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DISTRICT COURT
CLARK COUNTY, NEVADA

BRANDON JEFFERSON,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-10-268351-1

Dept No: IV

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on August 3, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on August 4, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Chaunte Pleasant
Chaunte Pleasant, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 4 day of August 2016, I placed a copy of this Notice of Entry in:

☑ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Brandon Jefferson # 1094051
P.O. Box 1989
Ely, NV 89301

Matthew Lay, Esq.
732 South Sixth Street, Suite 102
Las Vegas, NV 89101

/s/ Chaunte Pleasant
Chaunte Pleasant, Deputy Clerk

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CLERK OF THE COURT

FCL
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRANDON JEFFERSON,
#2508991
Defendant.

CASE NO: **10C268351**

DEPT NO: **IV**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 19, 2016
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable KERRY EARLEY, District Judge, on the 19th day of May, 2016; the Petitioner not being present, represented by his counsel MATTHEW D. LAY, ESQ.; the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD E. ZADROWSKI, Chief Deputy District Attorney; and the Court having considered the matter, including briefs, transcripts, documents on file herein, and without arguments of counsel; now therefore, the Court makes the following findings of fact and conclusions of law:

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not made phone calls to Jefferson's family members as Jefferson asked; and 3) counsel failed to obtain Jefferson's work records. After a discussion, the Court verbally denied the Motion. A written order then followed on November 1, 2011.

On November 16, 2011, the State filed a Second Amended Information which included the same substantive charges and minor grammatical/factual corrections.

On July 16, 2012, the State filed a Motion in Limine to Preclude Improper Testimony from Defendant's Expert Witness. Primarily, the Motion argued that defense expert Dr. Chambers could not argue about Jefferson's psychiatric state during his interview with Dr. Chambers, as the State would not have a fair opportunity to rebut the "state of mind" evidence. Alternatively, the State requested a psychiatric evaluation of Defendant. Defense counsel then informed the Court, on July 26, 2012, that it did not intend to present such evidence. Accordingly, the Court denied the State's Motion as moot.

Jury selection began on July 30, 2012. On August 1, 2012, the jury was sworn and Jefferson's jury trial began. A week later, the jury retired to deliberate. Two hours later, the jury found Jefferson guilty of Counts 1, 2, 4, 9, and 10, and not guilty of Counts 3, 5, 6, 7, and 8.[3]

On October 23, 2012, Jefferson appeared with counsel for a sentencing hearing. At the outset, the parties discussed whether Counts 1 and 2 merged, and the State informed the Court that it was not opposed to dismissing Count 2. The Court then adjudicated Jefferson guilty pursuant to the jury's verdict and entertained argument from the State and defense counsel. The Court then sentenced Jefferson to a $25 Administrative Assessment Fee, $150 DNA Analysis Fee, and incarceration in the Nevada Department of Corrections as follows: Count 1 – Life with parole eligibility after 35 years; Count 4 – Life with parole eligibility after 10 years, to run concurrent with Count 1; Count 9 – Life with parole eligibility after 35 years, to run consecutive with Counts 1 and 4; and Count 10 – Life with parole eligibility after 35 years, to run concurrent with Counts 1, 4, and 9, with 769 days' credit for time served. The Court also ordered Jefferson to pay $7,427.20 in restitution, and held that if he were released from

[3] The State voluntarily dismissed Count 11 on August 7, 2012, and the relevant jury instructions and verdict form were amended accordingly.

prison, Jefferson would be required to register as a sex offender pursuant to NRS Chapter 179D, and would be subject to lifetime supervision pursuant to NRS 179.460.

The Court filed a Judgment of Conviction on October 30, 2012, and Jefferson filed a Notice of Appeal on November 14, 2012. In a lengthy unpublished order, the Nevada Supreme Court affirmed Jefferson's Convictions and Sentence, reasoning that none of his 11 contentions of error were meritorious. Jefferson v. State, No. 62120 (Order of Affirmance, July 29, 2014). In particular, the Nevada Supreme Court ruled that the Court did not err by denying Jefferson's Motion to Suppress Unlawfully Obtained Statement because Jefferson was properly read his Miranda rights, the discussion with detectives was appropriate and not coercive, and the detectives' allegedly "deceptive interrogation techniques," were neither coercive nor likely to produce a false confession. Id. at 3-4. The Supreme Court further rejected Jefferson's allegations of prosecutorial misconduct and held that the Court did not abuse its discretion by admitting evidence of jail phone calls between Jefferson and his wife, admitting testimony from the victim's mother and brother about the sexual abuse, or declining to give Jefferson's proposed jury instructions. Id. at 5-10; 13-14. Finally, the Supreme Court held that sufficient evidence supported the jury's verdict because "the issue of guilt was not close given the overwhelming evidence presented by the State." Id. at 11-12, 16. Thereafter, remittitur issued on August 26, 2014.

On October 2, 2014, Jefferson filed, in proper person, a timely Post-Conviction Petition for Writ of Habeas Corpus. Shortly thereafter, the State filed a Motion to Appoint Counsel, reasoning that that it was in everyone's best interest to appoint counsel to assist Jefferson in post-conviction matters. The Court granted the Motion and Attorney Matthew Lay confirmed as counsel on October 28, 2014. That same day, the Court set a briefing schedule.

On December 22, 2015, Jefferson filed, with the assistance of counsel, a Supplemental Petition for Writ of Habeas Corpus. On April 5, 2016, the State filed its Response to both the original Petition and the Supplemental Petition. On May 19, 2016, the Court denied Jefferson's Petition and Supplemental Petition.

