes v. Woodford*, 335 F.3d 1024, 1070 (9th Cir. 2003), *revd. on other grounds by Ayers v. Belmontes*, 549 U.S. 7 (2006). Harmlessness under *Brecht* must consider the record as a whole. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995).

Here, the majority panel adopted the unprecedented position that since the state had waived the issue of harmlessness, the panel's obligations to consider the harmful effect of the supposed constitutional error were also waived. No case arising under § 2254 relieves the court of that obligation, and *Brecht* and *Fry* plainly impose the obligation to consider harmlessness whether or not one or both parties address the issue.

To support its determination that it need not address harmless error because the state waived it, the majority panel turned to *United States v. Gonzalez-Flores*, 418 F.3d 1093 (9th Cir. 2005), which is a direct review case that carries none of the burdens or considerations of AEDPA. While a court sitting in a direct review proceeding may have no recourse but to depend upon the government to prove harmlessness, the same cannot be said for a § 2254 proceeding. The concerns of comity, and effects of harm to the state via the overturning of years-old convictions simply do not exist in direct review as they do in habeas proceedings.

Further, the majority panel summarily recognized and dismissed its ability to determine harmlessness even if waived by the parties. In *Gonzalez-Flores*, the Ninth Circuit recognized that other circuits have held

that harmlessness may be considered where otherwise waived when the record is not so large as to make such review prohibitive, whether the harmlessness of the errors is debatable, and whether reversal will result in protracted, costly or futile lower court proceedings. *Id*. at 1100, *citing United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991).

In the present case, the state disputes that constitutional error occurred, and argued in briefing requested by the panel that any error which did occur was harmless. Thus, the state cannot be said to have waived the issue of harmlessness. Even if it did, that did not result in the Court's duty to determine the issue also being waived, particularly where the majority panel repeatedly within its own opinion dismisses several other allegations of error as harmless. The Ninth Circuit, therefore, should have considered the state's argument that any error was harmless and was obligated to reach the issue whether or not the state did so. Because the majority panel refused to perform either task, it improperly disregarded its obligation to review the state court decision for harmless error.

* * * * *

The State did not in the absence of counsel secretly interrogate Respondent about the pending rape/kidnapping charges, therefore, there was no knowing circumvention of his Sixth Amendment right to counsel. The federal district court correctly held that at the time Respondent made the incriminating statements about the solicitation to Detective Preusch, the State had not yet charged him with solicitation, therefore, his offense-specific right to counsel had not

attached, and pursuant to *Moulton*, the incriminating statements were admissible at the solicitation trial. No clearly-established federal law holds that when the trials were tried together, the admission of the lawfully-obtained and deliberately-elicited statements in the solicitation trial violated the right to counsel which had attached earlier to the rape charge; no Supreme Court precedent mandates that two such trials be tried separately. There is also no clearly-established federal law which holds that anytime a second, separate crime shows consciousness of guilt of a previously charged crime, those two crimes cannot be tried together without violating the right to counsel. Nor is there any such precedent which holds that in a single trial, the admission of lawfully-obtained, deliberately-elicited statements from a later offense which shows consciousness of guilt violates the right to counsel which had attached to the earlier charge. Lastly, the Ninth Circuit improperly disregarded it obligations under *Brecht* and *Fry* to determine if any constitutional error was harmless.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Catherine Cortez Masto
Attorney General of Nevada
Dennis C. Wilson
Counsel of Record
Senior Deputy Attorney General
555 E. Washington Ave. #3900
Las Vegas, NV 89101
(702) 486-3086
dwilson@ag.nv.gov

Counsel for Petitioners

APPENDIX

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16758
D.C. No. 2:06-cv-00634-RLH-RJJ

[Filed August 1, 2013]

TODD M. HONEYCUTT,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
BILL DONAT, Warden and ATTORNEY GENERAL OF THE STATE OF NEVADA,	)
	)
Respondents - Appellees.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, Senior District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted April 17, 2013
San Francisco, California

Before: NOONAN, O'SCANNLAIN, and N.R. SMITH, Circuit Judges.

Petitioner Todd M. Honeycutt appeals the district court's denial of his petition for a writ of habeas corpus (the "Petition"). We affirm in part and reverse in part.

I

The Nevada Supreme Court reasonably applied clearly established federal law when it denied Honeycutt's prosecutorial misconduct claims. "A prosecutor's actions constitute misconduct if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). "On habeas review, constitutional errors of the 'trial type,' including prosecutorial misconduct, warrant relief only if they 'had substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993)).

In this case, the Nevada Supreme Court reasonably concluded that the choking incident constituted misconduct, but did not prejudice Honeycutt. The relevant factors under *Brecht* demonstrate that the choking incident did not have a "substantial and injurious effect" on the outcome of Honeycutt's case. The record reveals strong evidence of Honeycutt's guilt. *See Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2003) ("This [is] not a case in which there was . . . 'a strong likelihood that the effect of the [misconduct] would be devastating to the defendant.'"). The choking

incident was a brief episode and not part of a pattern of ongoing misconduct. Honeycutt's testimony (which the incident interrupted) was not critical as Honeycutt claims—a fact underscored by Honeycutt's last minute decision to testify against counsel's advice. Further, the trial court sustained defense counsel's objection to the incident. *See Sassounian v. Roe*, 230 F.3d 1097, 1106 (9th Cir. 2000). Thus, we cannot say that the Nevada Supreme Court unreasonably concluded that the choking incident was harmless.

The Nevada Supreme Court did not unreasonably apply *Darden* when it concluded that none of the prosecutor's other actions (individually or collectively) amounted to misconduct. We note that defense counsel failed to object to most of the other actions Honeycutt now claims were misconduct. Accordingly, the Nevada Supreme Court reasonably denied Honeycutt's prosecutorial misconduct claims.

II

Even assuming that the trial court erred when it failed to instruct the jury on Honeycutt's alleged reasonable belief of the victim's consent, "[a] jury instruction that erroneously. . . omits an element of the offense is a non-structural constitutional error subject to harmless error review." *United States v. Anchrum*, 590 F.3d 795, 799 (9th Cir. 2009). "Under *Brecht*, an instructional error is prejudicial and habeas relief is appropriate only if, after reviewing the record as a whole, we conclude that there was a substantial and injurious effect or influence on the verdict, or if we are 'left in grave doubt' as to whether there was such an effect." *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir.

2010) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Here, Honeycutt failed to show that the jury would have accepted Honeycutt's alleged belief of the victim's consent, given the jury's rejection of Honeycutt's version of events and the lack of other supporting evidence. Thus, we cannot say that any alleged failure to instruct leaves us in "grave doubt" as to the propriety of Honeycutt's conviction. Accordingly, any alleged violation was harmless under *Brecht*.

III

The Nevada Supreme Court reasonably denied Honeycutt's ineffective assistance of counsel claim based on counsel's failure to proffer the correct belief of consent instruction. The Nevada Supreme Court invoked the "complete instruction" requirement for the first time in denying Honeycutt relief on direct appeal. *See Honeycutt v. State*, 56 P.3d 362, 368–69 (Nev. 2002). The Nevada Supreme Court overruled the requirement just three years later in *Carter v. State*, 121 P.3d 592, 595–96 (Nev. 2005). Honeycutt's counsel could not have known that failure to proffer the "complete instruction" would prompt the trial court to reject it. Thus, Honeycutt cannot show that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

IV

The Nevada Supreme Court reasonably applied clearly established law when it denied Honeycutt's claim that joinder of his charges for trial violated his due process rights and right against self incrimination. Honeycutt cites no Supreme Court case to support his

theory that joinder of the charges violated his right against self-incrimination. While he cites cases for the general rule that a defendant cannot be compelled to testify against himself, he fails to demonstrate that the trial court compelled him to testify. Indeed, Honeycutt chose to testify over advice of counsel. Thus, the Nevada Supreme Court did not unreasonably apply the Fifth Amendment's general prohibition against self-incrimination. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." (alteration in original) (internal quotation marks omitted)).

Similarly, Honeycutt fails to show that joinder rendered his trial "fundamentally unfair," thereby violating his due process rights. *See Fields v. Woodford*, 309 F.3d 1095, 1110 (9th Cir. 2002), *amended by* 315 F.3d 1062 (9th Cir. 2002). Evidence of the sexual assault and kidnapping was cross-admissible with the evidence of solicitation. *See id.* Further, the State's evidence on both sets of charges was strong, foreclosing any argument that evidence of the stronger charge would taint the jury's view of the weaker. *See id.* Thus, the Nevada Supreme Court reasonably denied Honeycutt's joinder-related claims.

V

The Nevada Supreme Court reasonably applied *Strickland* when it rejected Honeycutt's ineffective assistance of trial counsel claim arising from counsel's alleged failure to introduce exculpatory evidence. To overcome the presumption of adequate assistance, "a

defendant must show that counsel failed to act 'reasonably considering all the circumstances.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (alteration omitted). In addition, the defendant must "prove prejudice," meaning that he must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Here, counsel's failure to introduce allegedly exculpatory letters did not constitute deficient performance under *Strickland*. While Honeycutt claims that there "was no strategic reason for not introducing these letters," the record reveals that counsel could have reasonably decided not to introduce the letters. Honeycutt intended to invoke the Fifth Amendment and to refuse to testify regarding the solicitation charge. To preserve this right, counsel even advised defendant to refrain from testifying on the sexual assault and kidnapping charges. Had counsel introduced the letters at trial, it would have opened Honeycutt up to cross examination on their content, defeating counsel's effort to avoid Honeycutt testifying. Because Honeycutt cannot show that counsel failed to act reasonably given the circumstances, the Nevada Supreme Court reasonably denied his *Strickland* claim.[1]

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[1] The Petition raised two additional ineffective assistance of counsel claims. We do not address them, because Honeycutt has since conceded that they lack merit.

VI

We reject Honeycutt's claim of cumulative error. Honeycutt fails to show that, taken together, the alleged errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

VII

The Nevada Supreme Court unreasonably denied Honeycutt's *Massiah v. United States*, 377 U.S. 201 (1964), claim. The Sixth Amendment did not bar the State's investigation of the solicitation charge, even though Honeycutt was previously charged with the related offenses of sexual assault and kidnapping. *See McNeil v. Wisconsin*, 501 U.S. 171, 175–76 (1991) ("The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.]" (alterations in original) (quoting *Maine v. Moulton*, 474 U.S. 159, 179 (1985)). Nor did it bar the government from using Honeycutt's deliberately elicited statements as evidence of guilt on the solicitation charge.

But the Sixth Amendment did forbid the government from using deliberately elicited statements to incriminate the defendant on charges to which the right of counsel had already attached. *See Moulton*, 474 U.S. at 180. Applying this rule, we conclude that this case is indistinguishable from *Moulton*. Here, as in *Moulton*, the state elicited incriminating statements through an informant (and undercover agent) while the defendant was under indictment. *See id.* at 177 (the

state "knew that [the defendant] would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel"). Here, as in *Moulton*, the incriminating statements led to a new charge being filed against Honeycutt. Here, as in *Moulton*, the state used Honeycutt's deliberately elicited statements to incriminate him on charges to which his right of counsel had already attached.

We do not reach the issue of whether the violation of Honeycutt's *Massiah* right was harmless error. "Usually when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find." *U.S. v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005) ("This makes perfect sense in light of the nature of the harmless-error inquiry: it is the government's burden to establish harmlessness, and it cannot expect us to shoulder that burden for it."). None of the exceptions to the harmless-error waiver rule applies here. *See id.* at 1100–01.

AFFIRMED IN PART AND REVERSED IN PART. The parties shall bear their own costs.

N.R. SMITH, Circuit Judge, concurring in part, dissenting in part

I agree with the majority's conclusions and join in Parts I through VI of their disposition. However, I write separately in dissent, because I disagree that the Nevada Supreme Court unreasonably applied *Massiah v. United States*, 377 U.S. 201 (1964), or *Maine v. Moulton*, 474 U.S. 159 (1985), when it denied Honeycutt's *Massiah* claim.

The majority rests its conclusion on its view that this case is indistinguishable from *Moulton*. Even a cursory reading of *Moulton* contradicts this view. In *Moulton*, the police wired an informant (one of the co-defendants) to record a pre-planned meeting between the informant and Moulton. 474 U.S. at 164-65. The police later admitted that they were aware that the informant and Moulton planned to discuss the charges already pending against Moulton. *Id.* at During the meeting, the informant encouraged Moulton to engage in "a prolonged discussion of the pending charges . . . ." *Id*. While Moulton had previously suggested killing a witness, that plan was quickly dismissed during the conversation. *Id.* The state never charged Moulton with solicitation nor introduced evidence of solicitation. *Id.* at 167. Accordingly, the state used the evidence elicited only to prove charges already pending during the investigation and crimes committed contemporaneously with the previously-charged crimes. *Id.* The Supreme Court concluded that the state "knowingly circumvent[ed]" Moulton's right to counsel and, thereby, violated Moulton's Sixth Amendment right. *Id.* at 180.

There is a difference in kind between this case and *Moulton* in terms of the police's investigation, the evidence obtained, and the state's use of the evidence in the two cases. Accordingly, *Moulton* bears only a superficial resemblance to this case. For *Moulton* to be "indistinguishable" as the majority claims, there would have to be several important factual changes. The majority's view would require that: (1) the state had used the informant to gather specific details of Honeycutt's rape of the victim; (2) the police knew, going into the investigation, that the informant would elicit these details; (3) the state had introduced those details at trial; (4) the state had failed to charge Honeycutt with solicitation; and (5) the state had failed to introduce any statements about the solicitation.

Of course, just the opposite occurred in this case. The state did not seek details of Honeycutt's rape of the victim during its investigation of Honeycutt's later conspiracy to kill the victim. The police, permissibly investigating this separate crime, *see McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991), would have had no reason to expect details about the rape to come out of the investigation. Indeed, no details did come forth, so no details of the previously charged crimes were introduced at trial. Instead, the investigation brought forth details of a second crime, solicitation, which were used at trial to prove that crime.

The majority, then, implicitly argues that anytime a second, separate crime shows consciousness of guilt of a previously charged crime, those two crimes cannot be tried together. No clearly established federal law sets forth this automatic severance rule. In fact, elsewhere, the majority holds that the Nevada

Supreme Court reasonably rejected Honeycutt's severance claim. Even more importantly, *Moulton*, upon which the majority relies, says nothing about severance or the cross-admissibility of evidence, because the facts of that case did not implicate those issues. Thus, *Moulton* is distinguishable from this case, does not establish (much less clearly establish) the law that the majority seeks to impose upon the states, and cannot serve as the basis for relief under 28 U.S.C. § 2254(d).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

2:06-cv-0634-RLH-RJJ

[Filed July 21, 2009]

TODD M. HONEYCUTT,
Petitioner,
vs.
BILL DONAT, *et al.*,
Respondents.

ORDER

This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by petitioner Todd Honeycutt, a Nevada prisoner. The action comes before the court with respect to its merits. The court will deny the petition

I. Procedural History

Petitioner was originally charged by way of information with first degree kidnapping and two

counts of sexual assault. Exhibit 1.[1] A trial was held in the District Court for Clark County between October 22, 1998 and November 3, 1998, and the jury was unable to reach a verdict. Exhibits 6-12. Before the new trial, the prosecutor filed a motion requesting the petitioner's telephone services be revoked as petitioner was purportedly making harassing phone calls to a witness. Exhibit 11. The court granted this motion. Exhibit 12. The state sought reconsideration, arguing that petitioner should be placed in complete isolation as he was soliciting the murder of the alleged victim in the case. Exhibit 13. The court granted the motion. Exhibit 14.

On February 24, 1999, a grand jury returned an indictment charging the petitioner with solicitation to commit murder. Exhibit 16. The state moved to join the solicitation to commit murder case with the sexual assault and kidnapping case. Exhibit 17. The trial court granted the motion. Exhibit 24. A trial was held on all of the charges between September 21, 1999, and October 5, 1999. Exhibits 33-44. Petitioner was convicted as charged, and sentenced to life in prison with parole eligibility in five years for the kidnapping count, to life in prison with parole eligibility in ten years for the sexual assault counts, and to one hundred eighty months in prison with parole eligibility in seventy-two months for the solicitation of murder charge. Exhibits 44-46. Counts II and III were to run consecutively to each other, and the solicitation of

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[1] The exhibits cited in this order in the form "Exhibit ___," are those filed by respondents in support of their motion to dismiss the petition for writ of habeas corpus, and are located in the record at docket #18-24.

murder was to run consecutively to all the other charges. Exhibit 46. A judgment of conviction was entered on December 8, 1999. Exhibit 46.

