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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 TERRANCE LEDERR LAVOLL,

10 Plaintiff,

11 vs.

12 D. W. NEVEN, et al.,

13 Defendants.  
14

Case No. 2:08-CV-00011-PMP-(GWF)

**ORDER**

15 Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C.  
16 § 2254 (#7), respondents' answer (#35), and petitioner's reply (#40). The court finds that relief is  
17 not warranted, and the court denies the petition.

18 After a jury trial in the Eighth Judicial District Court of the State of Nevada,  
19 petitioner was convicted of one count of sexual assault on a minor under the age of sixteen years,  
20 two counts of sexual assault on a minor under the age of sixteen years with the use of a deadly  
21 weapon, and one count of solicitation of a minor to engage in acts that constitute the crime against  
22 nature. Ex. 21 (#23). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 59 (#25).  
23 Petitioner then filed in state court a post-conviction habeas corpus petition. Ex. 68 (#25). The  
24 district court denied the petition. Ex. 105 (#26). Petitioner appealed, and the Nevada Supreme  
25 Court affirmed. Ex. 122 (#26).

26 Petitioner then commenced this action. Respondents moved to dismiss (#21)  
27 grounds 1, 3, 5, 7, 9, and 10 of the petition (#7). Respondents argued that petitioner procedurally  
28 defaulted those grounds because he could have raised them on direct appeal but did not. Petitioner

1 did not oppose the motion. The court agreed with respondents that those grounds were procedurally  
2 defaulted, and the court dismissed those grounds. Order (#28). The state-law reason for the  
3 dismissal of those grounds is independent of federal law and adequate for a procedural default.  
4 Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003). Cause and prejudice to excuse the  
5 procedural default were never at issue because petitioner did not oppose the motion to dismiss  
6 (#21). Consequently, reasonable jurists would not find the court's conclusion to be debatable or  
7 wrong, and the court will not issue a certificate of appealability on the dismissal of grounds 1, 3, 5,  
8 7, 9, and 10 as procedurally defaulted.

9 “A federal court may grant a state habeas petitioner relief for a claim that was  
10 adjudicated on the merits in state court only if that adjudication ‘resulted in a decision that was  
11 contrary to, or involved an unreasonable application of, clearly established Federal law, as  
12 determined by the Supreme Court of the United States,’” Mitchell v. Esparza, 540 U.S. 12, 15  
13 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication “resulted in a decision  
14 that was based on an unreasonable determination of the facts in light of the evidence presented in  
15 the State court proceeding,” 28 U.S.C. § 2254(d)(2).

16 A state court's decision is “contrary to” our clearly established law if it “applies a  
17 rule that contradicts the governing law set forth in our cases” or if it “confronts a set  
18 of facts that are materially indistinguishable from a decision of this Court and  
19 nevertheless arrives at a result different from our precedent.” A state court's decision  
20 is not “contrary to . . . clearly established Federal law” simply because the court did  
not cite our opinions. We have held that a state court need not even be aware of our  
precedents, “so long as neither the reasoning nor the result of the state-court decision  
contradicts them.”

21 Id. at 15-16. “Under § 2254(d)(1)'s ‘unreasonable application’ clause . . . a federal habeas court  
22 may not issue the writ simply because that court concludes in its independent judgment that the  
23 relevant state-court decision applied clearly established federal law erroneously or incorrectly.  
24 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63,  
25 75-76 (2003) (internal quotations omitted).

26 [T]he range of reasonable judgment can depend in part on the nature of the relevant  
27 rule. If a legal rule is specific, the range may be narrow. Applications of the rule  
28 may be plainly correct or incorrect. Other rules are more general, and their meaning  
must emerge in application over the course of time. Applying a general standard to  
a specific case can demand a substantial element of judgment. As a result,

1 evaluating whether a rule application was unreasonable requires considering the  
2 rule's specificity. The more general the rule, the more leeway courts have in  
reaching outcomes in case-by-case determinations.

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

4 The petitioner bears the burden of proving by a preponderance of the evidence that  
5 he is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

6 In all surviving grounds for relief, petitioner claims that counsel provided ineffective  
7 assistance. "[T]he right to counsel is the right to the effective assistance of counsel." McMann v.  
8 Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of  
9 counsel must demonstrate (1) that the defense attorney's representation "fell below an objective  
10 standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the  
11 attorney's deficient performance prejudiced the defendant such that "there is a reasonable  
12 probability that, but for counsel's unprofessional errors, the result of the proceeding would have  
13 been different," id. at 694. "[T]here is no reason for a court deciding an ineffective assistance claim  
14 to approach the inquiry in the same order or even to address both components of the inquiry if the  
15 defendant makes an insufficient showing on one." Id. at 697.

16 Strickland expressly declines to articulate specific guidelines for attorney  
17 performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of  
18 interest, the duty to advocate the defendant's cause, and the duty to communicate with the client  
19 over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's  
20 duties so exhaustively as to give rise to a "checklist for judicial evaluation of attorney  
21 performance. . . . Any such set of rules would interfere with the constitutionally protected  
22 independence of counsel and restrict the wide latitude counsel must have in making tactical  
23 decisions." Id. at 688-89.

24 Review of an attorney's performance must be "highly deferential," and must adopt  
25 counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of  
26 hindsight." Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that  
27 counsel's conduct falls within the wide range of reasonable professional assistance; that is, the  
28

1 defendant must overcome the presumption that, under the circumstances, the challenged action  
2 ‘might be considered sound trial strategy.’” Id. (citation omitted).