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PETITION ARGUMENTS

I. JEFFERSON'S GROUNDS 1 AND 2 REGARDING HIS CONFESSION TO DETECTIVES ARE BARRED BY THE LAW-OF-THE-CASE DOCTRINE

"Under the law of the case doctrine, issues previously determined by [the Nevada Supreme Court] on appeal may not be reargued as a basis for habeas relief." Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001). See also Dictor v. Creative Mgmt. Servs., LLC, 126 Nev., Adv. Op. 4, 223 P.3d 332, 334 (2010) ("The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequence proceedings in that case."). Here, this Court finds that Jefferson's first and second arguments in his Pro-Per Petition regarding admission of his incriminating statements to the detectives were already raised and thoroughly briefed in his direct appeal. Compare Petition at 5-7 with Jefferson's Opening Appellate Brief ("AOB") at 6-15. The Nevada Supreme Court rejected his argument, reasoning that "the circumstances show Jefferson voluntarily waived Miranda," Jefferson v. State, No. 62120 at 4 n.1, and that "substantial evidence supported the district court's conclusion that Jefferson's confession was voluntary." Id. at 3.

Thus, because the Nevada Supreme Court already considered and rejected Jefferson's argument regarding Miranda, as well as his related argument regarding coercion, this Court finds that the law-of-the-case doctrine bars Jefferson from rearguing those issue in his Petition for a Writ of Habeas Corpus. As such, Grounds 1 and 2 are denied.

II. JEFFERSON'S ARGUMENTS REGARDING PROSECUTORIAL MISCONDUCT ARE WAIVED AND BARRED BY THE LAW OF THE CASE

In Ground 3, Jefferson contends that the State committed prosecutorial misconduct in four instances. This Court finds that his contention, namely, that the State "[i]mpermissably led CJ's testimony," Petition at 10, is barred by the law of the case because the Nevada Supreme Court already rejected his "contentions of prosecutorial misconduct." Jefferson v. State, No. 62120 at 6 n.2; AOB 21-22. Jefferson raised this exact issue in his opening brief and it was rejected by the Nevada Supreme Court.

In addition, this Court finds that all of the Jefferson's arguments regarding prosecutorial misconduct are waived and must be dismissed pursuant to NRS 34.810, which provides:

> The court *shall* dismiss a petition if the court determines that:
>
> . . .
>
> The petitioner's conviction was the result of a trial and the grounds for the petition could have been: (1) Presented to the trial court; (2) Raised in a direct appeal or a prior petition for writ of habeas corpus or post conviction relief; or (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

(Emphasis added); see also Great Basin Water Network v. State Eng'r, 126 Nev., Adv. Op. 20, 234 P.3d 912, 916 (2010) ("'[S]hall' is a term of command; it is imperative or mandatory, not permissive or directory."); Evans v. State, 117 Nev. 609, 646-647, 29 P.3d 498, 523 (2001) ("A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner."). Indeed, the Nevada Supreme Court has held that all "claims that are appropriate[4] for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Accordingly, this Court finds that Jefferson's arguments regarding prosecutorial misconduct should have been raised, if at all, on direct appeal, and his failure to do so precludes review because his arguments are considered waived. Id.; NRS 34.810(1)(b)(2). Further, this Court finds that because Jefferson fails to offer any good cause to excuse his failure to raise these particular arguments on direct appeal, Ground 3 is denied.

III. JEFFERSON'S ALLEGATIONS OF EVIDENTIARY ERROR ARE ALSO WAIVED AND BARRED BY THE LAW OF THE CASE

In Ground 4, Jefferson argues that the Court abused its discretion by "tainting the jury," admitting admissible hearsay, and permitting jurors to learn that Jefferson was incarcerated. Petition at 13-15.

[4] Claims of ineffective assistance of counsel must be raised in the first instance in post-conviction proceedings. Pellegrini, 117 Nev. at 882, 34 P.3d at 534. Other non-frivolous, properly preserved contentions of error are appropriate for appeal.

Jefferson alleges that the jury venire was tainted after the Court made, in reference to the difficult nature of the charges involved in this case, a broad statement to the effect that no one likes violence or sexual offenses. Petition at 13. In context, the purpose of the statement was not to voice a "professional opinion" on the matter, but to clarify that a juror is not disqualified simply because he or she has understandable negative feelings about violence and sexual offenses. This Court finds that because Jefferson could have raised this issue on direct appeal but failed to do so, it is waived and must be dismissed. See NRS 34.810(1)(b)(2).

Jefferson's second argument focuses on testimony from CJ's mother and brother regarding CJ's statements to them about the sexual abuse perpetrated by Jefferson. Jefferson previously raised this issue in his direct appeal, AOB 37-41, and the Nevada Supreme Court rejected the argument as meritless. Jefferson v. State, No. 62120 at 9-10. As such, this Court finds that the law-of-the-case doctrine bars Jefferson from rearguing this issue in the instant Petition. Pellegrini, 117 Nev. at 888, 34 P.3d at 538.

The third and final argument in this section alleges that jurors wrongfully learned of Jefferson's incarceration because of admission of phone calls between Jefferson and his wife, the victim's mother. Petition at 15. Jefferson previously raised this issue on direct appeal, AOB 27-30, and while the Nevada Supreme Court held that portions of the calls were more prejudicial than probative, it held that any error in admitting the calls was harmless. Jefferson v. State, No. 62120 at 6-7. In so holding, the Supreme Court focused on the use of inflammatory language and the clear anguish in Jefferson's wife's voice. Id. It did not, however, give credence to Jefferson's arguments that the phone calls erroneously permitted jurors to learn that he was incarcerated. Id. As such, this Court finds that this argument is without merit because the Nevada Supreme Court found no error in the admission of the calls and any argument that his incarceration status undermined his presumption of innocence was undermined by the trial judge's repeated verbal and written instructions that Jefferson was innocent until proven guilty. Glover v. Eighth Judicial Dist. Court of Nev., 125 Nev. 691, 719, 220 P.3d 684, 703 (2009) (Courts presume that juries will follow instructions). Further, this Court finds that the law-of-the-case doctrine bars Jefferson from rearguing this issue in the

instant Petition. Pellegrini, 117 Nev. at 888, 34 P.3d at 538. As such, Ground 4 is denied.