Petitioner appealed his convictions, arguing (1) the trial court abused its discretion in joining and then declining to sever the two cases; (2) several instances of prosecutorial misconduct deprived the petitioner of his right to a fair trial and impartial jury; (3) claims of outrageous state conduct, relating to solicitation of murder charge; (4) the trial court's bias and erroneous rulings deprived petitioner of his right to a fair trial when it forced the petitioner to testify to the solicitation to commit murder charge by improperly threatening to strike the testimony of another witness, by applying different rules for the state and defense, by improperly admitting a security office video tape and the testimony of witness Bard, and by improperly admitting a jury instruction; and (5) a claim of cumulative error. Exhibit 49. The Nevada Supreme Court affirmed judgment of conviction. Exhibit 52.[2] Remittitur issued on December 3, 2002. Exhibit 53.

Petitioner then filed a state habeas corpus petition, alleging thirteen grounds for relief. Exhibits 54 and 55. The state district court denied the petition. Exhibit 65. Petitioner appealed, and the Nevada Supreme Court remanded the case so that the district court could enter specific findings of fact and conclusions of law. Exhibits 66, 67 and 70. The state district court entered an order with findings and conclusions of law as was required. Exhibit 71. The Nevada Supreme Court then affirmed

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[2] *Honeycutt v. State*, 56 P.3d 362 (Nev. 2002).

the lower court's denial of petitioner's claim. Exhibit 72. Remittitur issued on May 22, 2006. Exhibit 73.

The instant federal habeas corpus action was initiated on May 18, 2006 (docket #1). Respondents moved to dismiss the petition (docket #16). This court granted the motion to dismiss, finding grounds three, five, seven, and eight were procedurally defaulted (docket #32). Respondents have answered the remaining claims in the habeas corpus petition (docket #36), petitioner has filed a reply (docket #37), and respondents have filed a response (docket #38).

II. Petitioner's Motion to Dismiss

Petitioner filed a reply to respondents' answer (docket #37). Respondents filed an opposition to the reply, stating petitioner filed a "First Amendment Petition" and is improperly attempting to amend his petition to include new claims through his reply when he has not complied with Federal Rule of Civil Procedure 15(a) (docket #39). Petitioner has filed a motion to dismiss the First Amendment Petition without prejudice (docket #42). The court is unaware of any first amendment petition that was file in the instant case. However, to the extent that petitioner's reply attempts to amend his original petition and add new claims, the court will grant the motion, and dismiss any such claims without prejudice.

III. Federal Habeas Corpus Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal standard for the Court's consideration of this habeas petition:

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

28 U.S.C. §2254(d).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693 (2002). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "'if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases'" or "'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established Supreme Court precedent "'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause "requires the state court decision to be more than incorrect or erroneous"; the state court's application of clearly established law must be objectively unreasonable. *Id*. (*quoting Williams*, 529 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

In determining whether a state court decision is contrary to, or an unreasonable application of, federal law, this Court looks to a state court's last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

IV. Discussion

A. Ground One

In his first ground for relief petitioner alleges he was denied the effective assistance of trial counsel in violation of his Sixth and Fourteenth Amendment rights. Petitioner argues thirteen specific subclaims of relief: (a) trial counsel was ineffective for failing to investigate, secure, or call expert witnesses; (b) trial counsel was ineffective for failing to correct the trial

judge when the trial judge improperly stated what the evidence was; (c) trial counsel was ineffective for failing to request that the jury view petitioner's van as it was the location of the allegations; (d) trial counsel was ineffective for failing to prepare and present evidence for a pretrial joinder motion; (e) trial counsel was ineffective for failing to include the entire correct jury instruction for mistaken belief in consent; (f) trial counsel was ineffective for failing to investigate information and evidence available to support defense witnesses and theories that would also contradict state witness Bates; (g) trial counsel was ineffective for abandoning petitioner's interests when he expressed contempt for him at trial; (h) trial counsel was ineffective for failing to move for dismissal of the solicitation charge on the basis that the trial court did not have jurisdiction to proceed against him; (i) trial counsel was ineffective for failing to request acquittal based on the insufficiency of the evidence; (j) trial counsel was ineffective for failing to investigate, interview, or call witnesses; (k) trial counsel was ineffective for failing to object to certain requests and instances at trial; (l) trial counsel was ineffective for failing to adequately cross-examine, prepare and present inconsistent statements, and for failing to impeach witnesses with prior inconsistent statements; and (m) trial counsel was ineffective for failing to present to the jury exculpatory evidence that petitioner only wanted to scare witness/victim Bates and not have her murdered.

In order to prove ineffective assistance of counsel, petitioner must show (1) counsel acted deficiently, in that his attorney made errors so serious that his actions were outside the scope of professionally

competent assistance and (2) the deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

Ineffective assistance of counsel under *Strickland* requires a showing of deficient performance of counsel resulting in prejudice, "with performance being measured against an 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v. Beard,* 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry,* 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

1. Counsel's Failure to Investigate, Secure, or Call Expert Witnesses

In ground one(a) petitioner contends that trial counsel was ineffective for failing to investigate, secure, or call a handwriting expert, a latent print examiner, a urologist, and a dental expert at trial. Petitioner argues that a handwriting expert would have testified that he was not the author or did not write the state's exhibit 45, a piece of paper containing the victim's personal information. Moreover, petitioner states that a latent print examiner could have determined whether petitioner had ever come into contact with the piece of paper.

Petitioner then asserts that a urologist would have testified about the improbability of the victim's

testimony that during the sexual assault she bit the petitioner's penis two or three times. Furthermore, petitioner alleges that a dental expert would have cast serious doubt upon the victim's testimony that she bit the petitioner, as a dental expert would have testified about the likelihood of serious injury that would have resulted had the victim bitten the petitioner.

Petitioner raised the instant claim in the state court, and the Nevada Supreme Court affirmed the lower court's denial, stating:

> First, appellant claimed that his trial counsel was ineffective for failing to investigate or call expert witnesses. Appellant asserted that his counsel should have had a handwriting expert, a latent print expert, a urologist, and a dental expert handy to testify on his behalf. Appellant argued that these experts would have provided testimony that contradicted the testimony of several of the State's witnesses.
>
> Appellant failed to demonstrate that the testimony of a handwriting expert and latent print expert regarding Exhibit 45 would have altered the outcome of his trial. Appellant alleged that their testimony would have proven he did not write or handle Exhibit 45. Appellant testified to this effect at trial. Additionally, the State argued to the jury that the source of the information on Exhibit 45 was what was important, not the source of the handwriting. Appellant also failed to demonstrate that the testimony of a urologist and dental expert would have altered the outcome of his trial. Appellant alleged that their testimony would have

> contradicted the victim's testimony. The victim testified that she bit appellant's penis two or three times during the assault. However, another witness testified that the victim's sexual assault report stated that she did not bite her assailant. Additionally, an officer testified that he saw appellant's penis within hours of the assault, when a serology kit was prepared for appellant, and he did not see any bite marks on appellant's penis. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72.

Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Counsel's failure to investigate or call a handwriting expert or latent print examiner did not prejudice the outcome of the trial. Regardless of whether the petitioner wrote exhibit 45, which contained the victim's personal information, there was evidence introduced at trial that the petitioner wanted to pay someone to kill victim Bates. Moreover, there was testimony that stated petitioner gave the victim's information to several people so that they could find her and prevent her from testifying at the trial.

Detective Hanna testified at trial that in the course of investigating the petitioner while he was housed at Clark County Detention Center (CCDC), he had a search warranted executed so that petitioner's mail could be search. Exhibit 39, T 115. In letters that were signed using petitioner's name and cell number, there was information relating to the solicitation of murder

charge. *Id*. Detective Preusch, undercover at the time, talked with petitioner about being hired to murder the victim. Exhibit 40, T 38.

David Paule, a CCDC inmate who was originally housed in the cell block as the petitioner, testified that the petitioner told him that he wanted his ex-girlfriend "taken out." *Id.* at T 5-6. Petitioner stated that she was accusing him of sexually assaulting him, that she was lying and that he wanted her killed. *Id.* at T 6. Petitioner told Paule that he would pay $3000 to someone if they would kill this woman. *Id.* at T 10. Paule also identified a letter given to him with the contact information of the victim and her friend. *Id.* at T 11-12; Exhibit 40, T 43. Petitioner testified at trial that he did not write exhibit 45, and the paper the informant and the police saw was not from him. Exhibit 42, T 21-23, 40. Petitioner stated that he only wanted to scare victim Bates and he did not want to kill her. *Id.* at T 42.

The Nevada Supreme Court's determination did not involve an unreasonable application of *Strickland*, as there is no indication that counsel's failure to call the expert witnesses regarding the letter prejudiced the outcome of the trial.

Moreover, the Nevada Supreme Court's ruling was not contrary to *Strickland* when it determined that the claim that counsel failed to call a urologist or dental expert at trial was without merit. Petitioner has not shown that counsel's failure to call a urologist or dental expert to refute the victim's statement that she bit his penis prejudiced the outcome of the trial.

At trial the victim Bates testified that she performed oral sex upon the petitioner against her will. Exhibit 39, T 25. She stated that she bit his penis at that time. *Id.* The sexual assault nurse examiner testified on cross-examination that the victim did not state that she had bit the petitioner's penis. *Id.* at T 78. Michael Barnbeck, the police officer who gathered the material used for the serology kit, testified that he did not see any bite marks on petitioner's penis. *Id*. at T 98. Petitioner also testified that Bates never bit him. Exhibit 41, T 43. Therefore, testimony was presented by several witnesses that victim Bates did not bite the petitioner, nor did they see evidence of bite marks on petitioner. Petitioner has not demonstrated that counsel's failure to call expert witnesses prejudiced the outcome in this case.

The court will deny ground one(a).

2. Counsel's Failure to Correct the Trial Court's Improper Statement of Evidence

In ground one(b) petitioner alleges that trial counsel was ineffective for failing to correct the trial judge when the judge improperly commented on the evidence. During closing arguments counsel discussed testimony of Linda Ebbert, the sexual assault nurse who examined victim Bates. Exhibit 43, T 61-62. Counsel stated:

> Now what did she [Linda Ebbert] testify? Yes, there's anal tears. We know that. And we'll talk about Dr. Eftaiha's testimony in a bit. But yes, there's anal tears, but the one thing that was interesting, she used this omnilight. Now this omnilight is to detect bruising. And once again,

ladies and gentlemen of the jury, with the confines of this van and with the struggle and with the relative size of Todd Honeycutt and Ms. Bates and everything they went through here, you would have to find some bruising. I mean, you remember the choking demonstration by Mr. Kephart? Well, if that kept up, do you think there would be bruising? And then she also testified there was a hand –

THE COURT: Mr. Yampolsky, you have mischaracterized the testimony as to what the light was used for. Please keep it within the bounds.

MR. YAMPOLSKY: The omnilight is to detect bruising.

THE COURT: Mr. Yampolsky, please state it correctly for the jury.

MR. YAMPOLSKY: Isn't that?

THE COURT: What it was used for by that nurse.

MR. YAMPOLSKY: It was used for by that nurse to look around her neck.

THE COURT: It was for examination of the pelvic area.

MR. YAMPOLSKY: But she - maybe I misspoke. Excuse me. But she also testified that she didn't see any bruises, and she is an expert in sexual assault.

Id. at T 61-62.

The Nevada Supreme Court affirmed the state district court's denial of this claim, stating the following:

> Second, appellant claimed that his trial counsel was ineffective for failing to correct the judge when the judge misstated the evidence. Appellant failed to demonstrate that his counsel was deficient in this regard. The record reveals that the judge did not misstate the evidence as alleged by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72.

Petitioner has not demonstrated that the Nevada Supreme Court's determination was objectively unreasonable. Linda Ebbert testified that in her practice they utilize an omnilight, which is used for detecting bruising, and to see if there are secretions on the skin, such as saliva, urine, semen, fibers of clothing, or hair. Exhibit 39, T 64. Ebbert stated on cross-examination that the omnilight was used to detect whether there were bruises on the victim, and none were found. *Id.* at T 77-78. Although counsel was correct in stating that the omnilight was used by witness Ebbert to detect bruising, and the trial judge improperly corrected him, the jury heard Ebbert's testimony as to why the omnilight was used. Moreover, the important information for the jury to hear was not why the omnilight was used, but the fact that Ebbert did not find any bruising on victim Bates, despite the victim's claim that petitioner had his knee to her throat, and that he choked her. Petitioner has not shown that counsel's failure to correct the trial judge

during closing arguments prejudiced the outcome of the trial.

The court will deny ground one(b).

3. Counsel's Failure to Request a Jury View of Petitioner's Vehicle

In ground one(c) petitioner contends that trial counsel was ineffective for failing to request that the jury be allowed to view petitioner's van, as it was the location of the alleged sexual assault. Petitioner contends that given the layout of the van, had the jury been shown the actual minivan, the jury would have concluded that the assault could not have taken place as the victim claimed.

On appeal, the Nevada Supreme Court affirmed the lower court's denial of this claim, finding it to be without merit. The court stated:

> Third, appellant claimed that his trial counsel was ineffective for failing to request that the jury see the actual minivan where the alleged assault took place. Appellant alleged that had the jury seen the actual minivan, the jury would have determined that the assault, as testified to by appellant, was physically impossible. Appellant failed to demonstrate that his counsel was deficient in this regard or that he was prejudiced. Photographs of the interior of the minivan and pertinent measurements were admitted into evidence and presented to the jury for consideration. Additionally, appellant's counsel did a demonstration to approximate scale for the jury and argued that the assault could not have physically occurred as testified to

> by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. There is no indication that trial counsel was ineffective for failing to request that the jury be allowed to view the minivan, nor has petitioner shown that counsel's alleged failure prejudiced the outcome of the trial.

At trial, Maria Thomas, a crime scene analyst for the Las Vegas Metropolitan Police Department, testified that she photographed the vehicle where the sexual assault took place. Exhibit 38, T 8. Thomas identified the photographs she took of the vehicle, which included pictures of the inside and the outside of the van. *Id.* at T 8-9. The jury viewed the photographs of the inside of the minivan. *Id.* The defense called James Thomas, a private investigator, to testify. Exhibit 40, T 63. Thomas also took pictures of the minivan. *Id*. Moreover, Thomas took pictures of the measurements inside of the vehicle, such as the distance between the two front seats and the distance from the top of the rear seat to the roof. *Id.* at T 65-68. The state district court also allowed defense counsel to set up seats approximating the setup of the seats in the minivan. Exhibit 42, T 37. Defense counsel went through petitioner's version of the events using the setup of chairs, and had petitioner move about the setup to show the events and how he and the victim were positioned the night of the incident. *Id.* at T 42-48.

The jury viewed photographs of the van, heard the measurements of all the pertinent distances from inside the vehicle, and even saw an approximation of how the events unfolded inside the vehicle during the trial. There is no indication that had the jury been allowed to see the actual inside of the van that the result of the trial would have been different.

The court will deny ground one(c).

4. Counsel's Failure to Prepare and Present Evidence for Pretrial Joinder Motion

In ground one(d) petitioner argues that trial counsel was ineffective for failing to prepare and present evidence for the hearing on the pretrial motion for joinder. Petitioner contends that the joinder of the solicitation charge with the other charges violated his Fifth Amendment right to remain silent, because he had to choose to either testify to both charges or remain silent as to both.

Prior to trial the state filed a motion for joinder, arguing that the solicitation for murder charge should be joined with the kidnapping and sexual assault charges for the purpose of trial. Exhibit 17. Defense counsel opposed the motion, arguing joinder of the offenses would violate petitioner's fourth, fifth, sixth, and fourteenth amendment rights. Exhibit 18. The trial court held a hearing on the motion on March 29, 1999. Exhibit 24. After hearing argument from counsel, the state district court determined that joinder was proper. *Id.*

On appeal from his convictions petitioner alleged that the trial court erred in joining the offenses.

Exhibit 49. The Nevada Supreme Court found that the district court did not err in joining the offenses or failing to sever the counts during trial. Exhibit 52. The court discussed the claim in depth, and found the claim to be without merit. Exhibit 52. Petitioner raised the ground that counsel failed to prepare and present evidence for the hearing on the pretrial motion for joinder in his state habeas corpus petition. Exhibits 54 and 55. The Nevada Supreme Court then affirmed the state district court's denial of the instant claim, stating:

> Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately oppose the joining of his solicitation charge to the other charges. Appellant failed to demonstrate that his counsel was deficient. On direct appeal, this court held that the district court did not err in joining appellant's charges or denying appellant's motion to sever the charges. [fn 6: *Honeycutt*, 118 Nev. At 667-69, 56 P.3d at 367-68.] Appellant failed to identify what additional argument his counsel should have made, and failed to demonstrate that any additional argument would have altered the district court's decision. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72.

The Nevada Supreme Court's determination that the instant claim was without merit was not an objectively unreasonable application of *Strickland*. Petitioner has not shown what more counsel should have argued or what evidence counsel should have

presented so that the trial court would have denied the motion for joinder. In fact, counsel did argue at the hearing on the motion for joinder, and at trial, that the solicitation to commit murder charge should not be joined. The Nevada Supreme Court found that the state district court did not abuse its discretion in joining the charges. Petitioner has failed to show that counsel acted in a deficient manner, or that if counsel did act ineffectively, that counsel's failure prejudiced the outcome of trial.