3           The Sixth Amendment does not guarantee effective counsel per se, but rather a fair  
4 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.  
5 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell  
6 below an objective standard of reasonableness alone is insufficient to warrant a finding of  
7 ineffective assistance. The petitioner must also show that the attorney’s sub-par performance  
8 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability  
9 that, but for the attorney’s challenged conduct, the result of the proceeding in question would have  
10 been different. Id. at 694. “A reasonable probability is a probability sufficient to undermine  
11 confidence in the outcome.” Id.

12           If a state court applies the principles of Strickland to a claim of ineffective assistance  
13 of counsel in a proceeding before that court, the petitioner must show that the state court applied  
14 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.  
15 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

16           In ground 2, petitioner argues that counsel provided ineffective assistance because  
17 counsel did not investigate whether the justice court had jurisdiction over petitioner. On this issue,  
18 the Nevada Supreme Court held:

19           First, appellant claimed that his trial counsel was ineffective for failing to assert that  
20 the district court was without jurisdiction as the State failed to file a complaint at  
21 appellant’s first appearance in the justice court. He asserted that NRS 171.178(4)  
22 mandated that a complaint must have been filed when he was presented before the  
23 magistrate for the first time. Appellant did not establish that his counsel was  
24 deficient or that he was prejudiced by his counsel’s actions. Appellant appeared  
25 before the justice court within forty-eight hours of his arrest, and the justice court  
26 determined that appellant’s arrest was supported by probable cause. The justice  
27 court further ordered the State to file a complaint within four days. The State filed a  
28 complaint, and later filed an amended complaint, and the justice court bound over  
appellant based on the charges in the amended complaint after a preliminary hearing.  
Appellant failed to demonstrate that the district court did not have jurisdiction to  
proceed because the State had not filed a complaint by the time appellant was first  
presented in the justice court. Therefore, the district court did not err in denying this  
claim.

27 Exhibit 122, pp. 3-4 (#26) (citing, inter alia, County of Riverside v. McLaughlin, 500 U.S. 44, 56  
28 (1991)) (footnotes omitted). The Nevada Supreme Court identified the relevant constitutional

1 principle established by the Supreme Court of the United States, that a magistrate must make a  
2 determination of probable cause within 48 hours of a warrantless arrest. The Nevada Supreme  
3 Court also was correct in noting that such a determination was made within that time. Regarding  
4 the timing of the filing of the complaint, the Nevada Supreme Court's interpretation of state law is  
5 final. Given that the underlying ground had no merit, the Nevada Supreme Court's determination  
6 that counsel did not provide ineffective assistance was a reasonable application of Strickland.  
7 Reasonable jurists would not find this court's determination to be debatable or wrong, and the court  
8 will not issue a certificate of appealability on the issue.

9 Ground 4 has two components. First, petitioner argues that counsel should have  
10 objected to the filing of the amended information. On this issue, the Nevada Supreme Court held:

11 Second, appellant claimed that his trial counsel was ineffective for failing to object  
12 to the filing of the amended information that added a charge inadvertently omitted  
13 from the original information. Appellant failed to establish that his counsel was  
14 deficient or that he was prejudiced by his counsel's actions. At the preliminary  
15 hearing, the district [sic] court found that there was probable cause to proceed to trial  
16 on all four counts of the amended complaint. Several days later, the State filed an  
17 information that omitted the first count of the amended complaint. Then, on the first  
18 day of trial, the State filed an amended information to include all of the counts in the  
19 amended complaint, the counts upon which the justice court had bound over  
20 appellant. The amended information merely corrected a clerical error within the  
21 original information prepared by the State. Therefore, the filing of the amended  
22 information did not add an "additional or different offense," to those for which  
23 appellant had already been bound over and provided notice. Further, as he was  
24 aware of the amended count, appellant's substantial rights were not prejudiced.  
25 Therefore, the district court did not err in denying this claim.

26 Ex. 122, pp. 4-5 (#26) (citing Nev. Rev. Stat. § 173.095(1)) (footnote omitted). The original  
27 criminal complaint against petitioner had three counts, with the victims' initials in parentheses:<sup>1</sup>

28 Count I: Sexual assault with a minor under sixteen years of age with use of a deadly  
weapon (E. H.);  
Count II: Sexual assault with a minor under sixteen years of age with use of a  
deadly weapon (I. B.);  
Count III: Solicitation of minor to engage in acts constituting crime against nature  
(N. B.).

29 Ex. 3 (#23). Before the preliminary hearing in the justice court, the prosecution filed an amended  
30 criminal complaint with a new first count and the original three counts renumbered accordingly:

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<sup>1</sup>Pursuant to Special Order 108, the Court has redacted the names of the minor victims.

1 Count I: Sexual assault with a minor under sixteen years of age (E. H.);  
2 Count II: Sexual assault with a minor under sixteen years of age with use of a  
3 deadly weapon (E. H.);  
4 Count III: Sexual assault with a minor under sixteen years of age with use of a  
5 deadly weapon (I. B.);  
6 Count IV: Solicitation of minor to engage in acts constituting crime against nature  
7 (N. B.).