IV. JEFFERSON'S ARGUMENTS REGARDING DOUBLE JEOPARDY AND/OR REDUNDANCY ARE WAIVED AND BARRED BY THE LAW OF THE CASE

In Ground 5, Jefferson argues that he was wrongfully convicted and sentenced in violation of Double Jeopardy and/or Nevada's redundancy doctrine because the evidence of at trial was non-specific. Petition at 16.

This Court finds that this argument is waived because Jefferson could have raised it on direct appeal but failed to do so. See NRS 34.810(1)(b)(2); Franklin, 110 Nev. at 752, 877 P.2d at 1059.

Further, this Court finds that Jefferson's argument also fails because of the law-of-the-case-doctrine as the Nevada Supreme Court affirmed Jefferson's Judgment of Conviction in its entirety because evidence supporting the jury's verdict was "overwhelming." Jefferson v. State, No. 62120 at 16; see also id. at 12 ("[A] rational trier of fact could have found Jefferson guilty of three counts of sexual assault and one count of lewdness beyond a reasonable doubt."). Moreover, while Jefferson claims that the evidence was "non-specific," the Nevada Supreme Court found that "CJ testified with specificity as to four separate occasions of sexual abuse." Id. at 11. Thus, this Court finds that Jefferson cannot reargue this issue in the instant Petition. Pellegrini, 117 Nev. at 888, 34 P.3d at 538. As such, Ground 5 is denied.

V. JEFFERSON CANNOT REARGUE SUFFICIENCY OF THE EVIDENCE

In Ground 6, Jefferson alleges insufficient evidence largely because "CJ's testimony was without independent details." Petition 17. This Court finds that this argument is without merit because the Nevada Supreme Court has "repeatedly held that the testimony of a sexual assault victim alone is sufficient to uphold a conviction." LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992); see also Gaxiola v. State, 121 Nev. 633, 648, 119 P.3d 1225, 1232 (2005). Moreover, this Court finds that Jefferson's argument also fails because the Nevada Supreme Court rejected the same argument on appeal, reasoning that "the issue of guilt was not close given the overwhelming evidence presented by the State." See Jefferson v. State, No. 62120 at 11-12; 16; see also Pellegrini, 117 Nev. at 888, 34 P.3d at 538 ("[I]ssues

previously determined . . . on appeal may not be reargued as a basis for habeas relief."). Thus, Ground 6 is denied.

VI. JEFFERSON RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In Jefferson's Ground 7 and the subsequent Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), Jefferson raises multiple grounds of ineffective assistance of trial counsel.

A. A Rigorous Two-Prong Test Applies To Ineffective Assistance Of Counsel Claims

"[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, ___ U.S. ___, ___, 131 S. Ct. 1388, 1403 (2012) (internal quotation marks and citation omitted); see also Jackson v. Warden, Nev. State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) ("Effective counsel does not mean errorless counsel"). To prevail on a claim of ineffective assistance of counsel, a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first, that his counsel's representation fell below an objective standard of reasonableness, and second, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068. This Court need not consider both prongs, however if a defendant makes an insufficient showing on either one. Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2052. Indeed, the question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common

custom." Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 788 (2011); see also Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). Accordingly, the role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In doing so, courts begin with the presumption of effectiveness and the defendant bears the burden of proving, by a preponderance of the evidence, that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004) (holding "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.").

Further, even if counsel's performance was deficient, "it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 562 U.S. at 104, 131 S. Ct. at 787 (quotation and citation omitted). Instead, the defendant must demonstrate that but for counsel's incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-12, 131 S. Ct. at 791-92 (internal quotation marks and citations omitted). All told, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "A petitioner for post-conviction relief cannot rely on conclusory claims for relief." Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002). Instead, the petition must set forth specific factual allegations that are not belied by the record,

and if true, would entitle the petitioner to relief. See NRS 34.735; Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). For the foregoing reasons, this Court finds that none of Jefferson's contentions of error, including his arguments in the Supplemental Petition, satisfy this standard.

GROUND 7(A) – Jefferson faults counsel for failing to file a Motion in Limine to prohibit Dr. Vergara from testifying outside her area of expertise. Petition at 21. He also states, in general, that counsel was unwilling to "develop a working relationship with the petitioner and prepare for trial." Id.

This Court finds that Jefferson's first argument fails because motion practice is a strategic matter that is virtually unchallengeable. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable."); Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991) ("[T]his court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion. This remains so even if better tactics appear, in retrospect, to have been available."). Moreover, this Court finds that Jefferson does not demonstrate how he was prejudiced by counsel's decision not to file the Motion in Limine, especially given the Nevada Supreme Court's holding that any errors with regard to Dr. Vergara were harmless. Jefferson v. State, No. 62120 at 8-9; see also Molina, 120 Nev. at 192, 87 P.3d at 538 (holding that petitioners must demonstrate how they were prejudiced by alleged errors).

Further, this Court finds that Jefferson's other claims fail because "[a] petitioner for post-conviction relief cannot rely on conclusory claims for relief." Colwell, 118 Nev. at 812, 59 P.3d at 467; see also NRS 34.735; Hargrove, 100 Nev. at 502, 686 P.2d at 225 (holding that a petition must set forth specific factual allegations that are not belied by the record, and if true, would entitle the petitioner to relief). Further, the Sixth Amendment does not guarantee a "meaningful relationship" between a defendant and his counsel, only that counsel be effective. Morris v. Slappy, 461 U.S. 1, 13, 103 S. Ct. 1610, 1617 (1983).

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As such, this Court finds that this claim is also nothing more than a conclusory claim for relief without any supporting facts. As such, this Court denies this claim.

GROUND 7(B) – Jefferson alleges trial counsel was ineffective for moving to omit CJ's statement to police and that defense counsel "misinterpreted" NRS 51.385. Both of these arguments apparently relate to the April 13, 2011, Motion in which counsel moved, on Jefferson's behalf, to preclude alleged testimonial statements CJ made to her mother and law enforcement regarding the sexual abuse. In support of his argument, Jefferson cites to portions of of CJ's voluntary statement to law enforcement to support his contention that law enforcement forced CJ to "fabricate allegations to effect an arrest." Petition at 21. This Court finds that Jefferson's contentions fail because they boil down to strategic decisions.

