

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JEFF N. ROSE,

Case No. 3:13-cv-00267-MMD-WGC

Petitioner,

## ORDER

v.

ROBERT LEGRAND, et al.,

## Respondents.

14 This counseled first-amended petition for writ of habeas corpus pursuant to 28  
15 U.S.C. § 2254 by state prisoner Jeff N. Rose is before the court for final disposition on  
16 the merits of the remaining grounds (ECF No. 16). Respondents have answered the  
17 petition (ECF No. 38), and Rose replied (ECF No. 41).

18 | I. PROCEDURAL HISTORY AND BACKGROUND

19        In January 2004, Rose represented himself at his first jury trial on charges of sexual  
20 assault and lewdness with a child under fourteen (exhibits 53, 54 to first amended  
21 petition).<sup>1</sup> The jury found petitioner not guilty of counts 1-25 and 66. (Exh. 56.) The court  
22 declared a mistrial on counts 26-65. The court set a new trial date, and counsel was  
23 appointed to represent petitioner. (Exh. 55.)

24 On May 13, 2004, petitioner was charged in an amended information with a total  
25 of forty counts. (Exh. 63.) Trial took place in August 2004. (Exhs. 82, 85, 86, 89, 95.) The  
26 jury found petitioner guilty of counts 1-10 (sexual assault of a minor under fourteen years

<sup>1</sup>Exhibits referenced in this order are exhibits to the amended petition, ECF No. 16, and are found at ECF Nos. 17-26.

1 of age, victim C.C.) and counts 21-30 (sexual assault with a minor under fourteen years  
2 of age, victim C.C.), and not guilty of counts 11-20 (lewdness with minor under the age of  
3 fourteen, victim C.C.) and counts 31-40 (lewdness with minor under age of fourteen,  
4 victim A.C.). (Exh. 97.)

5 The court imposed the following sentences: twenty years to life, a consecutive  
6 twenty years to life, and 18 twenty to life sentences, to run concurrently. (Exh. 106.) If  
7 petitioner is released on parole he will be subject to lifetime supervision and required to  
8 register as a sex offender. (*Id.*) Judgment of conviction was entered on November 17,  
9 2004. (*Id.*)

10 The Nevada Supreme Court affirmed the denial of petitioner's direct appeal in a  
11 published opinion on July 26, 2007. (Exh. 126.) The Nevada Supreme Court considered  
12 petitioner's briefing as well as *amicus curiae* briefing and denied petitioner's petition for  
13 rehearing and petition for *en banc* reconsideration. (Exhs. 127, 131, 133, 134, 139, 141,  
14 142.) The United States Supreme Court denied the petitioner a *writ of certiorari* on  
15 October 6, 2008. (Exh. 145.)

16 Petitioner filed a proper person state postconviction petition for writ of habeas  
17 corpus, which the state district court denied. (Exhs. 153, 154.) The Nevada Supreme  
18 Court reversed and remanded on March 10, 2010, remanding the case to state district  
19 court for appointment of counsel. (Exh. 160.)

20 On November 5, 2010, petitioner filed a counseled state postconviction petition.  
21 (Exh. 164.) The state district court held a hearing and then denied the petition. (Exh. 171.)  
22 The Nevada Supreme Court affirmed the denial of the petition on May 13, 2013, and  
23 remittitur issued on June 7, 2013. (Exhs. 182, 187.)

24 Petitioner dispatched his federal habeas corpus petition on May 20, 2013. (ECF  
25 No. 1.) On May 12, 2015, this Court granted in part respondents' motion to dismiss several  
26 grounds in the counseled amended petition. (ECF No. 32.) The Court now considers the  
27 merits of the remaining grounds.

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1           **II.     LEGAL STANDARD - AEDPA**

2           28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
3           Act (AEDPA), provides the legal standards for this Court's consideration of the petition in  
4           this case:

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

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

12           (2)       resulted in a decision that was based on an unreasonable  
13           determination of the facts in light of the evidence presented in the State  
14           court proceeding.

15           The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
16           applications in order to prevent federal habeas 'retrials' and to ensure that state-court  
17           convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685,  
18           693-694 (2002). This Court's ability to grant a writ is limited to cases where "there is no  
19           possibility fair-minded jurists could disagree that the state court's decision conflicts with  
20           [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The  
21           Supreme Court has emphasized "that even a strong case for relief does not mean the  
22           state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538  
23           U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
24           the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating  
25           state-court rulings, which demands that state-court decisions be given the benefit of the  
26           doubt") (internal quotation marks and citations omitted).

27           A state court decision is contrary to clearly established Supreme Court precedent,  
28           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."

1        *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and  
2        citing *Bell*, 535 U.S. at 694.

3        A state court decision is an unreasonable application of clearly established  
4        Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court  
5        identifies the correct governing legal principle from [the Supreme Court’s] decisions but  
6        unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S.  
7        at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires  
8        the state court decision to be more than incorrect or erroneous; the state court’s  
9        application of clearly established law must be objectively unreasonable. *Id.* (quoting  
10        *Williams*, 529 U.S. at 409).

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

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

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

25        Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be  
26        correct unless rebutted by clear and convincing evidence. The petitioner bears the burden  
27        of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*,  
28        563 U.S. at 181.

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1                   **III. THE INSTANT PETITION**

2                   **A. Claims other than Ineffective Assistance of Counsel**

3                   **1. Ground 1**

4                   Rose alleges that the trial court violated his Fifth, Sixth, and Fourteenth  
5                   Amendment rights to present a defense, cross examine witnesses, due process, and a  
6                   fair trial when it prevented him from presenting his defense. (ECF No. 16 at 8-14). Rose  
7                   states the following: he represented himself at his first trial, and all four accusers testified.  
8                   The testimony of two accusers was contradicted by testimony of other witnesses, and the  
9                   jury found Rose not guilty of all charges related to those two accusers. One of those two  
10                   had been molested when she was younger. Those two accusers testified that all four girls  
11                   had discussed the molestation before any of the girls came forward, which contradicted  
12                   A.C. and C.C.'s testimony that they had not discussed it amongst themselves. The jury  
13                   was unable to reach a verdict as to A.C. and C.C., and the judge declared a mistrial. (*Id.*)

14                   The State then filed an amended information charging Rose only as to A.C. and  
15                   C.C. Immediately before the second trial, at which Rose was represented by counsel, the  
16                   prosecutor made an oral motion to bar Rose's defense. The new trial judge ruled that no  
17                   evidence of any other accusers would be admitted at the second trial. The defense offered  
18                   a written offer of proof describing the testimony of the witnesses that the court had  
19                   precluded, including an expert witness; the court did not change its ruling. Rose was  
20                   convicted of the sexual assault charges as to C.C., acquitted of the lewdness charges as  
21                   to C.C., and acquitted of all charges as to A.C. (*Id.*)

22                   The Constitution guarantees a criminal defendant a "meaningful opportunity to  
23                   present a complete defense," and to introduce relevant evidence on his behalf. *Crane v.*  
24                   *Kentucky*, 476 U.S. 683, 690 (1986). However, this right is subject to reasonable  
25                   restrictions "to accommodate other legitimate interests in the criminal trial process."  
26                   *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted). States have  
27                   "broad latitude" in establishing rules of evidence, which may result in the exclusion of  
28                   evidence in criminal trials. *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (per curiam).