8 Id. At the preliminary hearing, the justice of the peace bound petitioner over for trial on all four  
9 counts of the amended complaint. Ex. 4, p. 73 (#23). The written commitment and order to appear  
10 reflect the verbal order of the justice of the peace. Ex. 5 (#23). The prosecution then used  
11 erroneously the original criminal complaint as the basis for filing the original information in the  
12 state district court, because the original information contained only the three counts of the original  
13 criminal complaint. See Ex. 8 (#23). Right before trial, the prosecution filed an amended  
14 information that contained all four counts on which petitioner was bound over for trial. Ex. 10  
15 (#23). In a colloquy on the matter, defense counsel Craig Jorgenson admitted that he knew that the  
16 original information was missing a count, and Jorgenson hoped that the prosecution would not  
17 notice the omission. He stated that he was not objecting to the filing of the amended information  
18 because he knew about the omitted count. Ex. 11A, p. 5 (#23). At the evidentiary hearing in the  
19 state habeas corpus proceedings, Jorgenson showed that he knew about the background behind the  
20 prosecution's error and ultimate correction of that error. Ex. 103, pp. 15-16 (#26). The Nevada  
21 Supreme Court's determinations of fact were reasonable in light of the evidence in the record. 28  
22 U.S.C. § 2254(d)(2). Given that there was nothing for counsel to object, the Nevada Supreme  
23 Court's determination that counsel did not provide ineffective assistance was a reasonable  
24 application of Strickland. Reasonable jurists would not find this conclusion to be debatable or  
25 wrong, and the court will not issue a certificate of appealability on the matter.

26 In the second part of ground 4, petitioner argues that counsel should have objected to  
27 the amendment of the information because the amendment introduced evidence of prior uncharged  
28 acts. Respondents correctly note that because the conduct at issue was the subject of Count I of the  
amended information, by definition it cannot be evidence of an uncharged act. Answer, p. 11 (#35).  
On this issue, the Nevada Supreme Court held similarly:

1 Third, appellant claimed that his trial counsel was ineffective for failing to file  
2 motions to discover his prior bad acts and prevent the State from introducing those  
3 acts into evidence. Specifically, he asserted that the conduct charged in Count 1 of  
4 the amended information should not have been introduced into evidence. Appellant  
5 failed to establish that his counsel was deficient or that he was prejudiced. We have  
said “that the use of uncharged bad act evidence to convict a defendant is heavily  
disfavored.” However, the evidence related to the acts described in Count 1, did not  
relate to an uncharged bad act, but to a charged crime. Therefore, the district court  
did not err in denying this claim.

6 Ex. 122, pp. 5-6 (#26) (footnote omitted). Given that the evidence presented in support of Count I  
7 was evidence of a charged act, the Nevada Supreme Court reasonably applied Strickland when it  
8 held that counsel did not provide ineffective assistance when he did not object to the use of  
9 evidence of prior uncharged acts. Reasonable jurists would not find this conclusion to be debatable  
10 or wrong, and the court will not issue a certificate of appealability on the issue.

11 In ground 6, petitioner claims that counsel provided ineffective assistance because  
12 counsel did not object to jury instructions regarding reasonable doubt, sexual assault, solicitation of  
13 a minor to engage in acts constituting the crime against nature, and the use of a deadly weapon. Ex.  
14 14 (#24) contains the instructions.

15 On the reasonable doubt instruction, the Nevada Supreme Court held:

16 Fourth, appellant claimed that his trial counsel was ineffective for failing to object to  
17 the jury instruction for reasonable doubt. Appellant failed to demonstrate that his  
18 counsel’s performance was deficient or that he was prejudiced. The district court  
19 gave Nevada’s statutory reasonable doubt instruction as set forth in and mandated by  
NRS 175.211. This court has repeatedly held that the current statutory definition is  
constitutional. Therefore, the district court did not err in denying this claim.

20 Ex. 122, p. 6 (footnotes omitted) (#26). Jury instruction 5 defined reasonable doubt. See Ex. 14  
21 (#24). This instruction is exactly the same as the instruction that the United States Court of Appeals  
22 for the Ninth Circuit determined was constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211-15  
23 (9th Cir. 1998). That court has also held that the issue is not worthy of a certificate of appealability.  
24 Nevius v. McDaniel, 218 F.3d 940, 944-45 (9th Cir. 2000). The Nevada Supreme Court reasonably  
25 applied Strickland when it determined that the lack of objection to the reasonable doubt instruction  
26 was not ineffective assistance of counsel. Reasonable jurists would not find this conclusion to be  
27 debatable or wrong, and the court will not issue a certificate of appealability on the issue.

1 On the instructions regarding sexual assault and solicitation, the Nevada Supreme  
2 Court held:

3 Fifth, appellant claimed that his trial counsel was ineffective for failing to object to  
4 the jury instructions for sexual assault and solicitation of a minor. Specifically,  
5 appellant claimed that (1) the instruction for sexual assault was defective as it failed  
6 to define “sexual aberration,” and (2) the solicitation and sexual assault instructions,  
7 when read together, improperly implied that the crime of sexual assault was gender  
8 neutral. Appellant failed to demonstrate that his trial counsel’s performance was  
deficient or that he was prejudiced. The district court gave instructions for sexual  
assault and solicitation of a minor that followed the language of the statutes. In  
addition the terms used to define and penalize sexual assault are gender neutral.  
Thus, appellant could be convicted for the sexual assault of a male victim.  
Therefore, the district court did not err in denying this claim.

9 Ex. 122, pp. 6-7 (citing Nev. Rev. Stat. §§ 200.366(1), 200.364(2), 201.195) (footnotes omitted)  
10 (#26). Jury instruction 11 defined sexual assault and sexual penetration. See Ex. 14 (#24). The  
11 instruction followed the language of Nev. Rev. Stat. § 200.366(1) (sexual assault) and Nev. Rev.  
12 Stat. § 200.364(1) (sexual penetration) that were in effect at the time. Jury instruction 17 defined  
13 solicitation of a minor to commit the infamous crime against nature. See Ex. 14 (#24). Again, the  
14 instruction followed the language of Nev. Rev. Stat. § 201.195. Petitioner’s argument about the  
15 definition of “sexual aberration” has no basis. “Sexual aberration” is not an element of either  
16 sexual assault or solicitation of a minor to commit the infamous crime against nature. Furthermore,  
17 the phrase “sexual aberration” appears nowhere in the instructions, and thus there was no need to  
18 define the term.