Jefferson cites to only 5 pages out of the total 29 page voluntary statement CJ gave to police. However, a read of the entire statement reveals that after the initial denial by the 5 year-old victim, once detectives revealed that they were aware of CJ's disclosure to her mother, CJ immediately proceeded to disclose the sexual abuse perpetrated by Jefferson. See Ex. 1, CJ's Statement to LVMPD, filed December 8, 2011, with the Court; see also Evidentiary Hearing Transcript, December 8, 2011, pp. 31-54. CJ disclosed to detectives that Jefferson made her perform oral sex on Jefferson and that "liquid" came out of his penis, Jefferson made CJ touch his penis, also that Jefferson put his privates in her privates and that she cried because it hurt. See Ex. 1, CJ's Statement to LVMPD, filed December 8, 2011, with the Court. Thus, this Court finds that defense counsel made the strategic decision to fight the admission of these statements and was successful.[5] Defense counsel did not misinterpret NRS 51.385 and never improperly shifted the burden. Instead, this Court finds that defense counsel made the strategic decision to oppose the admission of the CJ's disclosure to detectives. Davis, 107 Nev. at 603, 817 P.2d at 1171; Dawson, 108 Nev. at 117, 825 P.2d at 596. Moreover, this Court finds that Jefferson does not demonstrate how he was prejudiced by counsel's decision. Had the statement been used, the jury would have heard that this 5 year-old victim initially stated

[5] The Court precluded the statements to law enforcement; however, granted admission of the statements to CJ's mother subject to CJ's availability. See Order Partially Denying Jefferson's Motion to Preclude 51.385 Testimony and Order Denying State's Oral Motion to Terminate Jefferson's Outside Privileges, filed Jan. 17, 2012.

nobody touched her private areas, but upon being told that detectives already knew what CJ had told her mother, CJ went into detail about the sexual abuse committed against CJ. As such, this Court denies this claim.

GROUND 7(C) – Jefferson alleges trial counsel was ineffective for failing to object and/or move for a new jury panel and/or failing to move for a mistrial based on the District Court's question during jury voir dire. Jefferson argues that trial counsel should have objected and/or moved for a new jury panel and/or moved for a mistrial when the Court asked the panel, "How many of you like child molestation? I am not going to get people raising their hands to that." However, this Court finds that Jefferson's argument fails.

In context, the purpose of the statement was not to voice any sort of opinion on the matter, but to clarify that a juror is not disqualified simply because he or she has understandable negative feelings about violence and sexual offenses. While the State individually questioned Prospective Juror No. 245, she indicated, "I have a real problem with the charges." Trial Transcript ("TT") July 30, 2012, p. 126, 23-24. She went on to indicate, "[I]n my mind, that's one of the worst charges. I mean, anything else, I could probably look at it openly, but not when children are involved." Id. at p. 127, 8-11. As a result, the prosecutor asked anybody that had strong feelings should raise his or her hand so that she could discuss this issue with the prospective juror(s). Id. at p. 128, 2-7. The prosecutor then asked a series of questions to Prospective Juror No. 245 regarding the presumption of innocence. Id. at p.128 lines 15-25, pp. 129-30. It was in this context that the Court stated to Prospective Juror No. 245:

> It's kind of like what I talked about earlier, is there's nobody -- if I'm going to ask the question, how many of you like violence? How many of you like rape? How many of you like child molestation? How many -- you know, I'm not going to get people raising their hand in response to that.
> But as Ms. Fleck just clearly covered, it's just an accusation. And you said you believed you'd be able to keep an open mind and listen to the – listen to the testimony before you came to any conclusions. Would you be able to deliberate with your fellow jurors toward reaching a verdict?

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> ****
> I think you changed your position kind of during the questioning, so that's why I went back over it to clarify with you. You have not heard one word of testimony, nor seen one piece of evidence at this point.
>
> ****
> Are you saying that you're entirely close-minded and unable to deliberate?

Id. at p. 131, lines 2-12.

Thus, in this context, the Court was merely establishing that at this stage in the proceeding, the criminal charges were only an accusation and that the relevant inquiry was whether the potential juror could keep an open mind while listening to the evidence. Contrary to Jefferson's assertion, this Court finds that this statement was not prejudicial. It was understandable that none of the prospective jurors would like violence or child molestation, but that was not the relevant inquiry and the Court was emphasizing this to Prospective Juror No. 245.

Because there was no wrongdoing by the Court, this Court finds that any objection by counsel and/or any request for a new jury panel and/or moving for a mistrial by defense counsel would have been futile. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments.). Moreover, this Court finds that Jefferson does not demonstrate how he was prejudiced by counsel's decision not to raise this issue. As such, this Court denies this claim.

GROUND 7(D) – Jefferson alleges that trial counsel was ineffective for failing to impeach CJ with a prior inconsistent statement. This argument is related to supra Ground 7(B). This Court finds that Jefferson's contention fails because this again boils down to a strategic decision. Defense counsel did not elicit that when 5 year-old CJ initially sat down with two detectives, she stated nobody had touched her privates. This was because then the State would have been able to elicit the rest of the statement where CJ disclosed to detectives that Jefferson made her perform oral sex on Jefferson and that "liquid" came out of his penis, Jefferson made CJ touch his penis, also that Jefferson put his privates in her privates and that she cried because

it hurt. See Ex. 1, CJ's Statement to LVMPD, filed December 8, 2011, with the Court.

Thus, this Court find that defense counsel made the strategic decision to not attempt to impeach the 5 year-old victim which very well may have backfired with the jury and would have opened the door for the State to introduce the entirety of CJ's statement. See Davis, 107 Nev. at 603, 817 P.2d at 1171; Dawson, 108 Nev. at 117, 825 P.2d at 596. Moreover, this Court finds that Jefferson does not demonstrate how he was prejudiced by counsel's decision. As such, this Court denies this claim.