1 "The accused does not have an unfettered right to offer testimony that is incompetent,  
2 privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*,  
3 484 U.S. 400, 410 (1988).

4 Thus, a trial judge may exclude or limit evidence to prevent excessive consumption  
5 of time, undue prejudice, confusion of the issues, or misleading of the jury. See *Scheff*er,  
6 523 U.S. at 308; see also *Montana v. Egelhoff*, 518 U.S. 37, 42-43 (1996). The trial judge  
7 is entitled to broad latitude in this regard, so long as the rulings are not arbitrary or  
8 disproportionate. *Scheff*er, 523 U.S. at 308. Even where the exclusion of evidence  
9 violates a defendant's constitutional rights, habeas relief is only appropriate if the  
10 excluded evidence had a "substantial and injurious effect" on the verdict. See *Brech*t v.  
11 *Abrahamson*, 507 U.S 619, 637 (1993).

12 The Nevada Supreme Court explained its denial of this claim:

13 We also reject Rose's argument that the district court violated his due  
14 process right to a fair trial when it excluded evidence offered to support his  
15 theory that the victims had fabricated the allegations and to impeach the  
16 victims regarding statement they had made to police. Although a criminal  
17 defendant has a due process right to "introduce into evidence any testimony  
18 or documentation which would tend to prove the defendant's theory of the  
19 case," *Vipperman v. State*, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980),  
20 that right is subject to the rules of evidence, including the rules that evidence  
21 must be relevant, and that even relevant evidence is inadmissible if its  
22 probative value "is substantially outweighed by the danger of unfair  
23 prejudice, of confusion of the issues or of misleading the jury," NRS  
24 48.035(1). See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Jackson*  
25 v. *State*, 116 Nev. 334, 335, 997 P.2d 121, 121 (2000); *Brown v. State*, 107  
26 Nev. 164, 167, 807 P.2d 1379, 1381 (1991); *Vipperman*, 96 Nev. at 586,  
27 614 P.2d at 534. Having considered the record, we conclude that the district  
28 court did not abuse its discretion in concluding that to the extent that Rose's  
proffered evidence was relevant, it was inadmissible as it would unduly  
confuse the issues or mislead the jury. See *Jones v. State*, 113 Nev. 454,  
466-67, 937 P.2d 55, 63 (1997) (stating that district court has discretion to  
admit or exclude evidence and that decision is reviewed for manifest error).

24 (Exh. 126 at 13-14 n.18.)

25 Immediately prior to the start of trial, the State moved for a pre-trial ruling that the  
26 defense could not comment in opening statements nor cross examine the two other  
27 victims about the not-guilty verdicts with respect to those victims at the first trial. (Exh. 85  
28 ///

1 at 3.) After arguments by both sides, the trial court took a brief recess, then returned and  
2 ruled as follows:

3 I find there is marginal relevance to the information regarding [other  
4 alleged victim, D] and the other trial and the other victims, but I also find that  
5 under 48.035 that it's more – it's – the probative value is substantially  
outweighed by the danger of unfair prejudice, confusion of the issues, or  
misleading the jury.

6 I am not in any way, shape, or form going to allow you to bring up  
7 evidence of another trial, evidence of other victims. This case is going to  
8 stand on its own with regards to the two victims in this case. So neither the  
9 State nor the defense is going to be able to bring in any evidence of any  
prior trial, any acquittal, any other victims. The two girls . . . in this case, it's  
going to stand on its own.

10 If you deliberately — if there's any deliberateness as to bringing that  
out, there'll be sanctions from the Court.

11 That's my ruling. We're not briefing it. And we're moving forward with  
the trial.

12 (Id. at 22.)

13 The trial court heard extensive argument regarding the allegations by the other two  
14 accusers from the first trial and repeatedly expressed concern about the myriad ways that  
15 introduction of the testimony, the fact of the acquittals, etc., were highly likely to lead to  
16 confusion by the jury. (Exh. 85 at 2-22.) Having reviewed the state-court record, this Court  
17 is not persuaded that Rose has met his burden of demonstrating that the Nevada  
18 Supreme Court's decision that the district court did not abuse its discretion in barring  
19 reference to the other two accusers was contrary to, or involved an unreasonable  
20 application of, federal law established by the United States Supreme Court. 28 U.S.C. §  
21 2254(d). Accordingly, federal habeas relief is denied as to ground 1.

22 **2. Ground 2**

23 Rose argues that the State introduced statements he made to a polygrapher in  
24 violation of his Fifth, Sixth and Fourteenth Amendment rights to due process, a fair trial  
25 and cross examination. (ECF No. 16 at 14-22.) Rose contends that the statements were  
26 misleading, unfairly prejudicial and involuntary. He asserts that he was denied a complete  
27 //

1 pre-trial hearing on the voluntariness of the statements and an opportunity to cross  
2 examine Moore at that hearing. (*Id.*)

3 In order to warrant federal habeas relief with respect to a state court's evidentiary  
4 ruling, a decision to admit evidence must be so prejudicial that such admission violated  
5 fundamental due process and the right to a fair trial. *Larson v. Palmateer*, 515 F.3d 1057,  
6 1066 (9<sup>th</sup> Cir. 2008).

7 In rejecting this claim, the Nevada Supreme Court first recounted trial testimony:

8 The State also presented evidence regarding statements Rose made  
9 during an interview with Gordon Moore, an investigator with the Nevada  
10 Division of Investigations, shortly after the initial allegations were reported  
11 in July 2002. Moore testified that the interview focused on C.C.'s allegations  
12 because she had provided the clearest and most detailed descriptions of  
13 what Rose had done. Rose indicated to Moore that he was scared, and he  
14 denied the allegations. Moore testified that in his experience interviewing  
15 individuals accused of sexual abuse, such denials were not uncommon, and  
16 he therefore continued with the interview. During the course of the interview,  
17 Rose eventually offered possible explanations for C.C.'s accusations. In  
18 particular, Rose discussed with Moore two incidents that might explain  
19 C.C.'s accusations.

20 Moore conducted a polygraph examination that Rose voluntarily  
21 agreed to take. The fact that Rose had submitted to a polygraph  
22 examination and the results of the examination were not admitted as  
23 evidence at the trial. However, a transcript of the interview conducted as  
24 part of the examination was admitted at trial, along with Moore's testimony  
25 about statements that Rose made to him.