19 On the instruction regarding use of a deadly weapon, the Nevada Supreme Court  
20 held:

21 Sixth, appellant claimed that his trial counsel was ineffective for failing to object to  
22 the district court’s instructions for the use of a deadly weapon. He claimed that the  
23 district court erred by instructing the jury about general intent where specific intent  
24 to sexual assault the victim with the use of a deadly weapon is necessary to convict.  
25 Appellant failed to establish that his counsel was deficient or that he was prejudiced.  
26 The district court correctly instructed the jury that sexual assault is a general intent  
crime. The court also correctly instructed the jury on the use of a deadly weapon.  
The crime of sexual assault did not become a specific intent crime merely because  
the State alleged that appellant used a deadly weapon during the commission of the  
crime. Therefore, the district court did not err in denying this claim.

27 Ex. 122, p. 7 (citing Winnerford H. v. State, 915 P.2d 291, 294 (Nev. 1996), and Allen v. State, 609  
28 P.2d 321, 322 (Nev. 1980)) (footnotes omitted). In Allen, the Nevada Supreme Court held, “In



1 order to ‘use’ a deadly weapon for purposes of NRS 193.165, there need not be conduct which  
2 actually produces harm but only conduct which produces a fear of harm or force by means or  
3 display of the deadly weapon in aiding the commission of the crime.” 609 P.2d at 322. Jury  
4 instruction 15 followed the language of Allen. See Ex. 14 (#24).

5           Objections to the instructions defining sexual assault, solicitation of a minor, and the  
6 use of a deadly weapon would not have succeeded. The Nevada Supreme Court reasonably applied  
7 Strickland when it held that the lack of objection was not ineffective assistance of counsel.  
8 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not  
9 issue a certificate of appealability on this issue.

10           In one sentence, petitioner also argues that counsel was ineffective because he asked  
11 for an instruction on statutory sexual seduction. Statutory sexual seduction is a lesser included  
12 offense of sexual assault, and it is common to ask for instructions on lesser included offenses. At  
13 any rate, the jury found petitioner guilty of all charged counts of sexual assault, and thus the  
14 instruction for the lesser included offense caused him no prejudice. Reasonable jurists would not  
15 find this conclusion to be debatable or wrong, and the court will not issue a certificate of  
16 appealability on this issue.

17           In ground 8, petitioner claims that counsel provided ineffective assistance because he  
18 did not object to the introduction of photographs. The photographs are of two boys holding a gun,  
19 and one boy holding an alcoholic drink, in petitioner’s residence. The two boys did not testify at  
20 trial. On this issue, the Nevada Supreme Court held:

21           Seventh, appellant claimed that his trial counsel was ineffective for failing to object  
22 to the introduction of the photographs of appellant’s bedroom with underage boys  
23 holding a firearm and an alcoholic beverage. Appellant argued that the pictures were  
24 prejudicial and were improperly admitted through E. H., as he was not depicted in  
25 the pictures and could not testify to the authenticity of the gun or beverage.  
26 Appellant failed to establish that his counsel was deficient or that he was prejudiced  
27 by his counsel’s failure to object to the introduction of the evidence. E. H. testified  
28 that he had been to appellant’s home, spent the night in appellant’s room with A. P.  
and C. L., played with appellant’s firearm, and drank alcoholic beverages while at  
appellant’s home. E. H. had personal knowledge of the identities of those pictures,  
appellant’s room, appellant’s firearm, and the liquor he ingested. E. H. could  
identify the people, the room, the firearm, and the liquor bottle in a photograph and  
thus, authenticate the photographs for admission. Further, the photographs were  
relevant as they depicted the methods, about which E. H. testified, that appellant  
employed to gain the trust of boys prior to sexually assaulting them. Moreover,

1           appellant did not demonstrate that the conduct pictured in the photographs was so  
2           prejudicial that it substantially outweighed the photographs' probative value.  
3           Therefore, the district court did not err in denying this claim.

4           Exhibit 122, pp. 8-9 (#26) (footnotes omitted). The Nevada Supreme Court has held that the  
5           photographs were admissible evidence of other acts pursuant to Nev. Rev. Stat. § 48.045. Ground 7  
6           was the claim that the photographs should not have been admitted. Petitioner procedurally  
7           defaulted that claim. For the purposes of this order, the court assumes that the photographs were  
8           admissible. Given that an objection to the admission of the photographs could not succeed, counsel  
9           did not provide ineffective assistance by a lack of objection. The Nevada Supreme Court  
10          reasonably applied Strickland. Reasonable jurists would not find this conclusion to be debatable or  
11          wrong, and the court will not issue a certificate of appealability on this issue.