The court will deny ground one(d).

5. Counsel's Failure to Include the Entire Correct Jury Instruction for Mistaken Belief in the Consent

In ground one(e) petitioner alleges that trial counsel was ineffective for failing to include the entire correct jury instruction for mistaken belief of consent. At trial, defense counsel proffered the following jury instruction:

> In the crime of sexual assault, general criminal intent would exist at the time of the commission of sexual assault. There is no general criminal intent if the defendant had a reasonable and good-faith belief that Karen Bates voluntarily consented to engage in fellation and anal intercourse. Therefore, a reasonable and good-faith belief that there was voluntary consent is a defense to such charge.
>
> If after a consideration of all the evidence you have a reasonable doubt that the defendant had general criminal intent at the time of the act of fellatio and anal intercourse, you must find him not guilty of such crime.

Exhibit 43, T 4-5. The trial court did not give this jury instruction. Petitioner raised the failure to give this instruction on direct appeal. On appeal, the Nevada Supreme Court stated:

> At trial, Honeycutt proposed a jury instruction which stated, in essence, that a reasonable and good faith belief that there was voluntary consent is a defense to a charge of sexual assault. A criminal defendant is entitled to jury instructions on the theory of his case. [fn 20: *Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).] If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error. [fn 21: *Rugland v. State*, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986)]
>
> This court has previously indicated that Nevada law supports a defense of reasonable mistaken belief of consent in sexual assault cases. [fn 22: *See Owens v. State*, 96 Nev. 880, 884 n.4, 620 P.2d 1236, 1239 n.4 (1980); *see also Hardaway v. State*, 112 Nev. 1208, 1210-11, 926 P.2d 288, 289-90 (1996).] We conclude that based on the wording of NRS 200.366 and our prior case law defining the proof required for sexual assault, Nevada does recognize this defense. NRS 200.366 defines sexual assault as the penetration of another "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of

resisting." In *McNair v. State*, we concluded that the legal inquiry into the issue of lack of consent consists of two questions: (1) whether the circumstances surrounding the incident indicate that the victim reasonably demonstrated lack of consent; and (2) whether, from the perpetrator's point of view, it was reasonable to conclude that the victim had consented. [fn 23: 108 Nev. 53, 56-57, 825 P.2d 571, 574 (1992).] Thus, because a perpetrator's knowledge of lack of consent is an element of sexual assault, we conclude that a proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration. [fn 24: This is in contrast to our decision in *Jenkins v. State* that mistaken belief as to age is not a defense to statutory sexual seduction. 110 Nev. 865, 870-71, 877 P.2d 1063, 1066-67 (1994). *Jenkins* is not binding on our decision here since that crime was a strict liability offense in which knowledge of age is not an element of the crime. *Id*. Sexual assault is a general intent crime. *Winnerford H. v. State*, 112 Nev. 520, 526, 915 P.2d 291, 294 (1996). Thus, if a mistake is reasonable, it may be a defense to a charge of sexual assault. NRS 194.010(4).]

Honeycutt's counsel proposed the following instruction, citing instruction 10.65 from the California Jury Instructions for Criminal Cases ("CALJIC") as the sole legal authority:

> In the crime of sexual assault, general criminal intent must exist at the time of the commission of the sexual assault.

> There is no general criminal intent if the defendant had a reasonable and good faith belief that [the victim] voluntarily consented to engage in fellatio and anal intercourse. Therefore, a reasonable and good faith belief that there was a voluntary consent is a defense to such a charge.
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had general criminal intent at the time of the act of fellatio and anal intercourse, you must find him not guilty of such crime.

However, counsel did not include the entire correct instruction based on the evidence in this case. Counsel's proposed instruction omitted the following language:

> However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief. [fn 25: *California Jury Instructions, Criminal*, 10.65, at 828 (6th ed. 1996).]

The comment to CALJIC 10.65 states:

> In *People v. Williams* (1992) 4 Cal.4th 354 [14 Cal. Rptr.2d 441, 841 P.2d 961], it was held that this instruction should not be given absent substantial evidence of

> equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. Further the instruction should not be given when it is undisputed that the defendant's claim is "based upon the victim's behavior after the defendant had exercised or threatened force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another." Where the evidence is conflicting on that issue, the court must give this instruction, if as indicated there is substantial evidence of equivocal conduct, despite the alleged temporal context in which that equivocal conduct occurred. In such situation, the second bracketed paragraph [quoted above] should then be utilized. [fn 26: *Id.*]

The evidence of consent is conflicting in this case, in that the victim testified that the defendant used force and the defendant testified that, not only did the victim consent, but she initiated some of the actions.

Assuming that Honeycutt was entitled to an instruction on mistaken belief of consent, the proposed instruction must correctly state the law. [fn 27:] Honeycutt's proposed instruction was not "technically deficient in form," as the dissent alleges, but an incorrect statement of the law when there is evidence that the "consent" was achieved through threats, force and

> violence. Therefore, the district court did not err in refusing to give the instruction.

Exhibit 52.

The Nevada Supreme Court affirmed the lower court's denial of petitioner's claim that trial counsel was ineffective for failing to present a correct jury instruction on mistaken belief of consent, finding it to be without merit. The court specifically stated:

> Fifth, appellant claimed that his trial counsel was ineffective for failing to provide the entire instruction for mistaken belief of consent to the district court as a proposed jury instruction. Appellant failed to demonstrate that his counsel was deficient in this regard.
>
> Appellant's trial counsel proffered a jury instruction on the defense theory of reasonable belief of consent. The district court refused to give the proffered instruction. On direct appeal, this court concluded that because appellant's counsel omitted the State's theory of the case from the proposed jury instruction, the proposed instruction was an incorrect statement of the law, and the district court did not err by refusing to give the instruction. [fn 7: *Id.* at 671, 56 P.3d at 369-70] Prior to this court's opinion on direct appeal, this court has never obligated defense counsel to provide both the defense's and State's theories of the case in proffered jury instructions. Appellant's trial counsel could not have anticipated this court's decision on direct appeal, and counsel's inability to do so does not constitute ineffective assistance of counsel.

> Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. The Nevada Supreme Court's determination was not an objectively unreasonable application of *Strickland*. Trial counsel had no way of knowing that the Nevada Supreme Court, on appeal, would require defense counsel to proffer not only the defense theory but also the state's theory of the case in the instruction. Petitioner has not shown that trial counsel acted deficiently as trial counsel could not have anticipated the Nevada Supreme Court's ruling on direct appeal.

The court will deny ground one(e).

6. Counsel's Failure to Investigate Information and Evidence Available to Support Defense Witnesses and Theories

In ground one(f) petitioner contends that trial counsel was ineffective for failing to investigate information and evidence available to support defense witnesses and the defense theory. Petitioner contends that counsel failed to investigate and show how busy the Hard Rock Hotel was on the night the incident took place. Moreover, petitioner argues that counsel failed to investigate and introduce information regarding where the outside personnel of the casino where. Victim Bates testified that the hotel/casino was not busy and no hotel personnel were outside when she and the petitioner went outside to his vehicle. Petitioner also asserts that counsel failed to investigate and introduce records of taxicab companies to show that there were taxis outside of the Hard Rock. Petitioner

states that this information would have cast doubt onto the victim's testimony that there were no cabs available for her to take back to her hotel.

The Nevada Supreme Court affirmed the state district court's denial of this claim, stating:

> Sixth, appellant claimed that his trial counsel was ineffective for failing to conduct investigation regarding the Hard Rock Hotel and Casino. Appellant asserted that such investigation would have revealed that there were employees outside and cabs available at the time of the assault, contradicting with the victim's testimony.
>
> Appellant failed to demonstrate that his counsel was deficient in this regard. Appellant's counsel elicited testimony from the security manager for the Hard Rock that at the time of the assault there would have been two bicycle security guards patrolling the parking lot and an employee manning the valet area at the main entrance. The security manager also testified that cabs are generally available at the main entrance. Appellant failed to demonstrate that additional testimony regarding the Hard Rock would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72.

The Nevada Supreme Court's determination was not an objectively unreasonable application of *Strickland*. At trial Hard Rock hotel security manager John Barr testified he generally worked on Fridays and

Saturdays, in the day, and then would return around approximately 9:00pm until 3:00 or 4:00am. Exhibit 40, T 95. Barr told the jury that there were three public entrances to the Hard Rock in 1998. *Id.* Barr estimated that between 3:00am and 6:00am on a weekend, several hundred people would come and go from the Hard Rock Hotel. *Id*. at T 98. The Hard Rock had two security officers patrolling the parking lots. *Id.* In 1998, the parking lot contained approximately 1000 spaces, and two individuals could adequately patrol a parking lot that size. *Id.* at T 99. There were also valet parkers on duty between 3:00am and 6:00am on the weekends. *Id.* Barr testified that there was a night club located in the Hard Rock in 1998 called the Orbit Lounge that would close between 4:00am and 5:00am, depending on demand. *Id.* at T 100. Based on Barr's experience, the hotel was still busy at 5:00am in the morning. *Id.* at T 102.

On cross-examination Barr stated that he was not in charge of the valet section, and could not be sure if how many valet parkers were on duty, or where they were located. *Id.* at T 106-07. Moreover, Barr testified that he could not tell the exact positions of the security guards patrolling the parking lot in the early morning hours of the night in question. *Id.* at T 108. On re-direct Barr stated that although the hotel slows down in the early morning hours, it is still a busy hotel, and when the Orbit Lounge closes, there are lines of people waiting for the valet and for taxicabs. *Id.* at T 112.

Petitioner has not shown that counsel acted deficiently. Testimony was introduced at trial regarding whether there was personnel at the hotel, and how busy the hotel was the night of the incident.

Petitioner has not shown that any additional investigation or testimony at trial about how busy the hotel was or where the hotel personnel were located outside of the hotel would have changed the outcome of trial.

The court will deny ground one(f).

7. Counsel's Ineffectiveness in Abandoning Petitioner's Interests When He Expressed Contempt for Petitioner at Trial

In ground one(g) petitioner alleges that trial counsel was ineffective for abandoning petitioner's interests when he expressed contempt for him at trial. Petitioner states that counsel called him a "bad guy" and a "terrible boyfriend." Petitioner also notes that defense counsel stated that he was not liked in jail and that he was not a nice guy.

During closing arguments defense counsel stated:

> Now the prosecution brought in evidence of other crimes, and you'll hear a jury instruction saying well, that's not to show – he's not on trial for those other crimes. Well why did they bring that in? I mean, evidence to show he's not a nice guy. He's not a nice guy. But just because he's not a nice guy doesn't mean you can convict him of sexual assault.

Exhibit 43, T 54. Later in the closing arguments counsel told the jury:

> And that's the Salem witch trials in 1682, but this is Las Vegas in 1999. And Todd Honeycutt

> was targeted by a witch hunt. He wasn't liked in jail. Nobody liked him. David Paule saw him as his get-out-of-jail-free card or his get-out-of Nevada card, however you look at it, because he got to go back to California. He was in jail, but he's just an ordinary felon, not a nasty felon like Mr. Honeycutt. Oh, no. He doesn't like people that beat up on his mother. He wouldn't tolerate that. He was just trying to help.
>
> Now who is Mr. Honeycutt? He's chosen to put his hands – his faith in your hands. He's exercised his constitutional right to go to trial. As we've said, he's not a nice guy. He's a terrible boyfriend. He's a three-time convicted felon, once for malicious destruction of property when he was 18, once for burglary when he was 20, and then coercion.

Id. at T 55.

Petitioner raised the instant claim in his state habeas corpus petition, and the state district court denied the claim. On appeal, the Nevada Supreme Court affirmed the district court's denial, stating:

> Seventh, appellant claimed his trial counsel was ineffective for portraying appellant as a "bad guy" and a "terrible boyfriend." Appellant failed to demonstrate that his counsel was deficient in this regard. Although the record reveals that during closing arguments appellant's counsel referred to appellant as a "bad guy" and a "terrible boyfriend," appellant's counsel made these statements in an attempt to argue that appellant's prior conduct does not

> mean that he committed the instant offenses. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances." [fn 8: *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing *Strickland*, 466 U.S. at 691).] Appellant failed to demonstrate that acknowledging appellant's faults was not a reasonable tactical decision. Accordingly, we conclude that the district court did not err in denying this claim.

Exhibit 72.

The Nevada Supreme Court's determination is not an objectively unreasonable application of clearly established federal law, as determined by the United States Supreme Court. The United States Supreme Court has noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). "Whether counsel's actions constituted a 'tactical' decision is a question of fact, and...[a court] must decide whether the state court made an unreasonable determination of the facts in light of the evidence before it." *Pinholster v. Ayers*, 525 F.3d 742 (9th Cir. 2008) (citing *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004)). There is no indication that counsel acted deficiently when he used the terms "bad buy" and "terrible boyfriend" and told the jury that petitioner was not a nice person. Counsel was arguing to the jury that even though petitioner may be a "bad guy" that he did not commit the charged crimes. Petitioner has not shown that but for counsel's

alleged deficiencies, the outcome of trial would have been different.

The court will deny ground one(g).

8. Counsel's Failure to Move for Dismissal of the Solicitation Charge

In ground one(h) petitioner alleges that trial counsel was ineffective for failing to move to dismiss the solicitation charge on the basis that the state district court did not have jurisdiction to proceed against him. Petitioner contends that indictment was improper under NRS 172.255, that perjured police testimony was given at the grand jury hearing, that the state failed to present exculpatory evidence, and that the state presented false evidence at the hearing.

On appeal the Nevada Supreme Court affirmed the denial of the instant claim, finding:

> Eighth, appellant claimed that his trial counsel was ineffective for failing to move for dismissal of the solicitation charge. Appellant asserted that the indictment was improper under NRS 172.255, the police presented perjured testimony and false evidence to the grand jury, and the State failed to present exculpatory evidence to the grand jury.
>
> Appellant failed to demonstrate that his counsel was deficient in this regard. Nothing in the record supports appellant's claim that the indictment was not properly filed. Further, appellant failed to demonstrate that a motion to dismiss the indictment would have been successful. NRS 172.145(2) requires the district

> attorney to present to the grand jury any evidence that will explain away the charge. Contrary to appellant's assertions, his letters stating that he wanted the victim scared would not tend to explain away the charge, so long as the prosecutors could establish that he sought to have the victim killed. One of appellant's letters mentioned the victim dying. This was sufficient to establish probable cause to support the indictment. Finally, any misstatement on the part of Officer Hanna regarding any possible deal made with an inmate for his cooperation in obtaining evidence to support the solicitation charge was not sufficient to dismiss the indictment. Accordingly, we conclude the district court did not err in denying this claim. [fn 9: To the extent that appellant also raised this claim in the context of a claim of ineffective assistance of appellate counsel, appellant failed to demonstrate that his appellate counsel was ineffective, and we conclude that the district court did not err in denying this claim. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).]

Exhibit 72. The Nevada Supreme Court's determination was not an objectively unreasonable application of *Strickland*.

Petitioner first argues that at the grand jury hearing, the jury foreperson returned an indictment, and stated that at least twelve members had concurred, but that they had been excused. Petitioner states that counsel should have moved to dismiss the indictment under NRS 172.255. NRS 172.255 that

"indictment may be found only upon the concurrence of 12 or more jurors." The indictment here was found upon by at least twelve members of the grand jury. Petitioner has not shown that dismissal of the indictment was warranted and that counsel was deficient for failing to move for the dismissal of the indictment.

Petitioner also contends that the police gave perjured and false testimony and that the state failed to present exculpatory evidence of letters in which he stated he only wanted to scare the victim. These claims also fail. NRS 172.145(2) notes that a district attorney must submit evidence to the grand jury that would explain away the charge. The letters in which petitioner stated he wanted to scare the victim would not have explained away the charge, as there was also evidence presented that showed that the petitioner wanted the victim killed.

The knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. *Napue v. Illinois*, 360 U.S. 264 (1959). An allegation that false or perjured testimony was introduced is not a constitutional violation, absent knowing use by the prosecution. *Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979). It is petitioner's burden to show that a statement was false. *Id.* Mere inconsistencies in testimony do not establish knowing use of perjured testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992). The prosecution's presentation of contradictory testimony is not improper. *United States. v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993). There must be an allegation of specific evidence that the prosecutor knew to be false.

Where credibility is fully explored by the jury, it is properly a matter for jury consideration. *United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995); *Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979). The petitioner's burden for perjured testimony is a reasonable likelihood that the false testimony could have affected the verdict. *United States. v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. U.S.*, 405 U.S. 150, 154 (1972). A claim of perjured testimony is subject to harmless error analysis. *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (no prejudice where testimony did not affect the result). Petitioner has not shown that false or perjured testimony was given at the grand jury hearing that would require dismissal of the indictment, or that the state was aware of any allegedly false or perjured testimony and allowed the testimony to stand at the grand jury hearing. Exhibit 74 (attached at docket #40).

The court will deny ground one(h).