26 The first incident involved Rose putting powder on C.C.'s genital area  
27 at her request. According to Moore, Rose explained that on that particular  
28 occasion, C.C. and [Rose's daughter] J.R. called him into J.R.'s room after  
they had been swimming and he entered the room to find them lying naked  
on J.R.'s bed. J.R. complained of a rash on her genital area and asked Rose  
to put powder on the rash. C.C. then asked Rose to do the same to her.  
Rose indicated that he was reluctant to do so because C.C. was not his  
daughter, but C.C. persisted and so he complied. Rose initially indicated  
that he sprinkled the powder on C.C. without touching her, but he later  
indicated in response to Moore's questions that he may have touched her  
while applying the powder. Rose commented that he felt dirty about the  
incident because C.C. was not his daughter.

29 The second incident involved C.C. climbing into Rose's bed while he  
30 was asleep and rubbing her vagina on his hand. According to Moore, Rose  
31 explained that C.C. and J.R. were asleep at the end of his bed when he  
32 woke up to find that C.C. had climbed in bed with him and was rubbing her  
33 vagina against his hand. He explained that when he realized what was  
34 happening he pulled his hand away and told C.C. to get out of the bed and  
35 sleep on the floor.

1                   Despite Rose's statements about these two incidents, Moore  
2 acknowledged that Rose continuously and adamantly stated that he never  
3 touched C.C. with sexual intent. It appears that neither of the incidents  
4 described by Rose formed the basis for the charges against him. And J.R.  
5 and C.C. denied that either incident ever occurred. Additionally, shortly after  
6 his interview with Moore, Rose told Las Vegas Metropolitan Police Detective  
7 Kristin Meegan that he should not have made the statement about the  
8 second incident. At trial, Rose denied that either incident he described to  
9 Moore ever occurred, claiming that he made them up to satisfy Moore and  
to get Moore off of his back. The district court also admitted Rose's  
testimony from the first trial in which he denied making the statements to  
Moore.

7                   Rose testified at trial and generally denied all of the allegations. He  
8 also testified that in September 2001 he joined the Navy and was not in Las  
9 Vegas. He further testified that he did not return to Las Vegas until he was  
medically discharged in March 2002 after he fractured his leg.

10 (Exh. 126 at 6-7.)

11                   The Nevada Supreme Court thereafter denied the claim:

12                   Rose further argues that his due process rights were violated when the  
13 State introduced Gordon Moore's testimony that Rose told him about putting  
14 powder on J.R.'s and C.C.'s vaginas and about C.C. climbing into bed with  
15 him. Specifically, Rose argues that his rights were violated because (1)  
16 Moore's testimony was more prejudicial than probative, (2) the evidence  
17 amounted to prior bad acts, but the district court did not conduct a *Petrocelli*  
hearing, (3) the district court refused to allow Rose to cross-examine Moore  
at the suppression hearing, (4) the district court violated constitutional  
procedure by ruling on Rose's suppression motion before the hearing had  
been completed, and (5) the State committed prosecutorial misconduct by  
using the evidence while cross-examining Rose. We have considered these  
issues and conclude that they lack merit.

19 (Exh. 126, at 15 n.23.)

20                   The trial judge that presided over the first trial conducted a hearing with respect to  
21 the voluntariness of Rose's statements to Moore. (Exh. 78.) The court halted the hearing  
22 and expressed frustration that the State did not have the audio recording of the end of  
23 the interview between Moore and Rose. The court directed the State to try again to locate  
24 the tape, indicated that it could not rule on the motion without the tape, and sent the case  
25 to the overflow calendar. At a calendar call hearing a few days later, the presiding judge  
26 indicated that he had sought a ruling from the original judge with respect to the motion to  
27 suppress Rose's statements to Moore. (Exh. 81 at. 2-4.) He stated that the original judge  
28 indicated that even though she had told the parties that she was not making a ruling at

1 that point in the hearing without further search for the missing tape, having taken the  
2 matter under advisement, she decided to deny the motion based on the hearing that she  
3 had conducted. (*Id.*)

4 It is understandable that the defense would be frustrated with the manner in which  
5 the hearing recounted above unfolded. However, Rose did receive a hearing on the  
6 voluntariness of the statements. Further, at the outset of the interview, Moore read Rose  
7 his rights under *Miranda* and Rose signed a form indicating that he had been read and  
8 understood his *Miranda* rights. (Exh. 86 at 80.) Rose's false statements to Moore were  
9 relevant and admissible to demonstrate that Rose fabricated incidents to try to explain  
10 the victims' allegations. Rose has not shown that the trial court's evidentiary ruling with  
11 respect to the interview with Moore so was so prejudicial that such admission violated  
12 fundamental due process and the right to a fair trial. Rose simply has not met his burden  
13 of demonstrating that the Nevada Supreme Court's decision was contrary to, or involved  
14 an unreasonable application of, federal law established by the United States Supreme  
15 Court. 28 U.S.C. § 2254(d). Federal habeas relief is therefore denied as to ground 2.

### 3. Ground 3

17 Rose contends that the trial court denied a motion for a continuance to permit the  
18 defense to review a tape and transcript of the interview with Moore that the defense  
19 received just before the second trial started in violation of his Fourteenth Amendment due  
20 process and fair trial rights. (ECF No. 16 at 22.)

21 Whether to grant a continuance is within the trial court's discretion, and not every  
22 denial of a continuance violates due process "even if the party fails to offer evidence or is  
23 compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). "There  
24 are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to  
25 violate due process. The answer must be found in the circumstances present in every  
26 case, particularly in the reasons presented to the trial judge at the time the request is  
27 denied." *Id.*; see also *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

28 |||

1 Denying this claim, the Nevada Supreme Court explained:

2 This court reviews the district court's decision regarding a motion for  
3 continuance for an abuse of discretion. See *Mulder v. State*, 992 P.2d 845,  
4 850-50 (Nev. 2000). We have previously held that the district court abused  
5 its discretion by denying a defendant's request for a modest continuance to  
6 procure witnesses when the delay was not the defendant's fault. *Lord v. State*, 806 P.2d 548, 556 (Nev. 1991). However, when a defendant fails to  
7 demonstrate that he was prejudiced by the denial of a continuance, the  
8 district court's decision denying a continuance is not an abuse of discretion.  
9 *Mulder*, 992 P.2d at 850.

10 Here, Rose had at least a partial audiotape of the interview, a  
11 complete transcript, and Moore's notes before the first trial. He has not  
12 demonstrated that he was prejudiced by the district court's refusal to grant  
13 a continuance. Cf. *Beasley v. State*, 404 P.2d 911 (Nev. 1965). Accordingly,  
14 we conclude that the district court did not abuse its discretion in denying the  
15 motion for a continuance. [FN omitted]

16 (Exh. 126 at 13-14.)