12                 In ground 11, petitioner claims that counsel was ineffective for failing to object to  
13          cumulative punishments, namely, the equal and consecutive sentences imposed for use of a deadly  
14          weapon in Counts II and III. The Fifth Amendment's protection against double jeopardy does not  
15          necessarily preclude cumulative punishments for a single prosecution. Missouri v. Hunter, 459  
16          U.S. 359, 366 (1983). On this issue, the Nevada Supreme Court held:

17                         Fifteenth, appellant claimed that his trial counsel was ineffective for failing to  
18                         challenge the constitutionality of NRS 193.165. He asserted that the statute resulted  
19                         in cumulative punishments that violated double jeopardy. This court stated that the  
20                         deadly weapon enhancements set forth in NRS 193.165 "does not create any separate  
21                         offense but provides an additional penalty for the primary offense," and thus, did not  
22                         violate the double jeopardy clause. As the statute was constitutional, appellant was  
23                         not prejudiced by counsel's failure to raise an objection to it. Therefore, the district  
24                         court did not err in denying his claim.

25           Exhibit 122, pp. 14-15 (#26) (footnotes omitted). In an earlier case, the Nevada Supreme Court  
26           held:

27                         In Missouri v. Hunter, 459 U.S. 359 (1983), the United States Supreme Court held  
28                         that the double jeopardy clause of the United States Constitution does not preclude a  
29                         state legislature from imposing cumulative punishments for a single offense. The  
30                         Court stated: "With respect to cumulative sentences imposed in a single trial, the  
31                         Double Jeopardy Clause does no more than prevent the sentencing court from  
32                         prescribing greater punishment than the legislature intended." Id. at 366. . . .

33                         As noted above, NRS 193.165 clearly evidences a legislative intent to impose  
34                         separate penalties for a primary offense and for the use of a deadly weapon in the  
35                         commission of the offense. The statute imposes a separate term of imprisonment  
36                         "equal to and in addition to" the term of imprisonment imposed for the primary

1 offense. This separate prison term must be served consecutively to the term of  
2 imprisonment imposed for the primary offense, and the legislature expressly  
3 declared that NRS 193.165(1) “provides an additional penalty for the primary  
4 offense.” NRS 193.165(2). When the intention of the legislature is clear, it is the  
duty of this court to give effect to such intention and to construe the language of the  
statute so as to give it force and not nullify its manifest purpose.

5 Nevada Dept. of Prisons v. Bowen, 745 P.2d 697, 699 (Nev. 1987). The Nevada Supreme Court  
6 reasonably applied Hunter when it determined that the deadly weapon enhancement does not violate  
7 the Fifth Amendment. Consequently, an objection would not have succeeded, and thus the Nevada  
8 Supreme Court reasonably applied Strickland. Reasonable jurists would not find this conclusion to  
9 be debatable or wrong, and the court will not issue a certificate of appealability on this issue.

10 In ground 12, petitioner claims that appellate counsel provided ineffective assistance  
11 by not raising on direct appeal the issues contained in the procedurally defaulted grounds 1, 3, 5, 7,  
12 9, and 10. On the issues contained in grounds 1, 3, 5, and 7, the Nevada Supreme Court held:

13 First, appellate claimed that his appellate counsel was ineffective (1) for failing to  
14 argue that the district court lacked jurisdiction to convict him because the State had  
15 not filed a complaint at the time the [sic] of his initial appearance, (2) for failing to  
16 argue that the prosecution improperly amended the information on the day of trial,  
17 (3) for failing to argue that the jury instructions were erroneous, and (4) for failing to  
argue that the photographs were improperly admitted. For the reasons discussed  
above, we conclude that appellant did not establish that his appellate counsel was  
ineffective for failing to raise these issues. Therefore, the district court did not err in  
denying these claims.

18 Ex. 122, pp. 16-17 (#26). This was a reasonable application of Strickland for the reasons stated  
19 above in grounds 2, 4, 6, and 8.

20 Next, petitioner claims that appellate counsel should have raised the issue presented  
21 in ground 9. Ground 9 was a claim that hearsay was erroneously admitted. Petitioner’s claim was  
22 vague and conclusory, because he did not allege the specific instances of hearsay. The proper-  
23 person supporting memorandum to his state habeas corpus petition, Ex. 69 (#25), is identical; in  
24 fact, the petition (#7) in this action is a photocopy of his supporting memorandum. The  
25 supplements to his state habeas corpus petition, Exhibits 93 and 97 (#26), do not elaborate on the  
26 hearsay claim. On this issue, the Nevada Supreme Court held:

27 Third, appellant claimed that his appellate counsel was ineffective for failing to  
28 argue that the district court erred in permitting the introduction of hearsay.  
Specifically, appellant claimed that his counsel should have argued on appeal that N.

1 B.'s testimony that appellant "asked [N. B.] if [appellant] could suck [N. B.'s] penis"  
2 was hearsay. Appellant failed to show that his counsel was deficient or that he was  
3 prejudiced. As N. B. testified about what appellant said to N. B., the testimony was  
not hearsay. Therefore, the district court did not err in denying this claim.

4 Ex. 122, p. 18 (#26) (footnotes omitted). In an omitted footnote, the Nevada Supreme Court noted  
5 that petitioner raised a general claim that all of the victims' testimonies were based upon hearsay,  
6 but that petitioner identified specifically only one statement. It is unclear from the state-court  
7 record where petitioner raised that specific statement as an example of objectionable hearsay.  
8 Nonetheless, given that the example is not hearsay, the Nevada Supreme Court reasonably applied  
9 Strickland in holding that petitioner had failed to show that counsel was deficient or that petitioner  
10 was prejudiced by a lack of objection to that statement. The Nevada Supreme Court's  
11 determination that the general claim of hearsay does not identify specific statements is also a  
12 reasonable application of clearly established federal law, because petitioner did not prove deficient  
13 performance of counsel or prejudice with such a vague claim.