/ / /

9. Counsel's Failure to Request Acquittal Based on Insufficiency of the Evidence

In ground one(i) petitioner alleges that trial counsel was ineffective for failing to request acquittal based on the insufficiency of the evidence.

The United States Supreme Court has held that when reviewing an insufficiency of the evidence claim in a habeas petition, a federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The court must assume that the jury resolved any evidentiary conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*, 443 U.S. at 326; *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (*en banc*). The credibility of witnesses is beyond the scope of the court's review of the sufficiency of the evidence. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995). Under the *Jackson* standard, the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents "a high standard" to habeas petitioners claiming insufficiency of evidence. *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000).

The Nevada Supreme Court affirmed the state district court's denial of this claim, stating the following:

> Ninth, appellant claimed that his trial counsel was ineffective for failing to move for acquittal due to insufficient evidence. Appellant failed to demonstrate that his counsel was deficient in this regard or that such a motion would have been successful. The record reveals that sufficient evidence supported the jury's finding of guilty on all charges. [fn 10: *See Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (holding that sufficient evidence will support a jury conviction if a jury, acting reasonably, could have been convinced by the evidence presented that the defendant was guilty of the charge by beyond a reasonable

> doubt); *see also Hutchins v. State*, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) (recognizing that the uncorroborated testimony of a victim is sufficient to uphold a rape conviction).] Accordingly, we conclude the district court did not err in denying this claim. [fn 11: To the extent that appellant also raised this claim in the context of a claim of ineffective assistance of appellate counsel, appellant failed to demonstrate that his appellate counsel was ineffective, and we conclude that the district court did not err in denying this claim. *See Kirksey*, 112 Nev. at 998, 923 P.2d at 1113-14.]

Exhibit 72.

This Court agrees with the conclusion of the Nevada Supreme Court. The court has reviewed the record, and after viewing the evidence in the light most favorable to the prosecution, concludes that any rational trier of fact could have found the petitioner guilty of kidnapping, sexual assault, and solicitation to commit murder. The Nevada Supreme Court's ruling that there was sufficient evidence to support the petitioner's conviction was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. The issue of credibility of witnesses is beyond the scope of review. *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). Moreover, the state court's ruling was not based on an unreasonable determination of facts in light of the evidence. 28 U.S.C. § 2254(d). The court will deny habeas relief with respect to ground one(i).

10. Counsel's Failure to Investigate, Interview, or Call Witnesses

In ground one(j) petitioner alleges that trial counsel was ineffective for failing to investigate, interview, or call witnesses at trial. Specifically petitioner contends that counsel did not investigate, interview, or call Lisa Saponaro, Robin Hoppe, and Joann Klassen. Petitioner notes that these three witnesses would have called into question Lisa Bard's testimony that the petitioner had sexually assaulted her in 1997. Petitioner states that Saponaro would have testified that the petitioner was with her when Bard, petitioner's ex-girlfriend, said he assaulted her. Hoppe would have testified that petitioner was at the Tom & Jerry bar on the night he allegedly assault Bard. Klassen would have testified that Bard was committed to a mental ward for attempted suicide relating to an ex-boyfriend, and that Bard told her that petitioner did not assault her and that she just wanted petitioner out of her apartment.

The Nevada Supreme Court affirmed the state district court's denial of the instant claim, stating:

> Tenth, appellant claimed his trial counsel was ineffective for failing to interview Lisa Saponaro, Robin Hoppe and Joann Klassen and have them testify on his behalf. Appellant asserted that the testimony of these individuals would have contradicted and undermined Lisa Bard's testimony regarding appellant's alleged prior sexual assault of her.
>
> Appellant failed to demonstrate that his counsel was deficient in this regard or that, had these individuals testified on his behalf, the

> outcome of the trial would have been different. Appellant claimed that Saponaro and Hoppe would have testified that they were with him at the time the alleged prior assault occurred. Appellant testified to this same information at his second trial. [fn 12: Appellant's first trial resulted in a hung jury.] Although Saponaro testified at appellant's first trial that she was with appellant at the time he allegedly committed the assault on Lisa Bard, on cross-examination, Saponaro stated that she never came forward with this alibi information, and appellant ended up entering an *Alford* [fn 13: *North Carolina v. Alford*, 400 U.S. 25 (1970).] plea to a charge of coercion for the incident with Bard. Appellant claimed Klassen would have testified that Bard told her that appellant did not assault her, but rather made the story up. This information was presented to the jury through the testimony of an investigator who investigated the prior incident. Appellant also failed to demonstrate that his counsel would have been able to locate either Hoppe or Klassen to testify at his second trial. In his petition appellant stated that both of these individuals have moved, they no longer worked at the same place, and he did not know how to locate either of them. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. The Nevada Supreme Court's determination was not objectively unreasonable determination, as there is no indication that trial counsel was ineffective for failing to investigate, interview, or call Saponaro, Hoppe, and Klassen at

trial. Petitioner has not shown that the failure to call these witnesses prejudiced the outcome of trial.

Lisa Bard testified as a rebuttal witness for the state. Exhibit 42. Bard testified that she and the petitioner dated, and after they broke up, but before petitioner moved out of her apartment, the petitioner sexually assaulted her. *Id.* at T 76-89. Petitioner testified on cross-examination that he did not sexually assault his ex-girlfriend, Lisa Bard. Exhibit 41, T 116. Private investigator Collette Putnam testified as a sur-rebuttal witness and stated Bard told her that the petitioner did not rape her and that she made the incident up as she was angry with the petitioner and wanted him to move out of the apartment. Exhibit 42, T 124. Moreover, the petitioner testified that he entered into an *Alford* plea to the charge of coercion regarding the incident relating to Bard. *Id.* at T 128-29. Petitioner also testified that the night of the incident with Bard, that he had gone to the Tom & Jerry bar with a friend, and met Lisa Saponaro there. *Id.* at 132-33. Petitioner testified that he was with Lisa Saponaro and his friend Joe during the time he allegedly sexually assaulted Bard. *Id.* at T 134. Petitioner stated that when he went home he got into a fight with Bard, he went to sleep and woke up when the police arrived at the apartment. *Id.* at T 134-35.

Testimony was introduced at trial that could call into question witness Bard's truthfulness about whether the petitioner sexually assaulted her. Petitioner has not shown that trial counsel acted deficiently, or that this deficiency prejudiced the outcome of the trial. The court will deny ground one(j).

11. Counsel's Failure to Object to Certain Requests and Instances at Trial

Petitioner next alleges in ground one(k) that trial counsel was ineffective for failing to object to certain requests and instances at trial. Petitioner argues that counsel failed to object to: (1) the district attorney's request to do a demonstration on the petition, (2) the state's inquiry about the solicitation to commit murder charges, when the subject was never addressed during direct examination, (3) the state's motion to admit evidence of other crimes, wrongs, or bad acts, (4) the cross-examination of petitioner and defense witness Dixon, in which the prosecutor asked irrelevant questions and made prejudicial comments, (5) the state's closing arguments, in which there were numerous instances of prosecutorial misconduct, (6) the playing of an inaudible videotape, and (7) jury instruction number 18, which contained incorrect wording.

The Nevada Supreme Court affirmed the denial of the instant claim, stating:

> Eleventh, appellant claimed that his trial counsel was ineffective for failing to object to multiple instances of prosecutorial misconduct. This claim is belied by the record. [fn 14: *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to an evidentiary hearing on claims belied by the record). The record reveals that appellant's counsel objected to the conduct challenged by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Petitioner first contends that counsel should have objected to the state's request to do a demonstration on the petitioner at trial. The district attorney did ask the court for permission to perform a demonstration when the courtroom was set up with chairs that approximated the interior of the minivan. Exhibit 42, T 55. After the demonstration, outside the presence of the jury the following took place.

> Mr. Kephart [state prosecutor]: I do, Your Honor. Your Honor, I just think it incumbent for the record for any future scrutiny that may be placed on this trial that the record reflects what I had done prior to the close of testimony of Todd Honeycutt. For the record, I approached him. He was on the witness stand. I had him place his head against the back of the wall. I put my left arm across his shoulder. I asked his to count to ten. When he started counting, I applied pressure to his throat with my arm and he coughed at number two. The defense objected to mischaracterization of the testimony. The Court sustained that objection, Your Honor. Thank you.
>
> Mr. Yampolsky: And Your Honor did sustain as mischaracterized testimony, and I wasn't going to bring this up, but it would seem that this is prosecutorial misconduct that he approach a defendant like this and could be

> grounds for a mistrial. I'm not asking for one at this time, but I'll leave it at that.
>
> The Court: Thank you. The Court would note for the record that even though demonstrations are proper in court, at some point that last demonstration came over the line terms of this Court because it potentially could have provoked an incident in this court, and this Court will just not tolerate that under any circumstances.

Exhibit 42, T 57-58. Although trial counsel did not object prior to the state performing the demonstration, defense counsel did object during the demonstration, and the trial court sustained the objection. Petitioner has not shown that trial counsel should have known what type of demonstration the state was going to perform, and that he should have objected prior to the demonstration being performed, nor has he shown that the failure to object prior to the demonstration prejudiced the outcome of the trial.

Petitioner's claim that counsel failed to object to the state's improper inquiry about the solicitation to commit murder on cross-examination is also refuted by the record. During petitioner's testimony at trial, the state prosecutor asked petitioner a question relating to the solicitation to commit murder charge. Exhibit 41, T 91. Petitioner refused to answer the question. *Id*. Petitioner told the court that he was choosing to remain silent on anything relating to the solicitation to commit murder charge. *Id.* at T 92. After a brief recess in which defense counsel talked to the petitioner, petitioner again refused to answer any questions relating to the solicitation to commit murder charge. *Id.* at T 93. After another discussion the court limited

the testimony to the sexual assault for that day. *Id.* at T 93-94.

The following day, the trial court entertained argument from both parties on the issue of whether petitioner could assert a partial privilege, or could choose to testify to certain counts and not to others. Exhibit 42. Defense counsel argued on petitioner's behalf that petitioner could remain silent as to the solicitation to commit murder charge. *Id.* The court determined that petitioner, if he wished to testify, had to answer questions about all matters in the case, including the solicitation to commit murder charge. *Id.* While defense counsel did not object to the state's specific question during cross-examination, defense counsel did oppose the state's argument that petitioner had to answer questions relating to the solicitation charge. Petitioner has not shown that counsel acted deficiently, or that any alleged deficiency prejudiced the outcome of the trial.

With respect to counsel's failure to object to the state's motion to admit evidence of other crimes, wrongs, or bad acts, petitioner's claim also fails. Prior to petitioner's first trial, the state moved to admit evidence of other crimes, wrongs, or bad acts at trial. Exhibit 2. Defense counsel filed a written opposition, and argued at the hearing on the motion that the court should not allow the state to introduce evidence or testimony that the petitioner previously sexually assaulted Lisa Bard. Exhibits 3-5. Prior to the second trial, against defense counsel opposed the state's motion to admit evidence of other crimes, wrongs, or bad acts. Exhibit 31. Petitioner's contention that

counsel failed to object to the state's motion is refuted by the record.

Petitioner also has not shown that counsel was ineffective for failing to object during the cross-examination of the petitioner and defense witness Dixon. Petitioner contends that the prosecutor made prejudicial comments, asked irrelevant questions, and made sarcastic observations. Defense counsel did make objections to questions asked by the prosecutor during cross-examination of the petitioner and of witness Dixon. Petitioner has not shown that counsel failed to make additional objections that were warranted, or that the failure to make these objections prejudiced the outcome of the trial.

Petitioner also asserts that counsel failed to object to the playing of an inaudible videotape during trial. Petitioner's claim is belied by the record. First, prior to trial, defense counsel opposed the introduction of the videotape at trial. Exhibit 30. The issue was discussed prior to the start of trial. Exhibit 33. The court determined that the videotape would be admitted, but portions that could not be heard or where nothing was spoken on tape would be redacted. *Id.* at T 13-15. During trial, the state played a videotape at trial that had portions redacted. Exhibit 38, T 4. Defense counsel object to the introduction of the videotape. *Id.* It was noted that the volume on the television was not working properly so another television was brought into the courtroom. *Id.* The videotape was then played for the jury. *Id.* at T 5. There was no indication that the videotape could not be heard. *Id.* Petitioner has not shown that trial counsel was ineffective, or that any

deficiency on the part of counsel prejudiced the outcome of trial.

The record also refutes petitioner's argument regarding counsel's failure to object during the state's closing argument. While counsel did not object during the closing argument, the state did not appear to make any improper arguments. Petitioner has not shown that counsel's failure to object prejudiced the outcome of the proceedings. Finally, with respect to whether counsel failed to object to jury instruction number 18, petitioner has not shown that the jury instruction contained improper language. Therefore, counsel did not act deficiently in failing to object to the instruction.

The court will deny ground one(k).

12. Counsel's Failure to Adequately Cross-examine, Prepare, and Present Inconsistent Statements

In ground one(l) petitioner contends that trial counsel was ineffective for failing to adequately cross-examine, prepare, and present inconsistent statements and impeach witnesses Bates, Farrell, Bard, Fisher, and Maholick with their inconsistent statements.

The Nevada Supreme Court affirmed the state district court's denial of this claim on appeal, stating:

> Twelfth, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine the State's witnesses. Appellant failed to demonstrate that his counsel was deficient in this regard. The record reveals that appellant's counsel conducted a thorough cross-examination of the State's witnesses and

> exposed discrepancies and inconsistencies in the witnesses' statements. Appellant failed to identify what additional questions his counsel should have asked on cross-examination that would have altered the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. The Nevada Supreme Court's determination was not objectively unreasonable. Defense counsel cross-examined each of the listed witnesses at trial, and asked each about previous statements if they had made previous statements in the case. Exhibits 38-42. There is no indication that defense counsel did not conduct adequate cross-examination of each witness. Furthermore, petitioner has not demonstrated that any additional cross-examination by counsel would have change the outcome of the trial.

13. Counsel's Failure to Present Exculpatory Evidence

In ground one(m) petitioner argues that trial counsel was ineffective for failing to present evidence that petitioner only wanted to scare victim Bates and not have her murdered. Petitioner contends that trial counsel failed to present to the jury a letter that petitioner wrote which stated that he wished to scare the victim so that she would not testify at trial.

The Nevada Supreme Court affirmed the state district court's denial of this claim, finding the following:

> Thirteenth, appellant claimed that his trial counsel was ineffective for failing to present to

> the jury his letters that state he only wanted the victim scared. Appellant asserted that these letters would have undermined the State's claim that he wanted the victim killed. Appellant failed to demonstrated that the presentation of the letters would have altered the outcome of his trial. Even assuming some of the letters stated he only wanted the victim scared, at least one of the letters referenced the victim dying, and overwhelming evidence supported appellant's conviction for solicitation to commit murder. Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72.

The Nevada Supreme Court's determination was not an objectively unreasonable application of *Strickland*. Petitioner has not shown that trial counsel's failure to introduce the letters at trial prejudiced the outcome of trial. David Paule testified at trial that petitioner wanted the victim "taken out" and he understood that to mean that he wanted her killed. Exhibit 40, T 6. Paule stated that petitioner gave him a paper with the victim's address, phone number, and other identifying information on it. *Id.* at T 11. Detective Hanna, involved in the investigation of the solicitation to commit murder, had received a warrant to search petitioner's mail. Exhibit 39, T 115. Some of the letters referenced the victim not making it to the trial, so that the petitioner would get out of jail. *Id.* at T 116-19.

Detective Preusch, acting undercover, met with the petitioner at the jail, and discussed getting paid to kill the victim. Exhibit 40, T 35-47. Petitioner told the

detective that he did not care what happened to Bates, as long as she disappeared. *Id.* at T 47. The state also played the taped conversation between the petitioner and Preusch for the jury. Preusch had no doubts that the petitioner was paying him to kill victim Bates. *Id.* at T 48. Petitioner testified that he did not want to have the victim killed, but just scared. Exhibit 42, T 7. Petitioner cannot show that the failure to introduce other letters that allegedly stated that he wanted to scare the victim prejudiced the outcome of trial.

The court will deny ground one(m).

B. Ground Two

In his second ground for relief petitioner alleges that appellate counsel was ineffective for (1) failing to argue on appeal that the Luxor videotape was inaudible, (2) failing to raise on appeal the issue that the statements made to the undercover agent should have been suppressed, (3) failing to argue on appeal that the trial court had no jurisdiction to proceed against him based on the solicitation to commit murder charge based on an improper indictment, perjured police testimony, the state's failure to present exculpatory evidence, and false evidence, and (4) failing to argue on appeal the trial court's refusal to reconsider the grant of the state's motion to admit evidence of other crimes, wrongs, or bad acts.