17 Immediately prior to the start of the trial, defense counsel moved for a continuance,  
18 explaining that the third tape from the Moore interviewed had finally been located and  
19 only given to him the previous night after 5 p.m. (Exh. 82 at 5-7.) At the hearing, the State  
20 noted that the defense was familiar with the interview and had long possessed transcripts  
21 of portions of the interview as well as Moore's notes. (*Id.* at 11-12, 21-22.) The court  
22 inquired of the parties as to when defense counsel would be given a transcript of the  
23 portion of the tape the defense had not heard. (*Id.* at 20.) The court pointed out that it was  
24 Tuesday and Moore would be called to testify toward the end of the week. The court  
25 reasoned that the defense would have plenty of time to review the transcript before Moore  
26 testified and denied the continuance. (*Id.*)

27 Rose complains here that the defense did not have sufficient time to listen to the  
28 tape and that the transcript of the tape was incomplete and failed to reflect that Moore  
29 pressured Rose to such an extent that his statements were involuntary. (ECF Nos. 16; 41  
30 at 18-24.) However, the jury heard Rose's testimony that he was innocent of the charges  
31 and that he was under extreme pressure and fabricated two incidents out of fear. (Exh.  
32 95 at 81, 93,135-138.) Rose has failed to show that the Nevada Supreme Court's  
33 determination that he failed to show prejudice from the failure to grant a continuance was

1 contrary to, or involved an unreasonable application of, federal law established by the  
2 United States Supreme Court. 28 U.S.C. § 2254(d). Accordingly, ground 3 is denied.

3 **4. Ground 4**

4 Rose claims that his Fifth, Sixth and Fourteenth Amendment due process and fair  
5 trial rights were violated when the State introduced statements that Rose made to Moore,  
6 a polygrapher, and allowed Moore to testify to Rose's truthfulness. (ECF No. 16 at 24.)

7 The Nevada Supreme Court denied the claim, reasoning:

8 Rose argues that the district court abused its discretion by denying his  
9 motion for a mistrial after Moore mentioned the word "polygraph" in  
10 describing his training and experience. Rose argues that a mistrial was  
warranted because the testimony about Moore's training amounted to  
improper admission of polygraph evidence. We disagree.

11 The district court has discretion to deny a motion for a mistrial, and this  
12 court will not reverse the district court's decision "absent a clear showing of  
13 abuse." Polygraph evidence is inadmissible unless the State, defendant,  
14 and defendant's counsel have executed a stipulation providing for the  
defendant's submission to the polygraph examination. However, "[a]  
15 witness's spontaneous or inadvertent references to inadmissible material,  
not solicited by the prosecution, can be cured by an immediate  
admonishment directing the jury to disregard the statement."

16 Here, during the State's questioning of Moore, Rose asked for a  
17 foundation for Moore's expert opinion on interviewing suspects, and the  
district court ordered the State to question Moore about his qualifications.  
18 Moore then mentioned the word "polygraph" when describing his training  
and experience. Rose objected, and the district court specifically  
19 admonished the jury to disregard the statement. Moore did not make any  
mention of the fact that he gave Rose a polygraph test or testify as to the  
20 results of any polygraph test. Under these circumstances, we conclude that  
the admonishment was sufficient to cure any prejudice and therefore the  
district court did not abuse its discretion by denying Rose's motion for a  
21 mistrial.

22 (Exh. 126 at 15-16.)

23 At trial, the following occurred during the State's direct examination of Moore:

24 Q: Now, in regards to these interviews, Mr. Moore, did you notice some  
25 similar patterns that you had seen in the past in regards to other subjects  
that you saw in Mr. Rose?

26 DEFENSE COUNSEL: Objection, Judge. If he's going to testify to similar  
27 patterns, we simply don't have a substantial enough foundation for that.  
He's not an expert into – in looking at other people's patterns and making a  
28 nexus with Mr. Rose. This is — this is completely off the mark and he does

1 not have a sufficient foundation, we do not have sufficient expert training  
2 show that would allow him to make that kind of opinion.

3 THE COURT: Mr. —

4 STATE: I guess I could go back through all of his training, if . . . .

5 THE COURT: Why don't you do that for us . . . .

6 STATE Q: All right, Mr. Moore, let's go back through this then. What  
7 type of particular training have you received, specifically in regards to  
8 interviewing subjects, or suspects?

9 A: I've attended numerous federal and state, local level, seminars,  
10 conferences, specifically on the federal level with the Department of  
11 Defense Polygraph uh, Institute —

12 DEFENSE COUNSEL: May we approach, Judge.

13 (Exh. 86 at 87-88.) As set forth above, Moore only made a fleeting reference to a  
14 polygraph institute as he described his training as an investigator. Respondents note that  
15 no evidence was introduced that Moore was a polygrapher or that he conducted a  
16 polygraph examination of Rose. The jury was instructed that it may draw reasonable  
17 inferences from the evidence presented but that such inferences should not be based on  
18 speculation or guess. (Exh. 96, jury instruction no. 15.) The Court concludes that Rose  
19 has not shown that the Nevada Supreme Court's determination that the district court did  
20 not err in denying the motion for a mistrial was contrary to, or involved an unreasonable  
application of, federal law established by the United States Supreme Court. 28 U.S.C. §  
2254(d). Accordingly, federal ground 4 is denied.

21 **5. Ground 5**

22 Rose argues that the evidence was not specific enough to support a conviction in  
23 violation of his Fourteenth Amendment due process rights. (ECF No. 16 at 25.)

24 "The Constitution prohibits the criminal conviction of any person except upon proof  
25 of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing  
26 *In re Winship*, 397 U.S. 358 (1970)). On federal habeas corpus review of a judgment of  
27 conviction pursuant to 28 U.S.C. § 2254, the petitioner "is entitled to habeas corpus relief  
28 if it is found that upon the record evidence adduced at the trial no rational trier of fact

1 could have found proof of guilt beyond a reasonable doubt.” *Id.* at 324. “[T]he standard  
2 must be applied with explicit reference to the substantive elements of the criminal offense  
3 as defined by state law.” *Id.* at 324 n.16. On habeas review, this Court must assume that  
4 the trier of fact resolved any evidentiary conflicts in favor of the prosecution and must  
5 defer to such resolution. *Id.* at 326. Generally, the credibility of witnesses is beyond the  
6 scope of a review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330  
7 (1995).