14 Next, petitioner claims that appellate counsel should have raised the issues presented  
15 in Ground 10. Ground 10 contained three claims. First, the consecutive sentences for use of a  
16 deadly weapon violated the prohibition against double jeopardy. The court's disposition of ground  
17 11 also disposes of this claim. Second, insufficient evidence existed to establish that petitioner used  
18 a deadly weapon in the commission of the crimes. The record belies this claim, because appellate  
19 counsel did raise a claim that the evidence was insufficient to support the verdicts on the use of a  
20 deadly weapon, and the Nevada Supreme Court rejected that claim. See Ex. 59, pp. 4-5 (#25).  
21 Third, the order of restitution violated the prohibition against double jeopardy. Nevada authorizes  
22 the judge to impose restitution where appropriate. Nev. Rev. Stat. § 176.033(1)(c). As with the  
23 consecutive sentence for the use of a deadly weapon, the intent of the legislature governs whether  
24 the imposition of restitution violates the prohibition of double jeopardy. Given that the legislature  
25 of Nevada has authorized restitution, the judge's imposition of restitution did not violate the Double  
26 Jeopardy Clause. See Missouri v. Hunter, 459 U.S. at 366. Consequently, counsel did not perform  
27 deficiently, and petitioner was not prejudiced, by the lack of objection to restitution. Reasonable  
28

1 jurists would not find this conclusion to be debatable or wrong, and the court will not issue a  
2 certificate of appealability on this issue.

3 In ground 13, petitioner claims that counsel provided ineffective assistance by  
4 conceding petitioner's guilt on the lesser included offense of statutory sexual seduction.

5 3. "Statutory sexual seduction" means:

6 (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed  
7 by a person 18 years of age or older with a person under the age of 16 years; or  
8 (b) Any other sexual penetration committed by a person 18 years of age or older with  
a person under the age of 16 years with the intent of arousing, appealing to, or  
gratifying the lust or passions or sexual desires of either of the persons.

9 Nev. Rev. Stat. § 200.364. On this issue, the Nevada Supreme Court held:

10 Eighth, appellant claimed that his trial counsel was ineffective for conceding his  
11 guilt during closing arguments. He asserted that his counsel erred in asserting that  
12 statutory sexual seduction was the appropriate conviction instead of sexual assault.  
Appellant stated in his affidavit that he did not consent to his counsel's concession.

13 Appellant failed to establish that his counsel was deficient or that he was prejudiced.  
14 Appellant did not testify at trial. Thus, trial counsel's concession did not undermine  
15 any testimony by appellant. Further, the record supports the concession as part of  
16 the defense strategy. Trial counsel's cross-examination focused on whether the  
17 victims consented to the acts performed by appellant; therefore, trial counsel's  
18 closing argument was consistent with the defense strategy at trial. At the evidentiary  
hearing, appellant's post-conviction counsel did not ask appellant's trial counsel  
whether appellant consented to the closing argument. In light of appellant's single  
avermnt, which contradicted the apparent trial strategy, and the lack of development  
of further evidence at the evidentiary hearing despite the opportunity to do so, we  
conclude that the district court did not err in denying appellant's claim as he failed to  
meet his evidentiary burden of showing that his counsel was ineffective.

19 Exhibit 122, pp. 9-10 (#26) (footnotes omitted). Counsel's strategy must be put into the context of  
20 the case. In its decision on direct appeal, the Nevada Supreme Court accurately summarized the  
21 facts of the case:

22 On July 7, 1997, Lavoll approached [N. B.] and propositioned him for oral sex.  
23 When [N. B.] refused, Lavoll began to tap his fingers against a gun that he wore for  
24 his employment as a security guard. Lavoll propositioned [N. B.] once again, at  
25 which time, [N. B.] stated that he would think about it. It is from this incident that  
Lavoll is charged with solicitation of a minor to engage in acts constituting crimes  
against nature.

26 On or about that same day, Lavoll stayed overnight with [E. H.] and [E. H.'s] friend,  
27 at the friend's home. On this night, Lavoll approached [E. H.] and requested that [E.  
28 H.] allow Lavoll to perform oral sex upon him. After initially being rebuffed by [E.  
H.], Lavoll persisted until [E. H.] no longer refused, at which time Lavoll performed  
oral sex upon [E. H.]. [E. H.] testified that he agreed to allow Lavoll to perform oral

1 sex upon him because he was afraid that Lavoll would retrieve his gun. Lavoll was  
2 charged with one count of sexual assault stemming from this incident.

3 On the following day, July 8, 1997, the three victims accompanied Lavoll to a  
4 nearby fast food restaurant. Lavoll then solicited the two brothers, [I. B. and N. B.]  
5 for oral sex, telling [N. B.] that [I. B.] would agree to allow Lavoll to perform oral  
6 sex upon him if [N. B.] would agree to the same. [N. B.] declined the offer and  
7 retreated to a friend's house, leaving [E. H. and I. B.] behind with Lavoll.

8 After [N. B.'s] departure, Lavoll, and [E. H. and I. B.] walked to a vacant lot behind  
9 a supermarket. While in the vacant lot, Lavoll performed oral sex upon both [E. H.  
10 and I. B.] twice. Both [E. H. and I. B.] testified that they were intimidated because  
11 they knew that Lavoll carried a gun, and felt that they could not refuse Lavoll's  
12 advances. For this incident, Lavoll was charged with two counts of sexual assault  
13 with use of a deadly weapon.

14 After leaving the vacant lot, [E. H. and I. B.] returned to their respective homes and  
15 [N. B.] confronted his brother, [I. B.], about Lavoll. [N. B.] then reported what had  
16 transpired to his parents and the boys' parents then contacted [E. H.'s] mother. The  
17 police were notified and Lavoll was arrested without incident.

18 Ex. 59, pp. 2-3 (#25).<sup>2</sup> Jorgenson and petitioner faced a dilemma: If the jury believed the victims,  
19 then petitioner was guilty. There are no affirmative defenses, no justifications, no excuses to the  
20 crimes charged that would have led to an acquittal. The prosecution presented a strong case to the  
21 jury. Each victim's testimony was consistent both with his own prior statements and with the trial  
22 testimonies of the other victims. Jorgenson was unable to develop any inconsistencies or other  
23 issues that could have diminished any victim's credibility. Supporting the victims' testimonies  
24 were petitioner's statements to police officers: He admitted everything but the criminal sexual acts,  
25 which he denied committing. A jury could easily disregard petitioner's denials as self-serving,  
26 based upon the other evidence presented at trial. In short, a defense argument that the prosecution  
27 had not proven its case would have been futile..

28 On the other hand, Jorgenson's strategy, if successful, would have resulted in a  
sentence much more favorable to petitioner. By law, the victims could not consent to the sexual  
acts that petitioner performed upon them. However, by asking for an instruction on the lesser-  
included offense of statutory sexual seduction and by arguing that the victims were willing

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<sup>2</sup>The court has modified the manner in which the Nevada Supreme Court redacted the  
victims' names to be consistent with other quotations and this court's own manner of redaction.

1 participants in the sexual acts, Jorgenson was hoping that the jury would find petitioner guilty of  
2 statutory sexual seduction instead of sexual assault upon a minor. The penalty for sexual assault  
3 upon a minor is severe, and the deadly-weapon enhancement makes the penalty even more severe.  
4 Petitioner is serving five consecutive terms of life imprisonment with eligibility for parole on each  
5 term beginning after twenty years. In contrast, for a person of petitioner's age at the time  
6 committing statutory sexual seduction carries a minimum sentence no less than one year and a  
7 maximum sentence of no more than five years. Nev. Rev. Stat. §§ 200.368, 193.130. Furthermore,  
8 the use of a deadly weapon was not a question presented to the jury with respect to statutory sexual  
9 seduction. See Ex. 15 (#24). If Jorgenson had persuaded the jury, then petitioner would have  
10 served no more than 15 years in prison. Under those circumstances, the Nevada Supreme Court  
11 reasonably applied Strickland. Reasonable jurists would not find this conclusion to be debatable or  
12 wrong, and the court will not issue a certificate of appealability.

13               In ground 14, Petitioner claims that counsel provided ineffective assistance by not  
14 moving for a mistrial after the court clerk cried during the testimony of one of the victims.  
15 Respondents note that the transcript of the trial has no evidence that the court clerk cried.  
16 Respondents also noted that petitioner had the opportunity in his state evidentiary hearing, at which  
17 he was represented by counsel, to develop the facts behind this claim, but he did not. On this issue,  
18 the Nevada Supreme Court held:

19               Ninth, appellant claimed that his trial counsel was ineffective for failing to move for  
20 a mistrial when the court clerk cried in front of the jury during the victim's  
21 testimony. Appellant failed to establish that his counsel was deficient or that he was  
22 prejudiced. The record of appellant's trial contains no support for his claim that the  
23 clerk of the court cried throughout the victims' testimony. Further, the testimony  
24 taken at the evidentiary hearing did not address the clerk's conduct during the trial.  
25 The only support for this claim was appellant's affidavit in which he stated that the  
26 court clerk cried in front of the jury during the victims' testimony. In light of the  
27 single averment and the lack of development of further evidence at the evidentiary  
28 hearing despite the opportunity to do so, we conclude that the district court did not  
err in denying appellant's claim as he failed to meet his evidentiary burden of  
showing that his counsel was ineffective.

26 Exhibit 122, p. 10 (#26). Petitioner has not rebutted this finding with clear and convincing  
27 evidence, and thus this court presumes that the finding is correct. 28 U.S.C. § 2254(e)(1). Given  
28 that there was no evidence that the clerk of the court cried in front of the jury, the Nevada Supreme

1 Court's determination was a reasonable application of Strickland. Reasonable jurists would not  
2 find this conclusion to be debatable or wrong, and the court will not issue a certificate of  
3 appealability.

4 Ground 15 has three components. First, petitioner repeats his claim that counsel  
5 should have objected to the filing of the amended information. Second, petitioner argues that  
6 counsel did not investigate three other victims who did not testify but whose stories came through  
7 in another victim's testimony. On these issues, the Nevada Supreme Court held:

8 Eleventh, appellant claimed that his trial counsel was ineffective for failing to  
9 adequately prepare and investigate the case. Specifically, he asserted (1) counsel  
10 anticipated that appellant would plead guilty to the crimes and thus did not prepare  
11 for trial, (2) counsel should have sought the leave of the court for time to investigate  
12 the State's new charge and victim, and (3) counsel did not investigate other boys that  
13 were mentioned at trial. Appellant failed to establish that his counsel was defective  
14 or that he was prejudiced by counsel's failure to investigate. "An attorney must  
15 make reasonable investigations or a reasonable decision that particular investigations  
16 are necessary." A petitioner asserting a claim that his counsel did not conduct a  
17 sufficient investigation bears the burden of showing that he would have benefitted  
18 from a more thorough investigation. As noted above, the State did not add a  
19 completely new charge and victim, it merely amended an incomplete information to  
20 reflect the charges for which appellant had been bound over. As appellant had been  
21 bound over on the charge, counsel was able to question the victim about the  
22 allegation at the preliminary hearing. Further, appellant failed to identify what facts  
23 counsel could have discovered through additional investigation that would have  
24 affected the outcome of the trial. Therefore, the district court did not err in denying  
25 this claim.