"Claims of ineffective assistance of appellate counsel are reviewed according to the standard announced in *Strickland*." *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). A petitioner must show that counsel unreasonably failed to discover non-frivolous issues and there was a reasonable probability that but for

counsel's failures, he would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The Nevada Supreme Court considered the instant claims on appeal from the lower court's denial of the state habeas corpus petition. The court found the petitioner's first, second, and fourth subclaims to be without merit, stating:

> Appellant also raised three claims of ineffective assistance of appellate counsel. To state a claim of 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 resulted in prejudice such that the omitted issue would have a reasonable probability of success on appeal. [fn 15: *Kirksey*, 112 Nev. At 998, 923 P.2d at 1113-14 (citing to *Strickland*, 466 U.S. 668).] Appellate counsel is not required to raised every non-frivolous issue on appeal. [fn 16: *Jones v. Barnes*, 463 U.S. 745, 751 (1983).] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. [fn 17: *Ford*, 105 Nev. At 853, 784 P.2d at 953.]
>
> First, appellant claimed that his appellate counsel was ineffective for failing to appeal the introduction of the Luxor videotape on the basis of inaudibility. Appellant failed to demonstrate that this issue would have had a reasonable probability of success on appeal. The record reveals that although portions of the videotape are inaudible, the videotape was redacted to remove large portions where the victim was

inaudible or just crying. The record further reveals that the videotape, as redacted, was not entirely inaudible since both the prosecution and the defense referred to statements made on the videotape. Additionally, on direct appeal, this court rejected appellant's other challenges to the admission of the videotape. [fn 18: *Honeycutt*, 118 Nev. At 666 n.6, 56 P.3d at 366 n.6.] Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to appeal the improper introduction of undercover agent testimony. This claim is belied by the record. [fn 19: *See Hargrove*, 100 Nev. At 503, 686 P.2d at 225.] The record reveals that this claim was raised on direct appeal and this court concluded the claim lack merit. [fn 20: *Honeycutt*, 118 Nev. 666 n.6, 56 P.3d at 366 n.6]. Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant claimed his appellate counsel was ineffective for failing to appeal the district court's refusal to revisit the issue of admitting Bard's testimony regarding the prior bad act. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal. On direct appeal this court reviewed the admission of Bard's testimony and concluded that the district court did not abuse its discretion in admitting the testimony. [fn 21: *Id.* at 672-73, 56 P.3d at

> 370.] Accordingly, we conclude the district court did not err in denying this claim.

Exhibit 72. Moreover, in discussing and rejecting ground one(h), the court also rejected petitioner's third subclaim raised here. The court stated that to the extent petitioner was raising the claim as an ineffective assistance of appellate counsel claim, petitioner had failed to demonstrate that his appellate counsel was ineffective. *Id.* at 7, n.9.

Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. In his first subclaim petitioner contends that counsel should have argued on appeal that the Luxor videotape was inaudible. Petitioner cannot show that there is a reasonable probability that this claim would have prevailed on appeal. While portions of the videotape may have been inaudible, the tape was redacted to remove the majority of the inaudible parts of the tape. Exhibits 33 and 38. There were initially problems hearing the tape due to faulty equipment, but the equipment was replaced, and there is no indication that the videotape played for the jury was completely inaudible, as both parties referenced portions of the videotape at trial. Exhibit 38.

In his second subclaim petitioner asserts that counsel failed to raise on appeal the issue that his statements made to the undercover police officer should have been suppressed. This claim is belied by the record. Appellate counsel did raise the instant ground on direct appeal, and the Nevada Supreme Court rejected the claim. Exhibit 52. Counsel cannot be

ineffective when he did raise the instant claim on direct appeal.

In his third subclaim petitioner alleges that appellate counsel failed to raise the issue that the trial court had no jurisdiction to proceed against him on the solicitation to commit murder charge based on an improper indictment, perjured police testimony and the failure to present exculpatory evidence. This court addressed this claim, in the context of ineffective assistance of trial counsel, and found that petitioner had not shown that dismissal of the indictment was warranted. There is no indication that appellate counsel was deficient for failing to raise this claim, or that there is a reasonable probability that this claim would have been meritorious on appeal.

Finally, in his fourth subclaim petitioner alleges that appellate counsel was ineffective for failing to argue on appeal that the trial court erred in refusing to reconsider the grant of the state's motion to admit witness Bard's testimony. Appellate counsel did raise the instant ground on direct appeal, and the Nevada Supreme Court rejected the claim. Exhibit 52. Appellate counsel cannot be ineffective when he did raise the claim on direct appeal.

The court will deny ground two.

C. Ground Four

In ground four petitioner alleges that the trial court erred in admitting his statements made to undercover police agents, without an attorney, while in jail for the sexual assault and kidnapping charges. The statements and other evidence were later used to indict the petitioner for solicitation to commit murder. Prior to

trial defense counsel moved to suppress any statements made by petitioner to law enforcement personnel or their agents regarding the solicitation charge. Exhibit 25. Counsel argued that petitioner's Fifth and Sixth Amendment rights were violated when law enforcement deliberately elicited information and incriminating statements from petitioner. *Id.* After hearing argument on the issues, the state district court denied the motion to suppress. Exhibits 28 and 29. Petitioner raised this ground on direct appeal from his judgment of conviction and the Nevada Supreme Court rejected this claim, finding the claim was without merit. Exhibit 52.

The Sixth Amendment prohibits government agents from "deliberately eliciting" incriminating statements from a criminal defendant in the absence of his lawyer once the defendant's right to counsel has attached in the case. *Massiah v. United States*, 377 U.S. 201 (1964). The *Massiah* test has been extended to incriminating statements made by criminal defendants to jailhouse informants. *United States v. Henry*, 447 U.S. 264 (1980). The "primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). A criminal defendant must "demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." *Id*. However, in *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985), the United States Supreme Court noted that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."

The Nevada Supreme Court's rejection of petitioner's claim that the trial court erred in admitting incriminating statements made to an informant and an undercover agent without an attorney was not objectively unreasonable. Petitioner made incriminating statements to witness Paule and detective Preusch about a crime for which he had not yet been charged. Therefore, petitioner's Sixth Amendment right to counsel had not yet attached, and the incriminating statements were admissible at trial. *Moulton*, 474 U.S. at 180 n.16. Petitioner's right to counsel had attached regarding the sexual assault and kidnapping, thus the state could not have deliberately elicited incriminating statements from the petitioner regarding those charges.

Petitioner also has not demonstrated that his statements should have been suppressed because he was not read his *Miranda*[3] rights. Generally, police are required to give a suspect *Miranda* warnings only when that person is "in custody." *Thompson v. Keohane*, 516 U.S. 99, 101 (1995). While petitioner was "in custody," as he was being held in jail for re-trial on the kidnapping and sexual assault charges, the undercover police officer was not required to give petitioner *Miranda* warnings before asking questions regarding the solicitation to commit murder. *See Illinois v. Perkins*, 496 U.S. 292 (1990) (finding *Miranda* warnings "are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents"). Petitioner has not

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1996).

shown that the trial court erred when it denied his motion to suppress.

The court will deny ground four.

D. Ground Six

Petitioner argues in his sixth ground for relief that his Fifth and Fourteenth Amendment rights to due process were violated when the trial court abused its discretion in allowing the state prosecutor to perform a demonstration on him at trial. The prosecution choked petitioner while he was on the witness stand as a demonstration to show what had happened to victim Bates. Petitioner raised the instant claim on direct appeal. The Nevada Supreme Court rejected this claim, stating:

> We agree with Honeycutt that there was an instance of prosecutorial misconduct; namely, the prosecutor choking Honeycutt on the stand as a demonstration of what happened to the victim. The action was clearly improper. Honeycutt testified on direct examination that the sexual assault could not have occurred as the victim had described it and gave an in-court demonstration with a neutral party to corroborate his story. On cross-examination, the prosecutor asked if he could do his own in-court demonstration. Upon receiving permission, he approached Honeycutt, placed his arm across Honeycutt's throat and began pushing hard. Honeycutt's eyes began watering after a few seconds and he began to choke. Defense counsel immediately objected and requested a mistrial.

> The district court sustained the objection but denied the motion for a mistrial.
>
> We can see absolutely no reason why a prosecutor would take such an action. The decision to physically assault a defendant while on the stand goes well beyond the accepted bounds of permissible advocacy. However, we will not reverse the convictions on this ground because Honeycutt consented to the demonstration, and there is no indication that the action prejudiced Honeycutt in any way. On the contrary, it would appear that it would have prejudiced the State rather than Honeycutt, and Honeycutt reacted in a way which reflected well on him, rather than in a way which would prejudice him. This is in marked contrast to the situation described in *Hollaway v. State*, [fn 33: 116 Nev. 732, 742, 6 P.3d 987, 994 (2000).] where a stun belt was activated during closing arguments in a murder trial. In that case, the implication to the jury was that the State regarded Hollaway as extremely dangerous. Here, because of Honeycutt's reaction, there was no implication that Honeycutt was anything other than a gentleman, and he suffered no prejudice. Because of Honeycutt's conduct, the prosecutorial misconduct in conducting the demonstration was harmless, and the district court appropriately denied Honeycutt's motion for a mistrial.

Exhibit 52.

The Nevada Supreme Court's determination was not objectively unreasonable. Although the prosecutor's

actions were improper, petitioner cannot show that the prosecutor's actions prejudiced the outcome of the trial, or had a substantial and injurious effect on the jury or influenced the verdict. *Brecht v. Anderson*, 507 U.S. 619 (1993). If anything, the state prosecutor's actions were likely to have prejudiced the state's case and would not have prejudiced the petitioner.

The court will deny ground six.

E. Ground Nine

In ground nine petitioner contends that his Fifth, Sixth, and Fourteenth Amendment rights were violated when the Nevada Supreme Court failed to conduct a fair and adequate review on direct appeal. Petitioner states that the "facts" listed in the facts section of the Nevada Supreme Court were not the "actual facts of this case." Moreover, petitioner states it is disconcerting that two of the judges on the panel could make their determinations as they did.

The court will deny this ground for relief. Petitioner has not shown that the Nevada Supreme Court did not fully review his case and arguments on appeal. Petitioner merely takes issue with the outcome of his appeal. Petitioner has not stated any facts in the instant ground that would warrant habeas corpus relief.

F. Ground Ten

In his tenth ground for relief petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the trial court when it improperly joined, and then refused to sever, the solicitation to commit murder count from the sexual assault and

kidnapping counts. Petitioner raised this claim in his direct appeal, and the Nevada Supreme Court found the claim was without merit. Exhibit 52. The court stated:

> Honeycutt alleges that the district court erred in denying his motion to sever the solicitation to commit murder charge from the sexual assault and kidnapping charges. He claims that he wanted to testify on the sexual assault and kidnapping charges, but not on the solicitation charge. The district court made clear that Honeycutt could assert his right to remain silent as to all of the charges or testify as to all of the charges, but could not testify as to some, but not the others. Therefore, Honeycutt chose to testify as to all of the charges and now asserts that his Fifth Amendment rights were violated.
>
> NRS 173.115 provides:
>
> > Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charges, whether felonies or misdemeanors or both, are:
> >
> > ....
> >
> > 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> Clearly, the charge of solicitation to murder the victim/principal witness in a sexual assault and kidnapping case is factually connected to

the sexual assault and kidnapping. The charges were properly joined under NRS 173.115(2).

"The decision to sever is left to the discretion of the trial court, and an appellant has the 'heavy burden' of showing that the court abused its discretion." [fn 7: *Middleton v. State*, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (citing *Amen v. State*, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)).] Failure to sever requires reversal only if the joinder has "a substantial and injurious effect on the jury's verdict." [fn 8: *Id.*] "The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." [fn 9: *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976).] To require severance, the defendant must demonstrate that a joint trial would be "manifestly prejudicial." [fn 10: *United States v. Bronco*, 597 F.2d 1300, 1302 (9th Cir. 1979).] The simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process. [fn 11: *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991).] In this case, in a trial of the solicitation to commit murder charge, the sexual assault and kidnapping would be admissible to establish motive, and in a trial of the sexual assault and kidnapping charges, the solicitation to commit murder would be admissible to show consciousness of guilt. [fn 12: *Abram v. State*, 95 Nev. 352, 356-57 594 P.2d 1143, 1145-46 (1979) (threats against witness relevant to consciousness of guilt).] Cross-admissibility of

the evidence in the two separate charges is one of the key factors in determining whether joinder is appropriate. As this court said in *Middleton v. State*, "'[i]f...evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed.'" [fn 13: 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (quoting *Mitchell v. State*, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989)).] The district court did not err in not severing Honeycutt's charges for trial.

Honeycutt claims his Fifth Amendment rights were violated because he was not allowed to testify on the sexual assault and kidnapping charges while simultaneously asserting his Fifth Amendment right to remain silent on the solicitation charge. The United States Court of Appeals for the Seventh Circuit has stated: "'[S]everance is not required every time a defendant wishes to testify to one charge but to remain silent on another. If that were the law, a court would be divested of all control over the matter of severance an the choice would be entrusted to the defendant.'" [fn 14: *United States v. Dixon*, 184 F.3d 643, 646 (7th Cir. 1999) (quoting *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1998)).] The burden rests on the defendant to present enough information regarding the nature of the testimony he wishes to give on the one count and his reasons for not wishing to testify on the other to satisfy the court that his claim of prejudice is genuine, and to enable it intelligently to weigh the

considerations of economy and expedition in judicial administration against the defendant's interest in having a free choice with respect to testifying. [fn 15: *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968).] Honeycutt made no such detailed showing. "To establish that joinder was prejudicial 'requires more than a mere showing that severance might have made acquittal more likely.'" [fn 16: *Middleton*, 114 Nev. at 1108, 968 P.2d at 309 (quoting *United States v. Wilson*, 715 F.2d 1164, 1171 (7th Cir. 1983)); *United States v. Campanale*, 518 F.2d 352, 359 (9th Cir. 1975).]

Honeycutt argued that severance should be granted because he wished to present inconsistent defenses, but his defenses were not inconsistent. Wanting to testify as to one offense and not as to another is not an inconsistent defense; it merely reflects a different tactic on each charge. The district court clearly indicated that Honeycutt could choose to assert his Fifth Amendment right not to testify in the second trial, even though he testified in the first trial. [fn 17: The dissent argues that by testifying at his first trial, Honeycutt waived his Fifth Amendment right to remain silent. Despite the fact that Honeycutt testified at his first trial, the district court made clear that Honeycutt could choose not to testify at his second trial. The district court made clear that Honeycutt would be treated at the second trial as though he had never testified, thus, in effect reinstating his Fifth Amendment rights. The determination of whether to admit evidence is within the sound

> discretion of the district court, and that determination will not be disturbed unless manifestly wrong. *Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). The district court thus assured that the joinder of the charges would result in no fundamental unfairness. It cannot be a manifest abuse of discretion to admit evidence otherwise admissible in order to assure fundamental fairness.] And there is no violation of Honeycutt's rights by making him elect to testify as to all of the charges or to none at all. [fn 18: *Holmes v. Gray*, 526 F.2d 622, 626 (7th Cir. 1975).] Criminal defendants routinely face a choice between complete silence and presenting a defense. This has never been though an invasion of the privilege against compelled self-incrimination. [fn 19: *Id.*]
>
> Honeycutt fails to demonstrate any fundamental unfairness or a violation of his rights in the joinder of the counts of sexual assault, kidnapping, and solicitation to commit murder. The district court did not abuse its discretion in denying Honeycutt's motion to sever the counts.

Id.

"The propriety of...consolidation rests within the sound discretion of the state trial judge." *Fields v. Woodford*, 309 F.3d 1095, 1110 (9th Cir. 2002) (citations omitted). The joinder of offenses "must actually render petitioner's state trial fundamentally unfair and hence, violative of due process," in order for habeas relief to be granted. *Id. See also Davis v.*

Woodford, 384 F.3d 628, 638 (9th Cir. 2004) (citing *Sandoval v. Calderon*, 241 F.3d 765, 771-72 (9th Cir. 2001)). The prejudice to a trial is shown if the joinder of offenses had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abramson*, 507 U.S. 619, 637 (1993); *Sandoval*, 241 F.3d at 772. The Ninth Circuit has also stated:

> We have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible. *See United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). Undue prejudice may also arise from the joinder of a strong evidentiary case with a weaker one. *See id.*; *Bean*, 163 F.3d at 1085. The reason there is danger in both situations is that it is difficult for a jury to compartmentalize the damaging information. *See Bean*, 163 F.3d at 1084.

Sandoval, 241 F.3d at 772.

The Nevada Supreme Court's determination that joinder was proper and that the trial court did not abuse its discretion in failing to sever the charges is not objectively unreasonable. This was not a case where the trial court joined a strong evidentiary case with a weaker case. There was evidence to support each charge independently. Moreover, as the Nevada Supreme Court found, the bad act evidence admitted at trial that petitioner complained of would have been admissible even if the offenses were tried separately. There is no indication that the joinder of the sexual assault charges with the solicitation to commit murder charge had a substantial or injurious effect on the jury

which rendered the petitioner's trial fundamentally unfair.

The court will deny this claim.

G. Ground Eleven

In ground eleven petitioner contends that his Fifth, Sixth, and Fourteenth Amendment rights were violated due to the many instances of prosecutorial misconduct that occurred during trial. Petitioner lists the following acts and argues that these instances of prosecutorial misconduct rendered his trial unfair: (1) the district attorney's choking of petitioner, (2) the district attorney's prejudicial cross-examination of petitioner; (3) the district attorney's "forcing petitioner to state Bates was lying;" (4) the district attorney's improper cross-examination of defense witness Dixon; and (5) the district attorney's numerous instances of misconduct in closing argument.

This court discussed the choking incident in ground six, and the court found that the Nevada Supreme Court's determination was not objectively unreasonable. While the prosecutor's actions were clearly improper, there is no indication that the district attorney's action had a substantial and injurious effect on the jury or influenced the verdict. *Brecht v. Anderson*, 507 U.S. 619 (1993). The Nevada Supreme Court also affirmed the lower court's denial of the other subclaims contained in the instant ground for relief. The court stated:

> Honeycutt argues that some of the prosecutor's cross-examination of his was irrelevant, unduly salacious, and disrespectful. Aside from the fact no objection was made to

most of the prosecutor's questions, considering the nature of the charges and the divergent accounts of the circumstances by the victim and Honeycutt, the detailed cross-examination does not demonstrate misconduct. Honeycutt alleges that much of the cross-examination was sarcastic, thereby denigrating him, but that does not appear from the record. Although the cross-examination of Honeycutt was extensive and detailed, the State is entitled to test the credibility of the defendant. Honeycutt correctly cites *United States v. Rodriguez-Estrada* [fn 34: 877 F.2d 153, 159 (1st Cir. 1989).] for the proposition that it is the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric. However, Honeycutt fails to point out any such pejorative language or inflammatory rhetoric during the cross-examination.

Honeycutt argues that numerous instances of prosecutorial misconduct in closing argument deprived him of a fair trial. He argues that the prosecutor vouched for the State's witnesses, while calling Honeycutt a liar, among other derogatory terms. This court has stated that it is improper argument for counsel to characterize a witness as a liar. [fn 35: *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).] However, a prosecutor may demonstrate to a jury through inferences from the record that a defense witness's testimony is untrue. [fn 36: *Id.*] A review of the prosecutor's closing arguments shows that all references to the defendant and witnesses were not name-calling or improper

> vouching for the credibility of witnesses, but rather the drawing of inferences from evidence at trial.

Exhibit 52.

The Nevada Supreme Court's rejection of petitioner's claim is not objectively unreasonable. A court "review[s] claims of prosecutorial misconduct 'to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Drayden v. White*, 232 F.3d 704, 713 (9th Cir. 2000) (quoting *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991)). However, attorneys are given wide latitude during closing arguments. *Fields v. Brown*, 431 F.3d 1186, 1206 (9th Cir. 2005). Furthermore, questionable remarks can be cured by jury instructions. *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995).

The Nevada Supreme Court affirmed the denial of this claim, stating that after reviewing the testimony, and the prosecutor's cross-examination of defense witness Dixon and the petitioner, that the prosecutor did not improperly cross-examine the witnesses or make prejudicial comments. The court agrees. After reviewing the testimony, it does not appear the prosecutor acted improperly in conducting his cross-examination. Moreover, the Nevada Supreme Court's factual findings are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). When read in context, the statements petitioner complains about do not appear to have infected the whole trial with fundamental unfairness.

Furthermore, the Nevada Supreme Court's rejection that the prosecutor's closing arguments were improper is not objectively unreasonable. The state did not appear to make any improper arguments during closing arguments. Petitioner contests the prosecutor's statements calling him a "liar." Generally, a prosecutor cannot express an opinion about the defendant's guilt or the credibility of witnesses. *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985). A prosecutor may not refer to a criminal defendant as a liar unless the assertion is based on reasonable inferences of the evidence presented at trial. *United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998); *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). However, a prosecutor has reasonable latitude to fashion closing arguments. *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990). In cases where there are two conflicting stories, it may be reasonable to infer and argue that one of the two sides is lying. *United States v. Laurins*, 857 F.2d 529, 539-40 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

In the instant case, the prosecutor's remarks that the petitioner was lying were permissible, as they were reasonable inferences. There were two conflicting stories in petitioner's case, and one could infer that either the petitioner or the victim was lying. The Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and that ruling was not based on an unreasonable determination of facts in light of the evidence. 28 U.S.C. § 2254(d).

The court will deny ground eleven.

H. Ground Twelve

In ground twelve petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated due to outrageous government conduct when detective Hanna lied under oath at the grand jury hearing, when Paule and Preusch were allowed to question him without counsel being present, when he was entrapped by the state into the commission of a crime, and when the trial court failed to require the state to produce Paule's presentence investigation report.

The court discussed the issue of whether perjured testimony was given at the grand jury hearing, in conjunction with ground one(h), and found that petitioner had not shown that the detective lied at the grand jury hearing. Moreover, the court determined that petitioner's statements were properly admitted at trial, as his right to counsel regarding the solicitation had not attached and he had voluntarily given statements to the informant and police in relation to ground four.

Finally, the Nevada Supreme Court's determination that petitioner's claim that the trial court erred in not requiring the state to produce the informant's presentence investigation report was not objectively unreasonable. Defense counsel argued prior to the start of trial that petitioner was entitled to Paule's California presentence investigation report (PSI). Exhibit 37, T 3. The state told the court that they did not have Paule's California PSI. *Id.* at T 4. The court determined that it would not require the district attorney to request Paule's PSI from the State of

California and then produce it to the defendant. *Id.* at T 6.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the United States Supreme Court found that a state's suppression of evidence, whether intentional or inadvertent, will violate due process when that evidence is favorable or material to the defense. Moreover, the suppression of evidence must have prejudiced the proceeding. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The state did not suppress any evidence in this case. The district attorney told the court that it did not have Paule's California PSI.

The court will deny ground twelve.

I. Ground Thirteen

In his thirteenth ground for relief petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated due to judicial bias and improper rulings. Specifically petitioner contends that (1) the trial court forced him to testify to the solicitation charge, (2) the trial court abused its discretion in holding that the petitioner must answer questions outside the scope of direct examination relating to the solicitation to commit murder charge, (3) the trial court showed bias in applying different rules for the state and defense witnesses, (4) the trial court abused its discretion in admitting the redacted Luxor security videotape, (5) the trial court abused its discretion in admitting witness Bard's testimony, (6) the trial court erred in allowing a jury instruction on voluntary intoxication while precluding petitioner's proposed instruction on reasonable mistake of consent. The

Nevada Supreme Court rejected these claims on direct appeal, finding them to be without merit. Exhibit 52.

This court has previously addressed the issues raised in subclaims (1), (2), (4), and (5), and has found that the Nevada Supreme Court's denial of these claims was not objectively unreasonable. Petitioner also has not shown that the Nevada Supreme Court's rejection of subclaim (3) was objectively unreasonable. Subclaim (3) specifically alleges that the trial court showed bias when it allowed witness Ebbert to testify about her opinion regarding injuries to the victim's neck but would not allow the defense expert to testify his opinion about injuries to the victim's neck or vaginal area.

At trial Linda Ebbert, the sexual assault nurse that examined victim Bates, testified that she did an entire body check of the victim, and did not see any bruising on Bates. Exhibit 40, T 74-75. Ebbert noted that Bates complained of soreness in her upper chest and throat area. *Id.* at T 75. The state then asked Ebbert, if, her training and experience, if you have someone who was choked or had pressure applied to their throat, if she would expect there to be bruises. *Id.* Defense counsel objected, stating that the question was outside her area of expertise. *Id.* The court overruled the objection, stating she had been qualified as an expert in performing sexual assault examinations. *Id*.

The defense called Mohamed Eftaiha as an expert witness. Exhibit 41, T 8. Dr. Eftaiha practices colon, rectal, and general surgery. *Id.* at T 10. Defense counsel asked the doctor "[i]f somebody were choked by a force sufficient to cause the eyes to bug out and so the person is suffering from shortness of breath, would you

expect to see bruising around the neck?" *Id.* at T 18. The doctor answered that such choking would cause a lot of pressure on the skin and that would show at least a bruise or marks in the area. *Id.* On cross-examination the state asked the doctor if he had ever been qualified as an expert on bruising or choking, and the doctor stated he never had. *Id.* at T 18-19. The court found that the doctor qualified as an expert in rectal and colon surgery and the treatment of the rectum and colon. *Id.* at T 20.

Petitioner has not shown that the Nevada Supreme Court's rejection of this claim was objectively unreasonable. Petitioner has not shown that the trial court was biased in the way it dealt with the witnesses. Ebbert was found to be an expert in the area of performing sexual assault exams, which includes examination of the genital areas, as well as the rest of the body. Defense witness Eftaiha practices colon and rectal surgery, and had not shown that he was an expert in bruising of the neck and check area.

Regarding petitioner's sixth subclaim, petitioner has not shown that the Nevada Supreme Court's rejection of this claim was objectively unreasonable. The state district court, in jury instruction number 10, instructed the jury on the fact that sexual assault was a general intent crime. Exhibit 43, T 2. The instruction further stated that any claim or evidence of drinking alcohol or voluntary intoxication by the defense is no excuse or defense to the crime. *Id.* Petitioner has not shown that this is an incorrect statement of law or an incorrect jury instruction.

The court will deny ground thirteen.

J. Ground Fourteen

In his fourteenth and final claim petitioner argues that cumulative error deprived him of his right to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments.

The cumulative error doctrine recognizes that the cumulative effect of several errors may prejudice a defendant to the extent that his conviction must be overturned. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). The cumulative error doctrine, however, does *not* permit the Court to consider the cumulative effect of *non-errors*. *See Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999), *overruled on other grounds*, *Slack v. McDaniel*, 529 U.S. 473 (2000) ("where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation").

The Nevada Supreme Court stated that because petitioner failed to demonstrate that his trial or appellate counsel were ineffective, that he failed to demonstrate cumulative error in the case. Exhibit 72. This court has found petitioner's claims to be without merit, therefore the court also finds that petitioner has not shown cumulative error. This claim fails.

V. Evidentiary Hearing

Petitioner also has this court to hold an evidentiary hearing on the claims contained in the petition for writ of habeas corpus. A federal district court cannot hold an evidentiary hearing when a petitioner "has failed to develop the factual basis of a claim in State court proceedings" unless a petitioner can show (1) the claim relies on a new rule of constitutional law or a factual

predicate that could not have been previously discovered through the exercise of due diligence and (2) the facts underlying the claim are sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2). A petitioner has "failed to develop" the facts in state court if there is a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

Petitioner has not met the standard for holding an evidentiary hearing in federal court. Petitioner has not shown that his claims rely upon new facts that could not have been previously discovered in the state court, or that no reasonable fact finder would have found the petitioner guilty of the underlying offenses. The Court will deny petitioner's request for an evidentiary hearing.

VI. Certificate of Appealability

In order to proceed with an appeal from this court, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.* The Supreme Court has held that 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).

The Supreme Court further illuminated the standard for issuance of a certificate of appealability in

Miller-El v. Cockrell, 537 U.S. 322 (2003). The Court stated in that case:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Id. at 1040 (quoting *Slack*, 529 U.S. at 484).

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

IT IS THEREFORE ORDERED that petitioner's motion to dismiss the first amendment petition (docket #42) is **GRANTED**.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus (docket #10) is **DENIED**.

IT IS FURTHER ORDERED that the clerk shall **ENTER JUDGMENT ACCORDINGLY**.

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY**.

DATED this 20TH day of July, 2009.

/s/_____
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case Number: 2:06-cv-0634-RLH-RJJ

[Filed July 21, 2009]

Todd M. Honeycutt,	)
	)
Petitioner,	)
	)
v.	)
	)
Bill Donat, et al.,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

* * *

☒ **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.

* * *

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of Respondents and against Petitioner Todd M. Honeycutt.

July 21, 2009
Date

/s/ Lance S. Wilson
Clerk

/s/ Aaron Blazevich
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16758
D.C. No. 2:06-cv-00634-RLH-RJJ
District of Nevada, Las Vegas

[Filed September 12, 2013]

TODD M. HONEYCUTT,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
BILL DONAT, Warden; ATTORNEY GENERAL OF THE STATE OF NEVADA,	)
	)
Respondents - Appellees.	)

ORDER

Before: NOONAN, O'SCANNLAIN, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for rehearing with suggestion for rehearing en banc. Judges O'Scannlain and Noonan have voted to deny the petition for rehearing. Judge O'Scannlain has voted to deny the suggestion for rehearing en banc, and Judge Noonan has so recommended. Judge Smith has voted

to grant the petition for rehearing and the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35466
No. 35468

[Filed October 31, 2002]

TODD MICHAEL HONEYCUTT,	)
Appellant,	)
vs.	)
THE STATE OF NEVADA,	)
Respondent.	)
	)
TODD MICHAEL HONEYCUTT,	)
Appellant,	)
vs.	)
THE STATE OF NEVADA,	)
Respondent.	)
	)

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree kidnapping, two counts of sexual assault, and one count of solicitation to commit murder.[1] Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Affirmed.

[1] Although there is only one judgment of conviction and one appeal in this case, two docket numbers were assigned to the one appeal.

Mace J. Yampolsky, Las Vegas,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, James Tufteland, Chief Deputy District Attorney, and William D. Kephart, Deputy District Attorney, Clark County,
for Respondent.

BEFORE SHEARING, AGOSTI and ROSE, JJ.

OPINION

By the Court, SHEARING, J.:

A jury convicted Todd Michael Honeycutt of one count of kidnapping, two counts of sexual assault, and one count of solicitation to commit murder. Honeycutt appeals these convictions, claiming numerous instances of error that both individually and cumulatively denied his right to a fair trial. We find that Honeycutt was not denied his right to a fair trial. Accordingly, we affirm the judgment of conviction.

FACTS

On May 15, 1998, the victim and her friend, Janine Fischer, were on vacation at the Luxor Hotel in Las Vegas. That evening, both women met Honeycutt at the Hard Rock Café bar, shared several drinks and began talking. After Fischer left, the victim stayed with Honeycutt in the bar. The victim testified that Honeycutt tried to kiss her, but she pushed him away, stating that she did not like to kiss in public. Shortly thereafter, the victim told Honeycutt that she wanted to leave, and he offered to take her to her hotel. She agreed to go with him and entered his van. While the

van was parked, Honeycutt began kissing the victim's lips and breasts.

The victim testified that she resisted Honeycutt and told him she wanted to go back to the hotel. Honeycutt threw her down between the passenger seat and the driver's seat. He lay on top of her and pushed his hand across her throat. She said: "He choked me until I thought my eyes were going to pop out, and my face got extremely hot and red." She testified that he began to pull her pants off while holding her down. She told him to wait so she could get a condom from her pocket. She struggled with him and tried to get up, but Honeycutt pulled her down by the legs and neck.

The victim stated that she began to cry and noticed that Honeycutt had his pants down and his penis exposed. He forced her to perform fellatio on him. She tried to bite him, and he slapped her, saying "you're going to get it now." Honeycutt threw her over the back seat and penetrated her anally. The next thing she remembered was Honeycutt moving off her and back to the driver's seat. She pulled her pants back on and moved back to the front seat, and Honeycutt drove her to her hotel. When asked why she stayed in the van with him, she stated, "I was afraid that I couldn't run. I couldn't move, and I was afraid he was going to run me over."

Honeycutt's testimony differed. He testified that he asked the victim if he could kiss her and she agreed. He stated that when they got in the van, they continued kissing, and he undid her shirt. He stated that the victim was very responsive, and he asked her if she wanted to get into the back seat with him. She replied "yes." Honeycutt testified that the victim undid his

pants and performed fellatio on him. She asked if he had 'any condoms and then looked in her pockets to see if she had one. When Honeycutt tried to penetrate her vaginally, she told him to stop and instead penetrate her anally. He further testified that the victim said nothing when they were having sexual intercourse. Afterwards, Honeycutt and the victim climbed into the front seat. Honeycutt stated that he saw about $200.00 in her purse and took it, but he denied taking the money when she asked. He returned her to the Luxor Hotel, and the victim called Honeycutt "an asshole" and told him to "drop dead."

Sean Ferrell, a bystander, testified that at about 5:45 a.m., the victim approached him "out of nowhere" in front of the Luxor Hotel and asked him to remember a license plate number. She told him she had been sexually assaulted and fell against him "like a rag doll." She was shaking and began crying. He noticed no tears or rips in her clothing. Betty Jo Davis, a security officer at the Luxor Hotel, testified that the victim came to the security office that morning. Davis testified that when she arrived in the office, the victim was sitting in the room with her knees drawn up, crying hysterically and unable to speak. She stated that the victim told her that Honeycutt had sexually assaulted her through anal intercourse and that she was bleeding.