8 The Nevada Supreme Court rejected this claim on appeal, reasoning:

9 When considering the sufficiency of the evidence in sexual assault  
10 cases, we have held that the victim’s testimony alone is sufficient to uphold  
11 a conviction. *LaPierre v. State*, 836 P.2d 56, 58 (1992). Although the victim’s  
12 testimony need not be corroborated, we have held that “the victim must  
13 testify with some particularity regarding the incident in order to uphold the  
14 charge.” *Id.* In evaluating whether a child-victim’s uncorroborated testimony  
15 was sufficient to support multiple charges in *LaPierre v. State*, we  
16 acknowledged that “child victims are often unable to articulate specific times  
17 of events” and have difficulty recalling “exact instances when the abuse  
18 occurs repeatedly over a period of time.” *Id.* Accordingly, we explained in  
19 *LaPierre* that to support multiple charges of sexual abuse over a period of  
20 time, a child victim need not “specify exact numbers of incidents, but there  
21 must be some reliable indicia that the number of acts charged actually  
22 occurred.” *Id.*

23 In looking at the child-victim’s testimony in *LaPierre*, this court  
24 determined that the child victim testified with sufficient particularity to  
25 support five of the ten charged incidents, as she described in general terms  
when or where those incidents occurred. *Id.* at 57. However, this court  
further determined that the child-victim’s testimony lacked particularity as to  
the remaining five charges. Specifically, when the child victim was asked  
how many times the defendant assaulted her, she responded that it was  
“[t]en or more times” and that she knew it was that many because he was  
doing it up until he left.” *Id.* And she later testified that she was not  
“absolutely sure” how many times it happened and that was why she had  
said “ten or more times.” *Id.* This court described the testimony as  
“speculation” and “conjecture” regarding the number of incidents and  
concluded that “[s]omething more is required.” *Id.* at 58. In particular, this  
court opined that the case “might” be different if the child victim had testified  
that the defendant had assaulted her “every weekend for the period of time  
[he] resided in the family home or that he assaulted her nearly every  
weekend.” *Id.* But because the child-victim’s testimony was more  
speculative, this court reversed five of the convictions for insufficient  
evidence.

26 In this case, the State charged Rose with twenty counts of sexual  
27 assault. C.C. and others testified that from late 1999 to July 2002, she spent  
28 at least one night at the Roses’ house almost every weekend. C.C. testified  
that Rose touched her nearly every time she spent the night. The only times

1 he did not touch her were when he was away in the Navy from September  
2 2001 to March 2002. Although she could not specify an exact number of  
3 incidents, she testified that he touched her vagina with his fingers more than  
4 ten times and with his tongue more than ten times. She described different  
5 locations where she was touched and graphically detailed his actions. She  
6 recalled seeing the time on the clock when he assaulted her in certain  
7 rooms, and she described how she sometimes tried to fight him off and how  
8 he would flip her over if she was on her stomach.

9  
10 The victim's testimony in this case is distinguishable from that of the  
11 victim in *LaPierre*. C.C. definitively testified that Rose assaulted her nearly  
12 every time she spent the night at his house before and after he was away  
13 in the Navy and that she spent the night at his house almost every weekend  
14 during that time. This is the kind of testimony that we opined "might" have  
15 made a difference in *LaPierre*. Faced with such testimony here, we  
16 conclude it is sufficient. Taking the evidence in the light most favorable to  
17 the prosecution, a rational trier of fact could have found the essential  
18 elements of the charged sexual assaults beyond a reasonable doubt.  
19 Accordingly, Rose's conviction was supported by sufficient evidence.

20 (Exh. 126 at 8-11.)

21 At trial, C.C. testified to the following: she and/or she and her little sister spent the  
22 night at the Roses' house nearly once every weekend. She described with particularity  
23 the manner in which Rose touched her vagina with his fingers or tongue nearly every time  
24 she stayed over, including what she usually wore, what rooms she slept in, the usual time  
25 of night, that sometimes she would try to fight him off by kicking at him or trying to stay  
26 on her stomach. (Exh. 86 at 13-34, 37, 40.)

27 Having reviewed the record, this Court concludes that it cannot be said that based  
28 upon the evidence adduced at the trial no rational trier of fact could have found proof of  
guilt beyond a reasonable doubt. *Jackson*, 430 U.S. at 324. Thus, Rose has failed to  
demonstrate that the Nevada Supreme Court's decision was contrary to, or involved an  
unreasonable application of, federal law established by the United States Supreme Court.  
28 U.S.C. § 2254(d). Accordingly, federal habeas relief is denied as to ground 5.

29 **6. Ground 7**

30 Rose claims that the trial court's failure to record bench conferences violated his  
31 right to be present. (ECF No. 16 at 28.)

32 The constitutional right to be present largely arises from the Sixth Amendment  
33 Confrontation Clause, but a defendant also "has a due process right to be present at a

1 proceeding whenever his presence has a relation, reasonably substantial, to the fullness  
2 of his opportunity to defend against the charge . . . . [T]he presence of a defendant is a  
3 condition of due process to the extent that a fair and just hearing would be thwarted by  
4 his absence, and to that extent only." *U.S. v. Gagnon*, 470 U.S. 522, 526 (1985) (internal  
5 quotations and citations omitted); see also *Rushen v. Spain*, 464 U.S. 114, 125-126  
6 (1983) (Stevens, J. concurring in the judgment: "[T]he mere occurrence of an *ex parte*  
7 conversation between a trial judge and a juror does not constitute a deprivation of any  
8 constitutional right. The defense has no constitutional right to be present at every  
9 interaction between a judge and a juror, nor is there a constitutional right to have a court  
10 reporter transcribe every such communication."). The fact that a defendant was excluded  
11 from a trial proceeding should be considered in light of the entire record. *Gagnon*, 470  
12 U.S. at 526-527.

13 The Nevada Supreme Court denied this claim, explaining:

14 A defendant must be present at every stage of his trial, including jury  
15 selection. NRS 178.388(1). A defendant's right to be present at jury  
16 selection arises from his due process right to a fair hearing. *Gallego v. State*,  
17 23 P.3d 227, 240 (Nev. 2001). However, "[t]he due process aspect has  
been recognized only to the extent that a fair and just hearing would be  
thwarted by the defendant's absence." *Id.* Violations of the right to be  
present are reviewed for harmless error. *Id.*

18 In this case, the district court questioned four prospective jurors at  
19 the bench after they indicated that they could not be fair and impartial  
because they had previously been sexually assaulted or had friends or  
20 family that had been accused of sexual assault. The district court then  
dismissed them. The district court explained its reasoning for dismissing  
21 each juror and stated that it conducted individual voir dire at the bench  
because the issues were embarrassing and sensitive and the court did not  
want to taint the remainder of the jury pool. We conclude that Rose has not  
22 demonstrated that his absence from the bench conferences prejudiced him  
in any way. In particular, because the jurors were dismissed because they  
23 could not be fair and impartial to Rose, it appears the proceedings were fair  
and just despite his absence. *See id.*

24  
25 (Exh. 126 at 17.)

26 The trial court record reflects the following:

27 THE COURT: Okay. The jury panel has been excused, and I'm going  
28 to go ahead and put on the record regarding each of the information I  
received from the following people: Juror 200 was the last woman that I

1 excused. She came up to the bench and disclosed to me that her husband  
2 was recently accused by a next-door-neighbor of having inappropriate  
3 contact with her own daughter. There's also been allegations raised  
4 regarding the neighbor herself. They retained an attorney. She said that  
5 she, as a result of what had transpired, did not believe that she could be fair  
6 and impartial due to the nature of this case. I excused her.  
7

8 Juror number 265 is not dismissed, but disclosed to me, outside the  
9 presence of the jury, that her boyfriend, or significant other, had been  
10 accused of rape five or six years ago. She also – she told me that the person  
11 making the accusations had mental health issues and had accused many  
12 others of similar conduct, and that the case was dismissed, and that she  
13 could be fair and impartial.