26 Exhibit 122, pp. 11-12 (#26) (footnotes omitted). The court has already disposed of petitioner's  
27 claim regarding the amended information, in ground 4. On the investigation claim, E. H. testified  
28 about the night he stayed at a friend's home with petitioner. Present at the home were petitioner, E.  
H., and three other boys. E. H. testified that when petitioner was pressuring him to engage in oral  
sex, petitioner "bragged that he did it to [A. P.]<sup>3</sup> and [C. L.], "it" being "[p]robably just about most

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3Both prosecution and defense were aware of A. P., but he disappeared some time after  
petitioner's arrest. Right before trial started, he reappeared. After the jury was empaneled, the  
prosecution moved to let A. P. testify about what happened to him pursuant to Nev. Rev. Stat.  
§ 48.045, which governs admission of evidence of uncharged acts. The judge ruled that A. P. could  
testify only as part of the prosecution's rebuttal case. Ex. 11A, pp. 185-202 (#23). A. P. never  
testified in the trial.

After the jury trial at issue in this action, Petitioner was indicted for four counts of sexual



1 sexual things you could think of.” Ex. 12A, pp. 190-91 (#23). Counsel objected to the questioning,  
2 but he was overruled. E. H. also started to testify about what a third boy told him regarding  
3 petitioner’s statements, but counsel successfully objected to the hearsay. Id., p. 170 (#23). In light  
4 of counsel’s actions at trial, petitioner does not identify how additional investigation could have  
5 affected the outcome of the trial. The Nevada Supreme Court reasonably applied Strickland.  
6 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not  
7 issue a certificate of appealability.

8 Third, petitioner argues that counsel should have called as witnesses members of  
9 petitioner’s family, who could have rebutted the prosecution’s argument that petitioner was a  
10 predator of children. On the issue of calling family members to testify, the Nevada Supreme Court  
11 held:

12 Fourteenth, appellant claimed that his counsel was ineffective for failing to call  
13 witnesses “who would have refuted the State’s claims regarding Petitioner being a  
14 child predator.” He asserted that members of his family would have testified as  
15 such. Appellant did not establish that his counsel was deficient or that he was  
16 prejudiced. Appellant did not specifically identify the possible or potential witnesses  
17 who would have offered the testimony. Further, he did not allege the specific facts  
18 about which the witnesses would have testified that would have refuted the State’s  
19 allegations. Therefore, we conclude that the district court did not err in dismissing  
20 this claim.

21 Ex. 122, p. 14(#26) (footnote omitted). Petitioner had the burden of proving that counsel was  
22 deficient and that he suffered prejudice. In light of the specific accusations leveled against him by  
23 the victims, he needed to allege who these witnesses were and what their testimonies would have  
24 been. He did not. Under those circumstances, the Nevada Supreme Court reasonably applied  
25 Strickland. Reasonable jurists would not find this conclusion to be debatable or wrong, and the  
26 court will not issue a certificate of appealability.

27 assault, upon A. P., of a minor under sixteen years of age with use of a deadly weapon. He agreed  
28 to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to one count of sexual  
assault. Ultimately, this court denied a habeas corpus petition with respect to that conviction, and  
the court of appeals affirmed. See Lavoll v. Grigas, 2:01-CV-00635-PMP-(LRL).

1 In ground 16, petitioner argues that counsel provided ineffective assistance by failing  
2 to ensure that the sentences in this case and the sentence in the case involving A. P., described  
3 above at page 17 and footnote 3, would run concurrently. On this issue, the Nevada Supreme Court  
4 held:

5 Seventeenth, appellant claimed that his trial counsel was ineffective for failing to  
6 ensure that appellant's sentences ran concurrent with the sentences in another case  
7 that was also handled by the public defender's office. Appellant failed to  
8 demonstrate that his counsel was deficient or that he was prejudiced. The record  
9 indicated that appellant's counsel argued for concurrent sentences at appellant's  
sentencing hearing. Moreover, the district court decides whether sentences are  
imposed consecutively or concurrently. Therefore, the district court did not err in  
denying this claim.

10 Exhibit 122, pp. 15-16 (#26) (footnotes omitted). In an omitted footnote, the Nevada Supreme  
11 Court noted that the transcript of the sentencing hearing in this case is not available because court  
12 reporters are required by law to keep their notes for eight years and because the transcript was  
13 requested after that eight-year limit. Counsel did all that he could do to ensure that the sentences in  
14 this case run concurrently with the sentence in the case involving A. P., but the ultimate decision  
15 was with the district court. The Nevada Supreme Court reasonably applied Strickland.

16 Additionally, this court has the benefit of petitioner's habeas corpus petition that  
17 challenged the judgment of conviction in the case involving A. P., and that petition shows that  
18 ground 16 has no basis in fact. The sentence in the case involving A. P., C146525, does run  
19 concurrent with the sentence in the case at issue, C144545. See Lavoll v. Grigas, 2:01-CV-00635-  
20 PMP-(LRL), Third Amended Petition, Exhibits 4, 5 (#65). Ground 16 is without merit. Reasonable  
21 jurists would not find this conclusion to be debatable or wrong, and the court will not issue a  
22 certificate of appealability.

23 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#7) is  
24 **DENIED**. The clerk of the court shall enter judgment accordingly.

25 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

26 DATED: November 30, 2010.

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PHILIP M. PRO  
United States District Judge