Richard Antal and John Maholick, security officers at the Luxor Hotel, corroborated Davis's account. They stated that the victim gave a voluntary statement about the assault that was videotaped and played at trial. They both agreed that the victim was crying and difficult to understand throughout most of the

interview. They also testified that they noticed no bruises or marks on the victim.

The State and the defense introduced contradictory medical testimony regarding bruising on the victim's neck and rectal area. Linda Ebbert, the State's witness, testified that she examined the victim at the hospital with a standard sexual assault kit and used Toludine Blue Dye to test her rectal and vaginal areas for bruising. She pointed out some visible lacerations, abrasions, and redness in the victim's rectal area. She further testified that tears can occur, but are not common, in consensual anal intercourse. She also testified that the victim told her that her neck was sore, but Ebbert noticed no bruising. The defense witness, Dr. Mohamed Eftaiha, testified that Ebbert's findings were not conclusive evidence of nonconsensual anal intercourse. In fact, he concluded that the absence of bruises on the buttocks and neck indicated to him that the victim had possibly consented.

Honeycutt was initially tried on two counts of sexual assault and one count of kidnapping. Honeycutt testified against the advice of counsel, raising the defense of consent. That trial resulted in a mistrial. The district court then scheduled a second trial on the charges.

The district court conducted a Petrocelli[2] hearing prior to the first trial to determine whether evidence should be admitted concerning Honeycutt's prior sexual assault conviction. At that hearing, Honeycutt's former girlfriend testified that in 1997, Honeycutt had

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

sexually assaulted her. She stated that he covered her nose and mouth and assaulted her vaginally and anally. She stated that he was high on speed at the time, and that he hit her on the head when she screamed. Honeycutt entered an Alford[3] plea to that charge, contending that the sexual intercourse was consensual. The district court ruled that the former girlfriend's testimony was admissible.

Between the first and second trials, the State learned that the victim had received letters from Honeycutt threatening her and telling her not to testify, and that Honeycutt wrote a letter to a friend stating that he wanted to scare the victim into not testifying.

Prior to the second trial, David Paule, an inmate incarcerated with Honeycutt, informed Detective Larry Hanna that Honeycutt had approached him and offered him $3,000.00 to hire someone to murder the victim in the sexual assault case. Paule gave Hanna a piece of paper that Honeycutt had given him that contained the victim's name and address. Hanna told Paule that in exchange for eliciting information from Honeycutt regarding the solicitation, he would try to get Paule's charge of being an ex-felon in possession of a firearm "taken away."

Based on this information, the police sent Paule back to speak with Honeycutt twice with a tape recorder, but the tapes malfunctioned each time and failed to record the conversations. Both times Paule stated that Honeycutt talked more evasively about

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[3] North Carolina v. Alford, 400 U.S. 25 (1970).

wanting the victim killed and never specifically stated it again. The third time, when a recording was successfully made, Honeycutt made no admissions to Paule's repeated questions about his wanting to solicit the victim's murder. Paule also arranged for Honeycutt to speak to an undercover officer, Mark Preusch, about killing the victim. At that meeting, Honeycutt stated nothing, but Preusch testified that Honeycutt held up a piece of paper that said he wanted the victim to disappear.

Upon learning of these incidents, the State obtained an indictment charging Honeycutt with solicitation to commit murder and filed a motion to join that charge with the sexual assault and kidnapping charges at the second trial. Honeycutt filed a motion to sever the counts, arguing that the various charges involved inconsistent defenses. Furthermore, he argued, joinder for trial violated the Fifth Amendment[4] by forcing him to testify to the solicitation charge because he had already testified to the sexual assault charges. Finally, Honeycutt contended that the solicitation to commit murder charge was too prejudicial to be joined with the original charges. The district court denied the motion, concluding that the counts were sufficiently part of the same course of conduct and did not unfairly prejudice Honeycutt, and thus could be properly joined.

Honeycutt filed a motion to suppress his statements made to Paule and Preusch because they were elicited without proper Miranda[5] warnings. Honeycutt also

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[4] U.S. Const. amend. V.

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

filed motions to exclude the Luxor security tape and renewed his motion to exclude testimony regarding his prior conviction. The district court denied all motions, stating that Miranda warnings were not required, and although the prior bad act evidence was prejudicial, its probative value outweighed the prejudicial effect.

At the second trial, substantially the same testimony was elicited as had been at the first trial regarding the sexual assault incident. Honeycutt again testified against the advice of counsel, but attempted to assert his Fifth Amendment right not to testify as to the solicitation charge. The district court denied this request, indicating that Honeycutt could assert his Fifth Amendment right not to testify in the second trial, even though he had testified in the first trial, but he could not assert that right as to one charge and not the other.

Honeycutt also introduced the testimony of Sean Dixon, another inmate. Dixon testified that he was present when Honeycutt told Paule that he "wanted a lady scared," but Paule kept asking if Honeycutt wanted her killed. He testified that Honeycutt never said he wanted the victim killed. Dixon further testified that Paule tried three times to ask him to convince Honeycutt to have the woman killed.

The jury returned verdicts of guilty on all counts. The district court sentenced Honeycutt to serve concurrent terms of life with the possibility of parole on the kidnapping count and one sexual assault count. The court also sentenced him to a consecutive term of life with the possibility of parole on the second sexual assault count, and a consecutive term of 180 months on

the solicitation count. Honeycutt filed a timely notice of appeal.

DISCUSSION

Honeycutt argues that numerous errors, both individually and cumulatively, violated his right to a fair trial. He alleges that the district court erred in joining the sexual assault and solicitation charges, in denying an instruction on reasonable mistaken belief of consent, in admitting certain evidence, and in condoning numerous instances of prosecutorial misconduct.[6] Because we conclude that the district court did not err, we affirm the judgment of conviction.

Joinder and severance

Honeycutt alleges that the district court erred in denying his motion to sever the solicitation to commit murder charge from the sexual assault and kidnapping charges. He claims that he wanted to testify on the sexual assault and kidnapping charges, but not on the solicitation charge. The district court made clear that Honeycutt could assert his right to remain silent as to all of the charges or to testify as to all of the charges, but could not testify as to some, but not the others. Therefore, Honeycutt chose to testify as to all of the

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[6] Honeycutt alleged other assignments of error including: (1) eliciting Honeycutt's statements by a prison inmate without Miranda warnings and/or as a result of entrapment; (2) the State's failure to disclose exculpatory evidence; (3) biased and improper evidentiary rulings; (4) improperly threatening to strike a defense witness's testimony; and (5) giving an improper instruction on voluntary intoxication. We conclude that none of these assignments of error has merit.

charges and now asserts that his Fifth Amendment rights were violated.

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
>
> . . . .
>
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Clearly, the charge of solicitation to murder the victim/principal witness in a sexual assault and kidnapping case is factually connected to the sexual assault and kidnapping. The charges were properly joined under NRS 173.115(2).

"The decision to sever is left to the discretion of the trial court, and an appellant has the 'heavy burden' of showing that the court abused its discretion."[7] Failure to sever requires reversal only if the joinder has "a substantial and injurious effect on the jury's verdict."[8] "The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's

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[7] Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (citing Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)).

[8] Id.

discretion to sever."[9] To require severance, the defendant must demonstrate that a joint trial would be "manifestly prejudicial."[10] The simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process.[11] In this case, in a trial of the solicitation to commit murder charge, the sexual assault and kidnapping would be admissible to establish motive, and in a trial of the sexual assault and kidnapping charges, the solicitation to commit murder would be admissible to show consciousness of guilt.[12] Cross-admissibility of the evidence in the two separate charges is one of the key factors in determining whether joinder is appropriate. As this court said in Middleton v. State, "'[i]f ... evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed.'"[13] The district court did not err in not severing Honeycutt's charges for trial.

Honeycutt claims his Fifth Amendment rights were violated because he was not allowed to testify on the sexual assault and kidnapping charges while simultaneously asserting his Fifth Amendment right to

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[9] United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976).

[10] United States v. Bronco, 597 F.2d 1300, 1302 (9th Cir. 1979).

[11] Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir. 1991).

[12] Abram v. State, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145-46 (1979) (threats against witness relevant to consciousness of guilt).

[13] 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (quoting Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989)).

remain silent on the solicitation charge. The United States Court of Appeals for the Seventh Circuit has stated: "'[S]everance is not required every time a defendant wishes to testify to one charge but to remain silent on another. If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.'"[14] The burden rests on the defendant to present enough information regarding the nature of the testimony he wishes to give on the one count and his reasons for not wishing to testify on the other to satisfy the court that his claim of prejudice is genuine, and to enable it intelligently to weigh the considerations of economy and expedition in judicial administration against the defendant's interest in having a free choice with respect to testifying.[15] Honeycutt made no such detailed showing. "To establish that joinder was prejudicial 'requires more than a mere showing that severance might have made acquittal more likely.'"[16]

Honeycutt argued that severance should be granted because he wished to present inconsistent defenses, but his defenses were not inconsistent. Wanting to testify as to one offense and not as to another is not an inconsistent defense; it merely reflects a different tactic on each charge. The district court clearly indicated that

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[14] U.S. v. Dixon, 184 F.3d 643, 646 (7th Cir. 1999) (quoting U.S. v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998)).

[15] Baker v. United States, 401 F.2d 958, 977 (D.C. Cir. 1968).

[16] Middleton, 114 Nev. at 1108, 968 P.2d at 309 (quoting United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir. 1983)); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975).

Honeycutt could choose to assert his Fifth Amendment right not to testify in the second trial, even though he had testified in the first trial.[17] And there is no violation of Honeycutt's rights by making him elect to testify as to all of the charges or to none at all.[18] Criminal defendants routinely face a choice between complete silence and presenting a defense. This has never been thought an invasion of the privilege against compelled self-incrimination.[19]

Honeycutt fails to demonstrate any fundamental unfairness or a violation of his rights in the joinder of the counts of sexual assault, kidnapping, and solicitation to commit murder. The district court did not abuse its discretion in denying Honeycutt's motion to sever the counts.

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[17] The dissent argues that by testifying at his first trial, Honeycutt waived his Fifth Amendment right to remain silent. Despite the fact that Honeycutt testified at his first trial, the district court made clear that Honeycutt could choose not to testify at his second trial. The district court made clear that Honeycutt would be treated at the second trial as though he had never testified, thus, in effect reinstating his Fifth Amendment rights. The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). The district court thus assured that the joinder of the charges would result in no fundamental unfairness. It cannot be a manifest abuse of discretion to refuse to admit evidence otherwise admissible in order to assure fundamental fairness.

[18] Holmes v. Gray, 526 F.2d 622, 626 (7th Cir. 1975).

[19] Id.

Instruction regarding mistaken belief in consent

At trial, Honeycutt proposed a jury instruction which stated, in essence, that a reasonable and good faith belief that there was voluntary consent is a defense to a charge of sexual assault. A criminal defendant is entitled to jury instructions on the theory of his case.[20] If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error.[21]

This court has previously indicated that Nevada law supports a defense of reasonable mistaken belief of consent in sexual assault cases.[22] We conclude that based on the wording of NRS 200.366 and our prior case law defining the proof required for sexual assault, Nevada does recognize this defense. NRS 200.366 defines sexual assault as the penetration of another "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting." In McNair v. State, we concluded that the legal inquiry into the issue of lack of consent consists of two questions: (1) whether the circumstances surrounding the incident indicate that the victim reasonably demonstrated lack of consent; and (2) whether, from the perpetrator's point of view, it was reasonable to

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[20] Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

[21] Ruland v. State, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986).

[22] See Owens v. State, 96 Nev. 880, 884 n.4, 620 P.2d 1236, 1239 n.4 (1980); see also Hardaway v. State, 112 Nev. 1208, 1210-11, 926 P.2d 288, 289-90 (1996).

conclude that the victim had consented.[23] Thus, because a perpetrator's knowledge of lack of consent is an element of sexual assault, we conclude that a proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration.[24]

Honeycutt's counsel proposed the following instruction, citing instruction 10.65 from the California Jury Instructions for Criminal Cases ("CALJIC") as the sole legal authority:

> In the crime of sexual assault, general criminal intent must exist at the time of the commission of the sexual assault. There is no general criminal intent if the defendant had a reasonable and good faith belief that [the victim] voluntarily consented to engage in fellatio and anal intercourse. Therefore, a reasonable and good faith belief that there was a voluntary consent is a defense to such a charge.
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had general criminal intent at the time of the act

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[23] 108 Nev. 53, 56-57, 825 P.2d 571, 574 (1992).

[24] This is in contrast to our decision in Jenkins v. State that mistaken belief as to age is not a defense to statutory sexual seduction. 110 Nev. 865, 870-71, 877 P.2d 1063, 1066-67 (1994). Jenkins is not binding on our decision here since that crime was a strict liability offense in which knowledge of age is not an element of the crime. Id. Sexual assault is a general intent crime. Winnerford H. v. State, 112 Nev. 520, 526, 915 P.2d 291, 294 (1996). Thus, if a mistake is reasonable, it may be a defense to a charge of sexual assault. NRS 194.010(4).

> of fellatio and anal intercourse, you must find him not guilty of such crime.

However, counsel did not include the entire correct instruction based on the evidence in this case. Counsel's proposed instruction omitted the following language:

> However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.[25]

The comment to CALJIC 10.65 states:

> In People v. Williams (1992) 4 Cal.4th 354 [14 Cal.Rptr.2d 441, 841 P.2d 961], it was held that this instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. Further the instruction should not be given when it is undisputed that the defendant's claim is "based upon the victim's behavior after the defendant had exercised or threatened force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another." Where the evidence is conflicting on that issue, the court must give this instruction, if as indicated there is substantial evidence of equivocal conduct, despite the alleged temporal

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[25] 1 California Jury Instructions, Criminal 10.65, at 828 (6th ed. 1996).

> context in which that equivocal conduct occurred. In such situation, the second bracketed paragraph [quoted above] should then be utilized.[26]

The evidence of consent is conflicting in this case, in that the victim testified that the defendant used force and the defendant testified that, not only did the victim consent, but she initiated some of the actions.

Assuming that Honeycutt was entitled to an instruction on mistaken belief of consent, the proposed instruction must correctly state the law.[27] Honeycutt's proposed instruction was not "technically deficient in form," as the dissent alleges, but an incorrect statement of the law when there is evidence that the "consent" was achieved through threats, force and violence. Therefore, the district court did not err in refusing to give the instruction.

Prior sexual assault

Honeycutt moved to exclude the testimony of a prior sexual assault victim. The district court held a Petrocelli[28] hearing to determine the admissibility of the evidence. At that hearing, Honeycutt's former girlfriend testified that in 1997, Honeycutt had sexually assaulted her. She stated that he covered her nose and mouth and assaulted her vaginally and

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[26] Id. at 830.

[27] Barron v. State, 105 Nev. 767, 776, 783 P.2d 444, 448 (1989); cf. Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987).

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

anally, and hit her on the head when she screamed. Honeycutt entered an Alford[29] plea to a charge of coercion, contending that the sexual intercourse was consensual. The district court concluded that if Honeycutt argued consent as a defense, the evidence would be admissible as probative of intent in light of the similarity of the crimes.

NRS 48.045(2) provides that evidence of other crimes is admissible, not to prove character, but for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In Williams v. State,[30] this court stated:

> The crucial question in determining if a sexual assault has occurred is whether the act is committed without the consent of the victim, and the intent of the accused is relevant to the issue of consent or lack thereof. In the instant case, evidence of Williams' sexual misconduct with other persons was admitted as being relevant to prove his intent to have intercourse with the victim without her consent. This evidence was introduced after Williams admitted committing the act, but claimed to have done so with the victim's consent. By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams himself placed in issue a necessary element of the offense and it

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[29] North Carolina v. Alford, 400 U.S. 25 (1970).

[30] 95 Nev. 830, 833, 603 P.2d 694, 697 (1979) (citations omitted).

> was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams' testimony on a point material to the establishment of his guilt.

The decision to admit or exclude evidence lies in the sound discretion of the district court, and such a decision will not be overturned absent manifest error.[31] In cases of joined charges, the district court may admit the evidence if it satisfies one of the requirements of NRS 48.045(2) as to one of the charges as long as the overall prejudicial effect is outweighed by the probative value.[32] The district court made the appropriate determinations for admissibility and properly instructed the jury that this evidence was to be considered for purposes of intent to commit sexual assault and not propensity to commit the crime. The district court did not abuse its discretion in admitting the evidence.

Prosecutorial misconduct

We agree with Honeycutt that there was an instance of prosecutorial misconduct; namely, the prosecutor choking Honeycutt on the stand as a demonstration of what happened to the victim. The action was clearly improper. Honeycutt testified on direct examination that the sexual assault could not have occurred as the victim had described it and gave an in-court demonstration with a neutral party to

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[31] Petrocelli, 101 Nev. at 52, 692 P.2d at 508; Tillema v. State, 112 Nev. 266, 269-70, 914 P.2d 605, 607 (1996).