14 Juror number 209 was molested as a child and was excused.

15 Juror number 260, 206 and 277 also said that they were molested as  
16 children and needed to be excused. They showed visible agitation and  
17 disturbance as a result of being participating up to this point.

18 Juror number 284, I excused because he related to me that he had  
19 incest in his family. His father had molested a niece or had an incestuous  
20 relationship with a niece, and he watched how that impacted his mother. He  
21 said that it would bring up unhappy memories or disturbing memories, and  
22 that he couldn't be fair and impartial.

23 I think that covers all of the ones that have been excused for those  
24 reasons.

25 MS. HOFFMAN (defense counsel): Judge, for the record, the  
26 Defense lodged an objection at the bench, partially because as these at the  
27 bench conferences are going on with our jury pool the Defense and the  
28 State is not privy to anything that is said, and it's my understanding that  
there's not a record being taken of the conversation. We feel that this is a  
critical stage of the proceedings, that we have a right to be able to hear what  
the jurors say about whether they're able to be fair and impartial, and that  
we would also have an accompanying right to be able to voir dire in an  
attempt to rehabilitate witnesses. We can't do that if we can't hear what  
they're saying between Your Honor and the juror with all due respect and  
we'd object to this, and I'd like to record to reflect that.

29 . . .

30 THE COURT: And the record will certainly reflect that with all due  
31 respect, but there would be nothing to rehabilitate in front of the rest of the  
32 panel because they are not disclosing in front of everybody else that they  
33 have a particular issue that anybody else needs to hear about. And to save  
34 them the embarrassment and humiliation and the emotional portion of  
35 having to disclose this in front of all of the strangers that we have here in  
36 the courtroom, I take these folks up. I relay to you what their problems are  
37 after each one occurs. I tell you that I'm going to let them go because I  
38 believe it is discretionary on my part to let them go at this state as a result  
39 of what they disclosed to me. By not disclosing to the rest of the panel, I  
40 believe that that keeps that from tainting anybody else on this jury. And, so,  
41 your objection is noted. Thank you very much.

1 (Exh. 82 at 91-93.) The court subsequently brought some other jurors into the courtroom  
2 one at a time and permitted counsel to ask them questions. (*Id.* at 109-121.)

3 Here, Rose has made no showing that these *ex parte* exchanges between the  
4 judge and these jurors impacted his ability to fully defend himself and violated due  
5 process. While the initial conversations were *ex parte*, the judge then put the specifics of  
6 the conversations on the record and also permitted the parties to question subsequent  
7 jurors. The judge explained that she dismissed the four jurors because they had been  
8 sexually assaulted or had close family experience with sexual assault. It cannot be said  
9 that the judge's concern for the privacy of these potential jurors — all of whom were  
10 dismissed because the court had specific concerns that they could not be impartial and  
11 in fact might be biased against the defendant — prejudiced Rose in any manner. Nor  
12 does the record reflect that Rose had any objection to the jurors who were excused for  
13 cause by the court. Rose has failed to demonstrate that the Nevada Supreme Court's  
14 decision was contrary to, or involved an unreasonable application of, federal law  
15 established by the United States Supreme Court. 28 U.S.C. § 2254(d). Accordingly,  
16 federal habeas relief is denied as to ground 7.

17 **B. Ground 9 Ineffective Assistance of Counsel**

18 Ineffective assistance of counsel claims are governed by the two-part test  
19 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme  
20 Court held that a petitioner claiming ineffective assistance of counsel has the burden of  
21 demonstrating that (1) the attorney made errors so serious that he or she was not  
22 functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the  
23 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing  
24 *Strickland*, 466 U.S. at 687).

25 To establish ineffectiveness, the defendant must show that counsel's  
26 representation fell below an objective standard of reasonableness. *Id.* To establish  
27 prejudice, the defendant must show that there is a reasonable probability that, but for  
28 counsel's unprofessional errors, the result of the proceeding would have been different.

1       *Id.* A reasonable probability is “probability sufficient to undermine confidence in the  
2 outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly  
3 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,  
4 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the  
5 petitioner’s burden to overcome the presumption that counsel’s actions might be  
6 considered sound trial strategy. *Id.*

7       Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
8 performance of counsel resulting in prejudice, “with performance being measured against  
9 an objective standard of reasonableness, . . . under prevailing professional norms.”  
10 *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted).  
11 When the ineffective assistance of counsel claim is based on a challenge to a guilty plea,  
12 the *Strickland* prejudice prong requires a petitioner to demonstrate “that there is a  
13 reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and  
14 would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

15       If the state court has already rejected an ineffective assistance claim, a federal  
16 habeas court may only grant relief if that decision was contrary to, or an unreasonable  
17 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).  
18 There is a strong presumption that counsel’s conduct falls within the wide range of  
19 reasonable professional assistance. *Id.*

20       The United States Supreme Court has described federal review of a state supreme  
21 court’s decision on a claim of ineffective assistance of counsel as “doubly deferential.”  
22 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)).  
23 The Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s  
24 performance . . . through the ‘deferential lens of § 2254(d).’” *Id.* at 1403 (internal citations  
25 omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim  
26 is limited to the record before the state court that adjudicated the claim on the merits.  
27 *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed  
28       ///

1 the extensive deference owed to a state court's decision regarding claims of ineffective  
2 assistance of counsel:

3 Establishing that a state court's application of *Strickland* was unreasonable  
4 under § 2254(d) is all the more difficult. The standards created by *Strickland*  
5 and § 2254(d) are both "highly deferential," *id.* at 689, 104 S.Ct. 2052; *Lindh*  
6 v. *Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997),  
7 and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S.  
8 at —, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the  
9 range of reasonable applications is substantial. 556 U.S. at —, 129 S.Ct.  
10 at 1420. Federal habeas courts must guard against the danger of equating  
11 unreasonableness under *Strickland* with unreasonableness under §  
12 2254(d). When § 2254(d) applies, the question is whether there is any  
13 reasonable argument that counsel satisfied *Strickland*'s deferential  
14 standard.

15 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance  
16 of counsel must apply a 'strong presumption' that counsel's representation was within the  
17 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466  
18 U.S. at 689). "The question is whether an attorney's representation amounted to  
19 incompetence under prevailing professional norms, not whether it deviated from best  
20 practices or most common custom." *Id.* (internal quotations and citations omitted).

21 As ground 9(A), Rose claims that trial counsel rendered ineffective assistance for  
22 failing to conduct proper investigation and pretrial preparation, namely that counsel  
23 should have had a medical expert testify about Rose's injuries and should have had Dr.  
24 Esplin testify. (ECF No. 16 at 31-32.)