GROUND 7(E) – Jefferson alleges that trial counsel was ineffective for failing to confront Dr. Vergara regarding not conducting a sexual assault kit. Specifically, Dr. Vergara testified that a sexual assault examination should be done no later than 72 hours after the trauma, in fact "the sooner the better" or "probably even sooner" than 72 hours. TT, Aug. 2, 2012, p. 7, 23-25; p. 8; p. 9, 1-3. Jefferson references an EMT report (which would have been taken the day CJ went to the hospital on September 14, 2010) where medical personnel indicated that Jefferson last assaulted CJ on September 11, 2010. However, this Court finds that defense counsel had no basis to "confront" Dr. Vergara for not conducting a sexual examination kit.

A reading of CJ's entire statement to police reveals that CJ disclosed that the last time Jefferson made CJ perform oral sex on him or that Jefferson sexually assaulted CJ was "a week and 2 days ago." See Ex. 1, CJ's Statement to LVMPD, filed December 8, 2011, with the Court. Thus, there would have been no reason for Dr. Vergara to perform a sexual assault kit on CJ given that the last time Jefferson sexually assaulted CJ was well outside of the 72 hours. This information is also corroborated by CJ's mother's statement to detectives who never told law enforcement that CJ had been assaulted as recently as September 11, 2010. See Ex. 1, CJ's mom's Statement to LVMPD, filed December 8, 2011, with the Court. Additionally, CJ's and CJ's mother's testimony do not support this contention. TT, Aug. 2, 2012, pp. 41-78; TT, Aug. 3, 2012, pp. 10-45. Further, Detective Demas testified that CJ disclosed that the last time she had been sexually abused had been "approximately seven or eight days, so over the five-day period." TT, Aug. 6, 2012, p. 44, 11-16. Based on that information, Detective Demas advised

against doing a sexual assault kit. Id. at 17-25. Defense counsel successfully moved for inclusion of the report writer's testimony regarding the statement in question. TT, Aug. 8, 2012, pp. 27-35.

Based on all the witness' statements and testimony, this Court finds that defense counsel had no basis to confront Dr. Vergara for not doing a sexual assault kit on CJ. Any such attempt would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, this Court finds that Jefferson has failed to demonstrate how he was prejudiced by this. Any attempt to confront Dr. Vergara would have been successfully objected to. As such, this Court denies this claim.

GROUND 7(F) – Jefferson alleges that trial counsel was ineffective for failing to move for a continuance to "investigate" jail calls admitted into evidence. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. Jefferson sets forth nothing more than a bare allegation that other jail calls would have somehow shown that CJ's mother was on his side and this would have put the State in an "awkward position." Petition at 23.

On August 6, 2012, defense counsel attempted to preclude admission of *all* of the jail calls by filing a Motion in Limine for an Order Preventing the State from Introducing Unlawfully Recorded Oral Communications. Thus, this Court finds that defense counsel made the strategic decision to attempt to preclude admission of *all* of the jail calls by arguing that there was an expectation of privacy at the time the calls were made. As such, this Court finds that defense counsel cannot be faulted for the strategic decision to attempt to keep out all jail calls because if they had been successful, Jefferson's argument would be moot as counsel would have successfully precluded admission of all jail calls. Davis, 107 Nev. at 603, 817 P.2d at 1171; Dawson, 108 Nev. at 117, 825 P.2d at 596.

Moreover, this Court finds that Jefferson fails to demonstrate how he was prejudiced by not being able to introduce this alleged information. For the aforementioned reasons, this Court denies this claim.

GROUND 7(G) – Jefferson alleges that trial counsel was ineffective for failing to challenge the lewdness conviction because the only evidence presented to support this conviction was Jefferson's confession to detectives. Because this issue was raised on appeal by and it failed, this Court finds that any effort by trial counsel to attempt to challenge the lewdness count would have been futile as the Nevada Supreme Court found that there was sufficient evidence to support the jury's verdict. Jefferson v. State, No. 62120 at 11-12; see also Ennis, 122 Nev. at 706, 137 P.3d at 1103. Indeed, the Nevada Supreme Court found that the "issue of guilt was not close given the overwhelming evidence presented by the State." Jefferson v. State, No. 62120 at 16.

Further, the jury heard more than just Jefferson's confession. The jury also heard CJ's own testimony about 4 separate occasions of sexual abuse—three in Jefferson's bedroom and one in her own bedroom. CJ testified that on each of the three occasions in the master bedroom, Jefferson put his penis in her mouth, vagina, and anus and on the fourth occasion, in her bedroom, Jefferson put his penis in her mouth and vagina. Further, the jury heard from CJ's mother about CJ's initial disclosure, also about an instance when Jefferson seemed eager for CJ's mother to go to bed and for CJ to stay up with Jefferson—CJ's mother later found a sad, disoriented CJ standing in a dark bedroom (consistent with CJ's testimony of sexual abuse). The jury also heard from CJ's brother who testified how Jefferson would take CJ into his bedroom while their mother was at work and on 1 occasion, heard CJ crying from the master bedroom—again, this was consistent with CJ's testimony regarding the abuse. The jury also heard jail calls, Jefferson's letters to CJ's mother after his arrest, and the 911 call Jefferson made the day that he was arrested. All of these things corroborated CJ's testimony of sexual abuse. Thus, this Court finds that the jury did not solely rely on Jefferson's confession and Jefferson's argument is belied by the record. Further, this Court finds that any argument by defense counsel would have been futile. As such, Jefferson's this claim is denied.

GROUND 7(H) – Jefferson alleges that trial counsel was ineffective for failing to raise sufficiency of the evidence at trial. Jefferson raises multiple other issues within this ground as well: the fact that the State "led" CJ's testimony, the State used perjured testimony from

detectives, trial counsel failed to establish that detectives produced a false complaint and that trial counsel did nothing more than stand beside him "while the prosecuting attorneys manipulated the court and the jurors." Petition at 23.