[32] NRS 48.035(1).

corroborate his story. On cross-examination, the prosecutor asked if he could do his own in-court demonstration. Upon receiving permission, he approached Honeycutt, placed his arm across Honeycutt's throat and began pushing hard. Honeycutt's eyes began watering after a few seconds and he began to choke. Defense counsel immediately objected and requested a mistrial. The district court sustained the objection but denied the motion for a mistrial.

We can see absolutely no reason why a prosecutor would take such an action. The decision to physically assault a defendant while on the stand goes well beyond the accepted bounds of permissible advocacy. However, we will not reverse the convictions on this ground because Honeycutt consented to the demonstration, and there is no indication that the action prejudiced Honeycutt in any way. On the contrary, it would appear that it would have prejudiced the State rather than Honeycutt, and Honeycutt reacted in a way which reflected well on him, rather than in a way which would prejudice him. This is in marked contrast to the situation described in Hollaway v. State,[33] where a stun belt was activated during closing arguments in a murder trial. In that case, the implication to the jury was that the State regarded Hollaway as extremely dangerous. Here, because of Honeycutt's reaction, there was no implication that Honeycutt was anything other than a gentleman, and he suffered no prejudice. Because of Honeycutt's conduct, the prosecutorial misconduct in conducting the

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[33] 116 Nev. 732, 742, 6 P.3d 987, 994 (2000).

demonstration was harmless, and the district court appropriately denied Honeycutt's motion for a mistrial.

Honeycutt argues that some of the prosecutor's cross-examination of him was irrelevant, unduly salacious, and disrespectful. Aside from the fact no objection was made to most of the prosecutor's questions, considering the nature of the charges and the divergent accounts of the circumstances by the victim and Honeycutt, the detailed cross-examination does not demonstrate misconduct. Honeycutt alleges that much of the cross-examination was sarcastic, thereby denigrating him, but that does not appear from the record. Although the cross-examination of Honeycutt was extensive and detailed, the State is entitled to test the credibility of the defendant. Honeycutt correctly cites United States v. Rodriguez-Estrada[34] for the proposition that it is the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric. However, Honeycutt fails to point out any such pejorative language or inflammatory rhetoric during the cross-examination.

Honeycutt argues that numerous instances of prosecutorial misconduct in closing argument deprived him of a fair trial. He argues that the prosecutor vouched for the State's witnesses, while calling Honeycutt a liar, among other derogatory terms. This court has stated that it is improper argument for counsel to characterize a witness as a liar.[35] However, a prosecutor may demonstrate to a jury through

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[34] 877 F.2d 153, 159 (1st Cir. 1989).

[35] Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

inferences from the record that a defense witness's testimony is untrue.[36] A review of the prosecutors' closing arguments shows that all references to the defendant and witnesses were not name-calling or improper vouching for the credibility of witnesses, but rather the drawing of inferences from evidence at the trial.

CONCLUSION

We conclude that Honeycutt received a fair trial and affirm the judgment of conviction for one count of first-degree kidnapping, two counts of sexual assault, and one count of solicitation to commit murder.

/s/ Shearing, J.
Shearing

I concur:

/s/ Agosti, J.
Agosti

[36] Id.

ROSE, J ., dissenting:

The district court committed reversible error when it refused to sever the trial of the sexual assault and kidnapping charges from the solicitation of murder charge that occurred six months later. Because of this error, the refusal to give Honeycutt's consent instruction, and the prosecutorial misconduct that occurred during trial, I conclude that reversal is mandated.

Severance

Under NRS 173.115(2), a district court can join charges that involve acts close in time and relate to a defendant's common scheme, plan or motive, or otherwise are tied to each other. But any prejudice the joinder would create should always be considered, and joinder of charges should be denied if it would be prejudicial to the defendant.[1] Failure to sever when clear prejudice is shown requires reversal of any conviction obtained.[2]

The crimes of sexual assault and kidnapping are completely different from the solicitation of murder charge that occurred six months later. They are not part of a common plan or scheme, the percipient witnesses are different, and they are connected only by one single thread–the victim is the same. We have held that two incidents involving social drinks at a particular bar followed by alleged sexual assaults could not be joined because forty-five days separated the

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[1] See NRS 174.165(1).

[2] See Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964).

incidents.[3] Based on this, I conclude that severance of the solicitation of murder charge against Honeycutt was mandated because this charge was not closely related to and did not involve a common course or scheme as the sexual assault and kidnapping charges.

But the greater problem created by the joinder of the sexual assault and kidnapping charges with the solicitation of murder charge was that Honeycutt was automatically forced to surrender his right to remain silent. Honeycutt had already gone to trial on the sexual assault and kidnapping charges, the jury could not reach a verdict, and a mistrial was declared. At trial, he had testified on his own behalf, thereby forever waiving his right to remain silent on these charges.[4] The sexual assault and kidnapping charges were set for retrial. Joining the solicitation of murder charge with the sexual assault and kidnapping charges to which Honeycutt had already waived his right to remain silent, created the impossible situation where Honeycutt had waived his right to remain silent to some of the charges but had not to others. The logical solution was to sever the charges for trial, but the district court rejected Honeycutt's request to sever.

At retrial, Honeycutt took the stand and testified that the sexual acts were consensual, but then tried to remain silent and not testify about the solicitation charges. The district court directed Honeycutt to testify

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[3] Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

[4] Harrison v. United States, 392 U.S. 219, 222 (1968) (noting that when a defendant waives his right to remain silent at one proceeding, he has waived it for all subsequent proceedings).

to the facts of the solicitation charge. As the district court stated:

> Mr. Honeycutt, you've waived any rights you have as to answering or not answering by taking the stand and testifying on your behalf. You are obligated under the law to answer the questions truthfully that have been presented to you. This is not a separate trial. This is one trial. Both issues are before the Court, so you have an obligation to answer those. If you choose to not answer those, then the Court is then obligated to strike your testimony, sir.

What the district court did not grasp was that Honeycutt's Fifth Amendment right to remain silent about the sexual assault charges was forever waived when he took the stand in the first trial, and his right remained waived in the second trial whether he testified or not.[5] The prosecution could have called him to the stand as an adverse witness to testify about the sexual assaults; or if Honeycutt refused to testify, the prosecutor could have had his prior testimony at the first trial read into the record.[6] The majority endorses, without the citation of any authority, this unique procedure of restoring an accused's privilege against self-incrimination after it has been previously waived.

The majority cites United States v. Dixon,[7] where the Seventh Circuit Court of Appeals stated that a

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[5] Edmonds v. United States, 273 F.2d 108, 112-13 (D.C. Cir. 1959).

[6] Id.

[7] 184 F.3d 643, 646 (7th Cir. 1999).

severance is not required every time a defendant wants to testify to one charge and not to others. I heartily agree with this general proposition, but the unique facts of this case must be considered. In Dixon, all charges were being brought to trial for the first time–the defendant had not already waived his Fifth Amendment right as to some of the charges.[8] The unique situation in this case makes the general proposition stated in Dixon inapplicable.

We have held that any substantial detriment to the defendant brought about by the joinder of charges requires severance of the charges, including the denial of the ability to introduce evidence critical to the defendant's defense.[9] The majority declares that no "unfairness" or detriment to Honeycutt has been demonstrated. I respectfully disagree and our prior case law does also. Compelling a defendant to surrender his Fifth Amendment right against self-incrimination seems like a pretty big detriment to me.

Even assuming that Honeycutt did not waive his right against self-incrimination at the first trial as the district court believed, I conclude that joinder of the charges was prejudicial to Honeycutt. In order to meet the charges of sexual assault and kidnapping, it was imperative that Honeycutt testify that the sexual acts were consensual. He had done so in the previous trial that resulted in a mistrial. The majority opines that there were other ways for Honeycutt to present a

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[8] Id. at 645.

[9] Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998).

consent defense, but this is foolishness.[10] Clearly the primary way to show a consensual-sex defense is to have the accused testify to the consensual act. Further, the defendant should not be forced to use secondary, less persuasive evidence in meeting one charge in order to preserve his right to remain silent on the other charges.[11]

By failing to sever the charges, Honeycutt was forced to surrender his right against self-incrimination as to some charges in order to present his defense to the other serious charges. No defendant should be so compelled when the situation could be avoided by a severance of the charges for trial.

The failure to give Honeycutt's consent instruction

It is well established that a criminal defendant is entitled to an adequate instruction on the defense theory of the case, "no matter how weak or incredible the evidence supporting the theory may appear to be."[12] Recognizing this, the majority states that Honeycutt's proposed instruction on reasonable mistaken belief of consent must be given as long as there is evidence to

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[10] See Cross, 335 F.2d at 989 ("Prejudice has consistently been held to occur when ... [joinder] embarrasses or confounds an accused in making his defense.").

[11] See United States v. Scivola, 766 F.2d 37, 43 (1st Cir. 1985) (stating that a defendant may deserve a severance of counts where the defendant makes "a convincing showing that 'he has both important testimony to give concerning one count and strong need to refrain from testifying on the other'" (quoting Baker v. United States, 401 F.2d 958, 977 (D.C. Cir. 1968))).

[12] Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987).

support this theory. However, the majority concludes that the district court did not err in refusing Honeycutt's proposed instruction because it was an incomplete statement of the law which, according to the majority, equates to an incorrect statement of the law. I believe that the majority's conclusion, which basically requires a perfect instruction, is inconsistent with the underlying policy entitling a defendant to an instruction on the defense theory of the case.

We have required that the defendant's proposed instruction on the defense theory of the case must correctly state the law.[13] However, we have not required a perfect instruction. Such a requirement is inconsistent with our policy that a defendant is entitled to an instruction on his theory of the case even if the evidence supporting his theory is weak or slight. If the proposed instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court.[14] Indeed, the Court of Appeals of

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[13] See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

[14] See Echavarria v. State, 108 Nev. 734, 748, 839 P.2d 589, 598-99 (1992) (concluding that the district court did not err when it refused the defendant's proposed instruction but offered another instruction which incorporated the substance of the defendant's proposed deadly-weapon-enhancement instruction); see also U.S. v. Newcomb, 6 F.3d 1129, 1133 (6th Cir. 1993) (noting that the district court is responsible for making the necessary alterations to the defendant's proposed instruction if it is technically deficient and that the legal error could not serve to eliminate the defendant's existing right to have the jury instructed on his theory

Mississippi has stated:

> [T]he trial court cannot simply reject the poorly-drafted instruction, thus depriving the defendant of his defense, but the court has "the duty to make reasonable modifications of the requested instruction or, at the very least, to point out to [the defendant] wherein it may have been deficient and allow reasonable opportunity for correction."[15]

Here, Honeycutt's proposed instruction placed the district court on notice regarding the issue of reasonable mistaken belief of consent.[16] In addition, Honeycutt provided the district court with the legal authority in support of giving the instruction. The majority notes that Honeycutt omitted the bracketed portion of the proposed instruction, which was based on instruction 10.65 from the California Jury Instructions for Criminal Cases ("CALJIC"). In support of its conclusion that Honeycutt's proposed instruction was incomplete, and therefore an incorrect statement of the law, the majority cites to the comment to CALJIC

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of the case); People v. Nunez, 841 P.2d 261, 266 (Colo. 1992) (en banc) (same).

[15] Miller v. State, 733 So. 2d 846, 849 (Miss. Ct. App. 1998) (quoting Anderson v. State, 571 So. 2d 961, 964 (Miss. 1990)).

[16] Cf. Barnes v. Delta Lines, Inc., 99 Nev. 688, 690 n.1, 669 P.2d 709, 710 n.1 (1983) (concluding that the requirements of NRCP 51 were met when the appellants provided the trial judge with a citation to relevant legal authority in support of giving their proposed instruction, which placed the judge on notice regarding the issues of law involved).

10.65. However, the comment does not require that the bracketed part be included when there is conflicting evidence, but instead suggests that it should be utilized in situations where there is conflicting evidence on the issue of consent. Because the bracketed part of CALJIC 10.65 is not required, I conclude that Honeycutt's proposed instruction was not an incomplete statement of the law and more significantly, I conclude that Honeycutt's omission does not equate to an incorrect statement of the law.

Even assuming that Honeycutt's proposed instruction was technically deficient in form, it was substantially correct. Honeycutt should be provided the opportunity to make any corrections to his proposed instruction, and not simply rejected based on an omitted portion, which is not required. Accordingly, I conclude that the district court's refusal to give Honeycutt's proposed instruction was erroneous, and thus reversal is mandated.

Prosecutorial misconduct

The instances of prosecutorial misconduct were pervasive and substantial. They ranged from a demonstration that resulted in the prosecutor choking Honeycutt, to the prosecutor vouching for a witness and commenting on which witnesses were telling the truth.

First, Honeycutt contended that the sexual-assault incident could not have happened the way the victim described, and an in-court demonstration was conducted with a neutral party. When the prosecutor began his cross-examination, he asked if he could do his own court demonstration. Upon receiving

permission, he approached Honeycutt, placed his arms across Honeycutt's throat and pushed hard. Honeycutt's eyes began watering, and he began choking and coughing. Defense counsel objected, and the district court ordered the "demonstration" to stop. A subsequent motion for a mistrial was denied.

An accused who takes the stand runs many risks. One of them should not be that the prosecutor would physically assault him or her. Assaulting a defendant during trial is so prejudicial that it should be reversible error.[17] In this case, the physical assault had two negative impacts on Honeycutt. First, the demonstration was by no means reliable in reenacting what happened, and the effects on Honeycutt could easily have been more a result of the prosecutor's aggression than an accurate depiction of what occurred. Second, it clearly showed the personal animus and bias the prosecutor had toward Honeycutt. We have often stated that a prosecutor should not show his personal animus toward a defendant before a jury.[18] The majority opines that Honeycutt consented to the assault, but what choice did Honeycutt have when the district court gave the prosecutor permission to proceed with the demonstration, and the prosecutor then used extensive force in conducting the demonstration.

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[17] See Crow v. State, 984 S.W.2d 260, 263 (Tex. Crim. App. 1998) (Baird, J., dissenting).

[18] See Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (concluding that the prosecutor telling the defendant he deserved to die in the presence of the jury was egregiously improper), modified on other grounds by Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990).

In a recent case, Hollaway v. State,[19] the defendant Hollaway wore a stun belt that accidentally went off during closing arguments in a murder trial. Hollaway was sent writhing to the floor.[20] This court called the incident an "arbitrary and prejudicial factor" and reversed the case, in part, because of this incident.[21] Here, the intentional assault on Honeycutt was no less arbitrary and prejudicial. While the concerns of underscoring an accused's potential violence is not present in this case as it was in Hollaway, we do have the additional factors of an unreliable demonstration and an intentional assault against an accused by the State's representative. This incident introduced an arbitrary and prejudicial factor into the trial that made the trial result unreliable.

Next, in closing argument, the prosecutor stated that Honeycutt and one of his witnesses were the "kind of people" who need heavy security. He also stated that Honeycutt's witness was a liar, implied that the State's witnesses were more honest, vouched for the victim's credibility, and stated that Honeycutt was guilty. The prosecutor also argued facts that were not in evidence when he stated the reasons why Honeycutt approached David Paule to solicit the murder of the sexual assault victim.

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[19] 116 Nev. 732, 742, 6 P.3d 987, 994 (2000).

[20] Id.

[21] Id.

It is improper for a prosecutor to vouch for the credibility of a witness.[22] It is also improper to brand a defendant as a liar, or accuse his witness of lying.[23] Further, it is improper to refer to the defendant in a derogatory manner,[24] and references should not be made to events or documents that were not in evidence.[25]

While objections to most of the prosecutor's improper comments were not made, we can consider multiple incidents of substantial error under the plain

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[22] See Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (vouching for the credibility of a witness is impermissible because it invades the jury's function of assessing credibility); Yates v. State, 103 Nev. 200, 203, 734 P.2d 1252, 1254 (1987) ("Any expression of opinion on the guilt of an accused is a violation of prosecutorial ethics.").

[23] See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990) (holding that a prosecutorial statement that a defense witness is a liar is not a proper argument); Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (stating that it is improper argument to characterize a witness as a liar).

[24] See McGuire v. State, 100 Nev. 153, 157-58, 677 P.2d 1060, 1063 (1984) ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct.").

[25] See Rippo v. State, 113 Nev. 1239, 1254-55, 946 P.2d 1017, 1027 (1997) (stating that a prosecutor's comment to the effect that interviews and "things" happened outside the courtroom were improper references to evidence not presented at trial); Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (noting that a prosecutor may not argue facts or inferences not supported by the evidence).

error doctrine.[26] In light of the conflicting evidence regarding consent, I conclude that the multiple incidents of prosecutorial misconduct are sufficient to amount to reversible plain error.

In summary, I conclude that each of the above instances of error–severance, failure to give Honeycutt's consent instruction, and prosecutorial misconduct–constitute reversible error. In any event, I conclude that the cumulative error mandates this court to reverse and remand for a new trial.

Therefore, I respectfully dissent.

/s/ Rose, J.
Rose

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[26] Rowland v. State, 118 Nev._,_, 39 P.3d 114, 118 (2002).