25 The Nevada Supreme Court affirmed the denial of this claim in Rose's state  
26 postconviction petition, stating that many of the victim's allegations of sexual abuse  
27 predated Rose's broken hip and resultant physical limitations, and therefore, Rose failed  
28 to demonstrate prejudice. The state supreme court also pointed out that Rose failed to  
29 explain how counsel was deficient in failing to secure the attendance of expert witness  
30 Dr. Esplin at trial, or what counsel should have done differently, and therefore, Rose failed  
31 to demonstrate deficiency or prejudice. (Exh. 182 at 3 and n.1.)

32 Rose's wife testified as to how his injuries affected his daily life. (Exh. 89 at 32, 40-  
33 43, 45-46.) Rose also testified about how his injuries affected his daily life. (Exh. 95 at

1 104-107, 110-111, 134.) Further, respondents point out that Rose fails to show what Dr.  
2 Esplin — who was to testify that it was his opinion that the four accusers fabricated the  
3 allegations together — would have based his opinion upon on because the trial court had  
4 ruled that evidence of the other accusers and the previous acquittals would not be  
5 admitted.

6 As ground 9(B), Rose contends that trial counsel failed to seek a pretrial psychiatric  
7 evaluation of the victims. (ECF No. 16 at 32.)

8 Affirming the denial of this claim, the Nevada Supreme Court stated that Rose did  
9 not show that a psychological evaluation of the victims would have been appropriate, “as  
10 he did not show that the State benefited from a psychological expert or that there was a  
11 reasonable basis for believing that the victims’ mental or emotional state may have  
12 affected their veracity.” (Exh. 182 at 3-4.) The state supreme court thus concluded that  
13 Rose did not demonstrate a reasonable probability of a different outcome at trial had  
14 counsel sought a psychological evaluation of the victims. (*Id.*)

15 Here, Rose does not explain what a psychological evaluation would have revealed  
16 or show any reasonable probability that such an examination would have changed the  
17 outcome at trial.

18 In ground 9(C), Rose asserts that trial counsel was ineffective for failing to insist  
19 that the bench conferences be recorded because the conferences demonstrated “(1) the  
20 court’s bias against the defendant; (2) the unpreparedness and ineffectiveness of defense  
21 counsel; and (3) the overzealousness and misconduct of the prosecution.” (ECF No. 16,  
22 at 34-35.)

23 The Nevada Supreme Court affirmed the denial of the claim:

24 [A]ppellant argues that trial counsel was ineffective for failing to ensure that all bench conferences and discussions were recorded. We  
25 conclude that appellant failed to demonstrate that he was prejudiced, as he has not identified any issues that this court was unable to meaningfully  
26 review due to the failure to record bench conferences. See, *Hargrove [v.* State,] 100 Nev. at 502, 686 P.2d at 255 (holding that “bare” or “naked” claims are insufficient to grant relief). To the extent that he claims that  
27 appellate review of jury selection was not possible, this claim is belied by the record, as this court concluded on direct appeal that appellant was not  
28

1 prejudiced by the unrecorded bench conferences during the jury selection  
2 process. *Rose v. State*, 123 Nev. 194, 207-08, 163 P.3d 408, 417 (2007).  
3 Furthermore, a review of the record shows that most of the unrecorded  
4 bench conferences during trial were explained on the record or pertained to  
5 housekeeping matters. Therefore, we conclude that the district court did not  
6 err in denying this claim.

7 (Exh. 182 at 4-5.) Rose presents no further facts to support ground 9(B), and this court  
8 concludes that it is belied by the record.

9 Rose next alleges in ground 9(D) that trial counsel's opening statement was  
10 ineffective because it was not clear, precise or organized. (ECF No. 16 at 34.)

11 The Nevada Supreme Court observed that

12 [c]ounsel's opening statement set forth the theory of the defense and  
13 addressed evidence that would be presented at trial. Appellant has failed to  
14 specify what additional information counsel should have included in the  
15 opening statement, nor has he shown a reasonable probability that, but for  
16 counsel's error, the outcome of the trial would have been different.

17 (Exh. 182 at 5.)

18 The record reflects that during opening statements, defense counsel presented the  
19 defense theory of the case and stated that Rose has consistently denied the allegations.  
20 Counsel described some of the witnesses, emphasized that credibility will be important,  
21 and asked the jurors to take notes, ask tough questions and pay attention to the demeanor  
22 of witnesses. (Exh. 85 at 62-67.) Rose's contention that defense counsel failed to  
23 describe witnesses and evidence is, therefore, belied by the record.

24 In ground 9(E), Rose contends that trial counsel failed to challenge the trial court's  
25 bias. (ECF No. 16 at 34-35.)

26 Affirming the denial of this claim, the state supreme court reasoned:

27 [A]ppellant argues that trial counsel was ineffective for failing to move  
28 to recuse Judge Jackie Glass for bias toward the defense. Appellant  
specifically contends that Judge Glass was biased because she excluded  
evidence offered to support appellant's theory that the victims had  
fabricated the allegations, denied his motion for a continuance, conducted  
unrecorded bench conferences, reprimanded defense counsel for asking  
leading questions of appellant, and made inappropriate statements at  
sentencing. We conclude that appellant failed to demonstrate that trial  
counsel was deficient or that he was prejudiced. Adverse rulings "during the  
course of official judicial proceedings do not establish legally cognizable

1 grounds for disqualification." *In re Petition to Recall Dunleavy*, 104 Nev.  
2 784, 789, 769 P.2d 1271, 1275 (1988). Moreover, this court concluded on  
3 direct appeal that the district court did not abuse its discretion in excluding  
4 the evidence of fabricated allegations. *Rose*, 123 Nev. at 205 n.18, 163 P.3d  
5 at 415 n.18. Thus, a motion to recuse on this basis would have been futile.  
6 See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). As for  
7 the other challenged conduct and statements, appellant failed to demonstrate that Judge Glass closed her mind to the presentation of  
8 evidence, see *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169,  
9 1171 (1998), or displayed "a deep-seated favoritism or antagonism that  
10 would make fair judgment impossible," *Kirksey v. State*, 112 Nev. 980,  
11 1007, 923 P.2d 1102, 1119 (1996) (quoting *Liteky v. United States*, 510  
12 U.S. 540, 555 (1994)). Thus, we conclude that the district court did not err  
13 in denying this claim.  
14

15 (Exh. 182 at. 5-6.)

16 During trial, the court admonished defense counsel about leading questions,  
17 getting into testimony about other possible victims, repetition of questions, and asking  
18 Rose to speculate. (Exh. 95 at 94, 96, 99, 102, 112, 121-122,133.) In response to the  
19 State's objection, the court also asked defense counsel to ask questions in a proper form.  
20 (*Id.* at 127.) During the same part of the trial, the court also overruled several of the State's  
21 objections and granted defense counsel's continuing objection to the State's numerous  
22 objections. (Exh. 95 at 108, 113, 125, 127-128, 132.) Overall, the record of the state  
23 proceedings reflects the trial court's frustration with both sides rather than bias against  
24 Rose. (See, e.g., Exh. 95.)