First, to the extent Jefferson argues that trial counsel was ineffective for failing to raise the issue of sufficiency of the evidence, Jefferson neglects to say exactly what counsel should have done to raise this issue. This issue was raised on appeal and was unsuccessful, as such, this Court finds that any attempt by trial counsel to raise this issue would have been futile as it would have been denied. Jefferson v. State, No. 62120 at 11-12 (Order of Affirmance finding that there was sufficient evidence to support all Jefferson's convictions); see also Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Second, the remainder of Jefferson's issues are either not cognizable in their current form as permissible claims in a post-conviction petition for writ of habeas corpus or are not sufficiently articulated as claims of ineffective assistance of counsel. Jefferson takes issue with the State allegedly leading the victim during their examination of CJ and/or with using perjured testimony from law enforcement; however, this Court finds such substantive claims are deemed waived. These argument are waived because Jefferson could have raised them on direct appeal but failed to do so. See NRS 34.810(1)(b)(2); Franklin, 110 Nev. at 752, 877 P.2d at 1059.

In the form of ineffective assistance of counsel claims, this Court finds that Jefferson's claim is a non-specific bare allegations that does not support his claims. Hargrove, 100 Nev. at 502, 686 P.2d at 225. A close reading of CJ's testimony reveals that defense counsel objected repeatedly throughout her examination on the basis of "leading" or that the answer was suggested in the question. Also, appellate counsel raised this issue on appeal. See AOB at 21-22.[6] Jefferson fails to set forth exactly what more trial counsel should have done that would have changed the outcome of his case. In terms of Jefferson's allegation that the State used perjured testimony from detectives, this Court finds that this is a bare allegation that does not warrant relief.

[6] To the extent Jefferson raised the issue of the State leading CJ on direct appeal as prosecutorial misconduct, this issue could be barred by law-of-the-case. Pellegrini, 117 Nev. at 888, 34 P.3d at 538.

Third, Jefferson claims that counsel failed to establish that "detectives produced a false complaint, which explains no medical signs of abuse;" this Court finds that this claim should have been raised, if at all, on direct appeal and is now waived. To the extent Jefferson claims this is ineffective assistance of counsel, this Court finds that the claim is bare and lacking any specific facts or argument. Again, the Nevada Supreme Court found overwhelming evidence of guilt. Further, there was no need for law enforcement or the State to produce "medical signs of abuse" to prove an allegation of sexual abuse. LaPierre, 108 Nev. at 531, 836 P.2d at 58; see also Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (The Nevada Supreme Court has "repeatedly held that the testimony of a sexual assault victim alone is sufficient to uphold a conviction."). Thus, this Court finds that Jefferson errs in arguing that the State needed to set forth medical signs of abuse before prosecuting this case.

Moreover, this Court finds that Jefferson does not demonstrate how he was prejudiced by counsel's decisions set forth in Ground 7(H). As such, based on the foregoing, this claim is denied.

GROUND 7(I) – Jefferson alleges that he was prejudiced by the Court's failure to remove trial counsel from representing Jefferson based on a conflict of interest. Specifically, Jefferson argues that because he filed a bar complaint against trial counsel prior to trial that this created a conflict of interest. This argument is more thoroughly briefed in Jefferson's Supplemental Petition for Writ of Habeas Corpus.

The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. Coleman v. State, 109 Nev. 1, 3, 846 P.2d 286, 277 (1993) (citing Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992)). In order to demonstrate an error based on a conflict of interest, a defendant must show that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980)). A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Nev. R. Prof'l Conduct 1.7(a). A concurrent conflict of exists if there is a significant risk that the representation of one or more clients will be materially limited by a

personal interest of the lawyer. See Nev. R. Prof'l Conduct 1.7(a)(2).

Here, this Court finds that Jefferson fails to show how trial counsel was limited by a "personal interest." Jefferson sets forth only that because he filed a bar complaint, this automatically created a conflict and that unless Jefferson waived this conflict, trial counsel could not continue to represent him. However, Jefferson fails to cite to *any* authority that an unsubstantiated bar complaint, along with other complaints about representation, creates an actual conflict that required any sort of waiver by Jefferson.

Further, this Court finds that Jefferson has not shown error based on a conflict of interest because he has not shown that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler, 446 U.S. at 348, 100 S. Ct. 1708). Instead, Jefferson cites to authority which is either not relevant to Jefferson's case or position in an attempt to convince this Court that there was an actual conflict in Jefferson's case that required him to waive such a conflict.

Here, Jefferson submitted a bar complaint received by the Nevada State Bar where the Bar apparently received it on October 18, 2011. Jefferson stated in the complaint that he was "having a bit of an issue" with his attorney. Exhibit A attached to Supplemental Petition. "A bit of an issue" is not an actual conflict. Jefferson goes on to say that when his attorney visited him, he "either 'lightly' verbally abuses him or ignores his outlook." Id. Jefferson then alleges that trial counsel told him on October 11, 2011, that "people like [Jefferson] belong in hell not prison." Id. Jefferson then went on to speculate why trial counsel allegedly made this comment, it could be due either to the serious charges Jefferson was facing of sexually assaulting his 5 year-old daughter or because Jefferson is African-American. Id. Notably, in Jefferson's Motion to Dismiss Counsel and Appoint Alternate Counsel filed on October 19, 2011, Jefferson never stated this at all. Even if the Motion was drafted prior to October 11, 2011, at the hearing for Jefferson's Motion, which post-dated the alleged bar complaint, Jefferson never once raised this issue. TT, Nov. 1, 2011, p.3.

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Instead, Jefferson took the opportunity he had to alert the Court as to the issues with trial counsel to raise three issues regarding why he wanted new counsel: 1) trial counsel failed to subpoena employment records; 2) trial counsel failed to call Jefferson's family members; and he failed to provide Jefferson with the full discovery in the case. Id. Yet, Jefferson expects this Court to believe that trial counsel made the statement, "people like [Jefferson] belong in hell not prison," yet he never once mentioned this to the Court when he had the chance.

Further, in his own exhibits to his instant Petition, Jefferson attached two letters he allegedly sent to Clark County Public Defender Phil Kohn. However, again, he never raised this statement in the letters to Kohn. Instead, Jefferson raises issues regarding trial strategy. The letters to Kohn are dated March 28, 2012, and May 22, 2012—well after the alleged statement was made.

Jefferson never filed any sort of motion with the Court nor did he ever raise the issue. Again, Jefferson expects this Court to believe that trial counsel made this statement when he never raised it with the Court nor with Kohn. There is no indication that trial counsel was even aware that Jefferson allegedly sent these letters to Kohn.

At the hearing on Jefferson's Motion, trial counsel stated that despite Jefferson filing his Motion, he wanted "what's best for [Jefferson]." TT, Nov. 1, 2011, p.2. Further, the Nevada Supreme Court held that Jefferson's conflict with counsel was "minimal" and easily resolved. Jefferson v. State, No. 62120 at 15. As such, this Court finds that Jefferson has not shown error based on a conflict of interest because he has not shown that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Thus, this Court denies this claim.

VII. JEFFERSON RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

For claims of ineffective assistance of appellate counsel, the prejudice prong is slightly different. Jefferson must demonstrate that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1997); Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004). Appellate counsel is not

required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751-54, 103 S. Ct. 3308, 3312-14 (1983). After all, appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

GROUND 8(A) – Jefferson alleges that appellate counsel was ineffective for failing to adequately present "Miranda violations." Petition at 25. However, Jefferson fails to set forth exactly what it is that appellate counsel should have raised. Jefferson alleges that appellate counsel should have raised other alleged issues related to Jefferson's confession such as that he was never read his Miranda rights. However, contrary to Jefferson's claim, Detectives did give Jefferson his Miranda rights prior to questioning him, thus, Jefferson's claim is belied by the record. Jefferson v. State, No. 62120 at 3.

Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones, 463 U.S. at 751-54, 103 S. Ct. at 3312-14. Because Jefferson was read his Miranda rights, this Court finds that trial counsel and then appellate counsel raised the issue they thought was best in relation to the confession. Moreover, appellate counsel did raise the issue that Jefferson did not properly waive his Miranda rights; however, the Nevada Supreme Court concluded that this argument lacked merit. Jefferson v. State, No. 62120 at 4, fn.1. Thus, this Court finds that any claim that Jefferson did not understand he was in police custody would have been unsuccessful. Again, appellate counsel raised the best issue given the facts surrounding Jefferson's confession and this Court finds that counsel cannot be faulted for not raising every colorable argument Jefferson believes appellate counsel should have raised. Further, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

GROUND 8(B) – Jefferson alleges that appellate counsel was ineffective for failing to present that the State knowingly used perjured testimony through Detective Katowich. Jefferson cites to two pages of Katowich's testimony wherein he testified that CJ in fact did have a forensic interview. This Court finds that Jefferson's allegation is bare and does not

warrant relief. Further, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

Jefferson also argues that appellate counsel failed to "direct the court to the fact that the prosecution suborned perjury by forcing CJ to change testimony to prove guilt of the petitioner." Petition at 26. This Court finds that appellate counsel cannot be faulted for not raising a meritless, unsubstantiated allegation. Appellate counsel did raise the issue of prosecutorial misconduct alleging that the State had impermissibly, repeatedly led CJ and "supplied the preferred answers." See AOB at 21-22. This Court finds that Jefferson fails to set forth what more appellate counsel should have raised. Moreover, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

GROUND 8(C) – Jefferson alleges that appellate counsel was ineffective for failing to adequately present the issue of the denial of his pro se Motion to Dismiss Counsel and Appoint Alternate Counsel. Jefferson alleges that appellate counsel should have elaborated in the argument that the State also made argument during the hearing on Jefferson's Motion and was "culpable in the ineffective assistance of counsel." Petition at 27.

This Court finds that Jefferson's argument is meritless and belied by the record. The State did not argue during this hearing. Upon review of the transcript related to Jefferson's Motion, there is 1 paragraph in the 6 pages of argument (the remainder of the transcript does not pertain to Jefferson's Motion) attributable to the State. TT, Nov. 1, 2011, p.6 at 12-17. The State did not take a position or argue in regards to Jefferson's Motion. Leading up to the State's statement, Jefferson had indicated to the Court that he wanted to terminate Mr. Cox because he failed to get employment records and failed to make phone calls to Jefferson's family. Id. at p.3. Mr. Cox indicated that he did not think the employment records were relevant to Jefferson's defense in the case. Id. at pp.5-6. This was especially true in light of the fact that there was no specific time period pled in the charging document. Id. at p.6. As a result of this

exchange, the State simply advised the Court that Jefferson had stated in his statement to police that he had lost his job. Id. Thus, Jefferson's complaint that he wanted the Court to dismiss defense counsel because counsel failed to get Jefferson's employment records was nonsensical as the employment records were not relevant to Jefferson's defense as Jefferson, by his own admission, was unemployed when he sexually abused his daughter.

The Court finds that this was a non-issue and appellate counsel cannot be faulted for failing to raise a meritless issue. Further, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

GROUND 8(D) – Jefferson alleges that appellate counsel was ineffective for failing to present the issue raised supra Ground 7(C)—Jefferson alleges "structural error" in regards to the Court's statement to the jury panel. This Court finds that appellate counsel did not raise this issue because it was a non-issue with no probability of success on appeal. See supra Ground 7(C). This was a non-issue and appellate counsel cannot be faulted for failing to raise a meritless issue. Further, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

GROUND 8(E) – Jefferson alleges that appellate counsel was ineffective for failing to present the issues: (1) CJ's brother testified without being at the evidentiary hearing to determine the reliability of his statements; (2) the State "discredited" CJ's mother's hearsay statement, yet used her as a witness; and (3) Jefferson was precluded from "adequately" cross-examining CJ on hearsay that conflicted because CJ was excused as a witness. All of Jefferson's arguments fail.

First, Jefferson seems to be arguing that CJ's brother should not have been able to testify about CJ's disclosure to their mother. These statements relate to Jefferson's Motion to Preclude Inadmissible 51.385 Evidence, see supra Ground 7(B). This Court finds that Jefferson's argument is belied by the record as appellate counsel did raise this claim. Hargrove,

100 Nev. at 502, 686 P.2d at 225; see also AOB at 39-41. As such, this claim is denied.

Jefferson's second argument within this Ground is a meritless, non-issue. As such, this Court finds that appellate counsel cannot be faulted for not raising the issue that the State, in Jefferson's opinion, "discredited" CJ's mother's hearsay statement, yet used her as a witness. During defense closing, defense counsel specifically made an allegation that CJ's mother lied about the last time that Jefferson sexually assaulted CJ and that the "story changed." TT, Aug. 8, 2012, p.93. This was in regards to why Dr. Vergara did not perform a sexual examination kit. In response to this, during rebuttal, the State argued, in relevant part:

> Detective Demas specifically told the doctor not to collect the DNA because the last abuse was beyond the minimum three to, at the max, five-day time frame. [CJ's brother] had said it'd been more than two weeks since he last saw his dad take his sister into the bedroom, and the detective learned from [CJ] during that interview that it'd been over a week since the last abuse occurred.
>
> And we heard from the detective about this three-day, at the most, five-day time frame in which DNA can be collected. And we actually heard specifically from Dr. Vergara that really it needs to be less than 72 hours; less than three days before there can be any kind of legitimate chance of collecting DNA.
>
> Now, the defense called Mr. Teague, the ambulance driver, to come in here, the ambulance -- the paramedic in the ambulance, to talk about [CJ's mother's] statement to him on -- about the date of September 11th. Remember, he never talked to [CJ]. This is not something that [CJ] told him. Detective Demas talked -- Detective Katowich talked directly to [CJ], but [Mr. Teague] never did. He simply obtained the statement from Cindy, and Cindy had told him about the date of September 11th, 2010.
>
> So, are we to believe that [CJ] said to her mom, yeah, mom the last time it happened? Is that – is that what we're supposed to believe? Does that make sense? What makes sense is that [CJ] told her mother, the last time it happened, you were at work. And her mom thought about, okay, when's the last day I worked? September 11th, 2010, so that's when she tells the paramedic.

TT, Aug. 8, 2012, p. 111.

Thus, the Court finds that the State never discredited CJ's mother. Rather, the State argued that it made no sense that this 5 year-old victim told her mom a specific date when telling her about the sexual abuse. Rather, it made sense that CJ's mother assumed this was the date, based on the manner in which CJ disclosed. Nothing within the State's argument

"discredited" CJ's mother. Further, this Court finds that it is up to the State how to present its case, not the defendant. As such, this Court finds that Jefferson could not have raised the issue that the State, allegedly, "discredited" CJ's mother, "yet presented her as a witness to recount hearsay." This Court finds that this non-issue would have had no chance of success on appeal. Further, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

Third, Jefferson alleges that he was precluded from "adequately" cross-examining CJ on hearsay that conflicted because CJ was excused as a witness. This Court finds that this is a non-specific bare allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225. This Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

GROUND 8(D) – Jefferson alleges substantive claims that are waived and must be dismissed pursuant to NRS 34.810. See also Pellegrini, 117 Nev. at 882, 34 P.3d at 534. Jefferson also alleges that appellate counsel should have presented actual innocence based on CJ's statement to police, see supra Ground 7(B); a bare allegation that the State demanded CJ alter her testimony; and the lack of an accurate medical observation, see supra Ground 7(H).

The United States Supreme Court has held that in order for a defendant to succeed based on a claim of actual innocence, he must prove that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995)). Procedurally barred claims may be considered on the merits, only if the claim of actual innocence is sufficient to bring the petitioner within the narrow class of cases implicating a fundamental miscarriage of justice. Schlup, 513 U.S. at 314 115 S. Ct. at 861). This Court finds that Jefferson fails to set forth any new evidence that would have made it more likely than not that no reasonable juror would have convicted him. As such, this Court finds that Jefferson fails to demonstrate that

the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532.

Appellate counsel did raise the issue of sufficiency of the evidence. Within this argument, appellate counsel raised issues regarding alleged inconsistencies in witness statements, the lack of physical evidence, the alleged unreliability of Jefferson's confession, and the fact that CJ never testified as to the any acts of lewdness. The Nevada Supreme Court could have agreed and reversed Jefferson's convictions, but it did not. As such, this Court finds that Jefferson fails to demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; Lara, 120 Nev. at 184, 87 P.3d at 532. As such, this claim is denied.

VIII. JEFFERSON IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
>
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
>
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). However, a defendant is entitled to an evidentiary hearing only if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605

In the instant case, this Court finds that Jefferson's arguments are waived and/or barred by the law of the case and/or meritless. To the extent he raises issues that the Court could address on the merits, this Court finds that his arguments are nevertheless belied by the record

or insufficient to warrant relief. As such, this Court finds that there is no need to expand the record to resolve Jefferson's Petition, his request for an evidentiary hearing is denied.

IX. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction *Strickland* context. *McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006), *cert. denied*, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even if cumulative error review is available, such a finding in the context of a *Strickland* claim is extraordinarily rare. *See, e.g., Harris by & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). After all, "[s]urmounting *Strickland*'s high bar is never an easy task," *Padilla*, 559 U.S. at 371,130 S. Ct. at 1485, and there can be no cumulative error where the defendant fails to demonstrate *any* single violation of *Strickland*. *See, e.g., Athey v. State*, 106 Nev. 520, 526, 797 P.2d 956 (1990) ("[B]ecause we find no error . . . the doctrine does not apply here."); *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012) ("Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal"); *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is nothing to cumulate.") (internal quotation marks omitted).

Here, this Court finds that Jefferson has not demonstrated that any of his claims warrants relief, and as such, there is nothing to cumulate. Therefore, Jefferson's cumulative error claim is denied.

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ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and is, denied.

DATED this 14 day of June, 2016.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____ for
BERNARD E. ZADROWSKI
Chief Deputy District Attorney
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APPROVED AS TO FORM AND SUBSTANCE

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