25 In ground 9(F), Rose claims that trial counsel failed to object to the admission of  
26 Moore's interview, failed to properly object to and prevent Moore's testimony and failed  
27 to file a motion *in limine* to prevent Moore's improper speculations on Rose's credibility.  
28 (ECF No. 16 at 35.)

29 The Nevada Supreme Court affirmed the denial of this claim:

30 [A]ppellant argues that trial counsel was ineffective for failing to  
31 effectively prevent and cure a reference by State witness G. Moore to  
32 prejudicial polygraph evidence. Appellant failed to demonstrate that trial  
33 counsel was deficient or that he was prejudiced. Trial counsel objected and  
34 requested a mistrial when Moore mentioned the word "polygraph" in  
35 describing his training and experience. On direct appeal, this court  
36 concluded that the district court's admonishment to the jury cured any  
37 prejudice from this single "polygraph" reference and that a mistrial was not  
38

warranted. Rose, 123 Nev. at 206-07, 163 P.3d at 416-17. Thus, we conclude that the district court did not err in denying this claim.

(Exh. 182 at 7.)

Trial counsel filed a successful motion for *in camera* review of Moore's personnel records and also filed a motion to suppress Rose's statements to Moore and to challenge the voluntariness of Rose's statements, which, as discussed above, the trial court denied. (Exhs. 69, 71, 66, 81.) Rose has not set forth what other steps trial counsel should have taken. Especially in light of the pretrial motions, Rose has not demonstrated a reasonable probability of a different outcome at trial.

Finally, in ground 9, as 9(G) Rose argues that trial counsel failed to object to prosecutorial misconduct. (ECF No. 16 at 35-36.)

Rejecting this claim, the Nevada Supreme Court reasoned:

[A]ppellant argues that trial counsel was ineffective for failing to timely object to prosecutorial misconduct during closing argument. Specifically, he contends that the prosecutor improperly referred to him as a “predator,” stated that defense counsel used “smoke screens and flat-out deception” and “is trying to fool you,” and commented that the victims were “old enough to be believed, to be remembered, and to be given justice.” Appellant challenged these comments on direct appeal and this court concluded that the comments were not prejudicial and thus did not amount to plain error. [citing, Rose v. State, 123 Nev. 194, 208-11, 163 P.3d 408, 417-19 (2007).] Although appellant appears to contend that his appellate rights were forfeited by counsel’s failure to object, he offers no cogent argument as to how a different standard of review on appeal would have affected the outcome of either the trial or the appeal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Thus, we conclude that the district court did not err in denying the claim.

(Exh. 182 at 7.)

Rose has not shown that this decision is contrary to or an unreasonable application of *Strickland*. On direct appeal, the Nevada Supreme Court determined that the above comments were improper but that none were prejudicial and therefore none constituted plain error. Even assuming, *arguendo*, that defense counsel was ineffective for failing to object to these improper comments, Rose cannot demonstrate that, but for counsel's failure to object during closing arguments, there is a reasonable probability of a different outcome at trial. As detailed above, the jury heard the two girls testify extensively. In fact,

1 the jury acquitted Rose of all charges as to A.C. C.C. testified with particularity as to  
2 specific acts that Rose committed. State investigator Moore testified about his interview  
3 with Rose, including about the incidents that Rose fabricated to try to explain the charges.  
4 Moreover, the jury heard Rose testify to his innocence and heard his explanation for  
5 fabricating incidents.

6 Rose has, therefore, failed to show that the Nevada Supreme Court's decision on  
7 any portion of federal ground 9 is contrary to, or involves an unreasonable application of,  
8 *Strickland*, or was based on an unreasonable determination of the facts in light of the  
9 evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas  
10 relief is denied as to ground 9.

11 **C. Ground 10 Cumulative Error**

12 Rose argues that cumulative error warrants habeas relief. (ECF No. 16 at 36.) The  
13 Ninth Circuit has concluded that cumulative errors may warrant AEDPA relief if the errors  
14 taken together rise to a violation of the due process guarantee of fundamental fairness.  
15 *Parle v. Runnels*, 505 F.3d 922 (9<sup>th</sup> Cir. 2007).

16 On direct appeal, the state supreme court concluded:

17 Rose argues that his conviction must be reversed because of  
18 cumulative error. "The cumulative effect of errors may violate a defendant's  
19 constitutional right to a fair trial even though errors are harmless  
20 individually." If the defendant's fair trial rights are violated because of the  
21 cumulative effect of the errors, this court will reverse the conviction. The  
22 relevant factors to consider when deciding whether cumulative error  
23 requires reversal are "(1) whether the issue of guilt is close, (2) the quantity  
24 and character of the error, and (3) the gravity of the crime charged." Although  
25 the crimes charged are serious, the State presented compelling  
26 evidence of Rose's guilt and the few errors that we have discussed are  
minor. We hold that there is no cumulative error warranting reversal.

27 (Exh. 126 at 22.) Further, the Nevada Supreme Court affirmed the denial of Rose's  
28 postconviction petition, including a claim of cumulative error: "because [Rose] failed to  
demonstrate multiple deficiencies, he failed to demonstrate cumulative error." (Exh. 182  
at 8.)

27 This Court has denied habeas relief on the grounds set forth above. Having  
28 carefully reviewed the state-court record and the parties' arguments, this Court concludes

1 that Rose has not demonstrated any combination of errors that so infected the trial with  
2 unfairness as to make his conviction a denial of his due process rights. Ground 10 is,  
3 therefore, denied.

4 Accordingly, the petition is denied in its entirety.

5 **IV. CERTIFICATE OF APPEALABILITY**

6 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules  
7 Governing Section 2254 Cases requires this Court to issue or deny a certificate of  
8 appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within  
9 the petition for suitability for the issuance of a COA. *See 28 U.S.C. § 2253(c); Turner v.*  
10 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

11 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner  
12 "has made a substantial showing of the denial of a constitutional right." With respect to  
13 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would  
14 find the district court's assessment of the constitutional claims debatable or wrong." *Slack*  
15 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4  
16 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate  
17 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)  
18 whether the court's procedural ruling was correct. *Id.*

19 Having reviewed its determinations and rulings in adjudicating Rose's petition, the  
20 Court concludes that, pursuant to *Slack*, reasonable jurists could find its ruling on ground  
21 2 to be debatable or wrong. The Court therefore will issue a certificate of appealability for  
22 its resolution of ground 2 only.

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## **V. CONCLUSION**

It is therefore ordered that the first-amended petition (ECF No. 16) is denied in its entirety.

It is further ordered that a certificate of appealability is granted as to ground 2.

It is further ordered that the Clerk enter judgment accordingly and close this case.

DATED THIS 20<sup>th</sup> day of December 2016.

6.  
  
MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE