THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA, #2799593, Appellant, v. STATE OF NEVADA, Respondent.	)	**CASE NO.: 74988** **E-FILE** D.C. Case: C-11-272657-1 Dept.: V

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APPELLANT'S APPENDIX VOLUME TWO

Appeal from a Denial of Post Conviction Relief

Eighth Judicial District Court, Clark County

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Docket 74988 Document 2018-20291

MASTER INDEX

Case No.: 74988

CERTIFICATE OF SERVICE

I certify I am an assistant to Terrence M. Jackson, Esquire; a person competent to serve papers, not a party to the above-entitled action, and that on the 28th day of May, 2018, I served a copy of the foregoing: Appellant's Appendix and Index, Volumes 1 and 2, as follows:

[X] Via Electronic Service to the Nevada Supreme Court, to the Eighth Judicial District Court, and by United States first-class mail to the Nevada Attorney General and the Petitioner/Appellant as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANTHONY CASTANEDA, #2799593

Defendant.

CASE NO: **C-11-272657-1**

DEPT NO: **V**

STATE'S OPPOSITION TO DEFENDANT'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

DATE OF HEARING: **OCTOBER 16, 2017**
TIME OF HEARING: **9:00 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Supplemental Points and Authorities In Support of Petition for Writ of Habeas Corpus for Post Conviction Relief.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On April 20, 2011, ANTHONY CASTANEDA (hereinafter "Defendant") was charged by way of Information with 15 counts of Possession Of Visual Presentation Depicting Sexual Conduct Of A Child (Category B Felony - NRS 200.700, 200.730).

On July 8, 2013, a jury trial convened and lasted six days. On July 16, 2013, the jury returned a guilty verdict for all 15 counts. Defendant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – a maximum of 72 months and minimum of 28 months; as to Count 2 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 1; as to Count 3 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 2; as to Count 4 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 3; as to Count 5 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 4; as to Count 6 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 5; as to Count 7 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 6; as to Count 8 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 7; as to Count 9 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 8; as to Count 10 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 9; as to Count 11 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 10; as to Count 12 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 11; as to Count 13 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 12; as to Count 14 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 13; and as to Count 15 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 14. Defendant received 160 days credit for time served. Defendant's sentence was suspended and placed on probation for a fixed 5-year term. In addition, a special sentence of lifetime supervision was imposed. On November 25, 2013, Defendant filed a Notice of Appeal. A Judgment of Conviction ("JOC") was filed on December 31, 2013.

On May 21, 2014, Defendant appeared in court with counsel for a probation violation hearing. On June 16, 2014, an Amended Judgment of Conviction ("AJOC") was filed to reflect Defendant's reinstatement to probation under the original conditions, except that the previously imposed condition of lifetime supervision was vacated.

On July 2, 2015, Defendant's probation was revoked and his original sentence was modified to a maximum of 72 months and a minimum of 24 months, on each count concurrently, with 273 days credit for time served. A Second Amended Judgment of Conviction was filed on the same date.

On July 16, 2016, the Nevada Supreme Court entered its Order vacating in part the Second Amended Judgment of Conviction, finding that Defendant could only be properly charged and convicted with one count of Possession of Visual Presentation Depicting Sexual Conduct Of A Child. On July 19, 2016, a Third Amended Judgment of Conviction was filed to reflect the Nevada Supreme Court's Order. Remittitur issued July 21, 2016.

On December 7, 2016, Defendant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On December 28, 2016, the State filed its Opposition to Defendant's Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On January 4, 2017, Defendant's motion and request were denied.

On December 20, 2016, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). On March 29, 2016, the State filed its Opposition to Defendant's Petition.

On April 26, 2017, Terrence Jackson was confirmed as counsel. On July 25, 207, Defendant, through counsel, filed the instant Supplemental Points and Authorities In Support of Petition for Writ of Habeas Corpus for Post Conviction Relief ("Supplement"). The State responds as follows and respectfully requests that this Court order Defendant's Supplement be DENIED.

STATEMENT OF THE FACTS

The Nevada Supreme Court, in its Order of Affirmance, filed on July 21, 2016, summarized the facts of the instant matter as follows:

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The charges against Defendant originated in a report by a former housemate of his to the Las Vegas Metropolitan Police Department ("Metro"). The former housemate reported that, after moving out of Defendant's house, she and her boyfriend found mixed in with their belongings a USB flash drive similar to one Defendant customarily kept on his key chain. When they opened the flash drive, they discovered that it held copies of Defendant's driver's license, birth certificate, Social Security card and military records, as well as a file of pornographic images, some depicting children.

Metro obtained a search warrant to view the contents of the flash drive. On the flash drive, in addition to Defendant's identification, detectives found a subfolder named "girl pics." This subfolder contained pornographic images, including several that an FBI database established as known images of child pornography downloadable from the World Wide Web. Based on this evidence, detectives obtained a search warrant for Defendant's home and home computers. The home computers, a desktop and a laptop, contained each of the child pornography images found on the flash drive and several additional known images of child pornography as well, for a total of 15 separate depictions, with most being found on both the desktop and the laptop. Defendant was interviewed by a detective while the search was underway. After the interview concluded, he came into the room where another detective had one of the illegal images open on the computer. Reportedly, Defendant saw what was on the screen and said, "Those are kids, I'm sorry."

The State charged Defendant with 15 counts of knowingly and willfully possessing 15 image files depicting sexual conduct of a child in violation of NRS 200.730. Before trial, the State and Defendant stipulated not to publish the charged images in open court but, rather, to put copies of them into evidence in a sealed envelope for the jury to examine if it so chose. They further stipulated, quoting language from NRS 200.730, that each of the 15 charged images depicted a child "under the age of 16 years as the subject of a sexual portrayal or engaging in, or simulating, or assisting others to engage in or simulate, sexual conduct."

After a six-day trial, the jury convicted Defendant on all 15 counts. The district court judge sentenced Defendant to a minimum of 28 months and maximum of 72 on each count, the sentences to run concurrently. The district court suspended the sentences and placed Defendant on probation for a 5-year term.

ARGUMENT

I. DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL ARE WITHOUT MERIT

"[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, 563 U.S. 170, 189, 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 as it relates to a guilty plea, 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, 686-687, 104 S.Ct. 2052, 2063-2064 (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 687-688, 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."). This analysis does not indicate that

the court should "second guess reasoned choices between trial tactics," Donovan, 94 Nev. at 675, 584 P.2d at 711, but rather, the court must determine whether counsel made a "sufficient inquiry into the information...pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

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 (quotations and citations 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 111-112, 131 S.Ct. at 791-792 (internal quotation marks and citations omitted).

For claims of ineffective assistance of appellate counsel, the prejudice prong is slightly different. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A claim of ineffective assistance of appellate counsel must still satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751-754, 103 S.Ct. 3308, 3312-3314 (1983). The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying

good arguments...in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

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). Here, Defendant's arguments fall far short of satisfying Strickland.

A. Ground One of Defendant's Supplement is Without Merit

In Ground One of his Supplement, Defendant alleges that trial counsel was ineffective for failing to "notice a necessary expert witness," and failing to contact "any of the employees who worked for Defendant's software security services company SpyBox." Supplement at 2-6. Specifically, Defendant alleges that the expert counsel consulted "would have rebutted Detective Ehler's critical testimony." Id. However, Defendant's allegation is misguided as deciding which witnesses to call is a virtually unchallengeable decision. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Additionally, as to Defendant's expert witness claim, the United States Supreme Court stated that a defense expert witness is not required solely because the State used an expert witness. Harrington, 562 U.S. at 111, 131 S.Ct. at 791 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.").

In the instant matter, defense counsel argued at trial that the late notice of a rebuttal expert was warranted because Det. Ehlers's testimony strayed from what was included in his report. Jury Trial - Day 4 Recorder's Transcript ("4 RT"), filed December 20, 2013, 57-66. Defendant's trial counsel cannot be ineffective for Det. Ehlers's unanticipated testimony. See Harrington, 562 U.S. at 110, 131 S.Ct. at 791 ("an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities"). Moreover, Defendant's assertion is misguided as Defendant's trial counsel had no reason to call an expert.

On July 11, 2016, at the very outset of Det. Ehler's cross-examination, defense counsel attacked Det. Ehlers's testimony on direct examination. 4 RT 20. On that same date, defense counsel requested leave of the court to call a computer expert ("Mare") to rebut Det. Ehler's testimony. 4 RT 57-66. Defense counsel preserved the proffered expert testimony of Leon Mare ("Mare") by filing an Offer of Proof Regarding Defendant's Motion to Call a Computer Expert to Rebut Detective Ehlers' Surprise Trial Testimony on October 7, 2013. However, even if Mare testified, Defendant is still unable to establish any prejudice because trial counsel successfully argued each of the arguments Mare would have made during Det. Ehlers's cross-examination and re-cross. 4 RT 21-27, 27-31, 32-33, 47-49, 50, 51-52, 75-77, 104-105; see Offer of Proof Regarding Defendant's Motion to Call a Computer Expert to Rebut Detective Ehlers' Surprise Trial Testimony, filed on October 7, 2013, 4-5. Lastly, the question of prejudice is governed by the law of the case because the Nevada Supreme Court concluded on direct appeal that Defendant was able to make the points he wanted to make without calling an expert. NV Supreme Court Clerk's Certificate/Judgment, filed July 7, 2016. Therefore, Defendant's claim is without merit.

B. Ground Two of Defendant's Supplement is Without Merit

In Ground Two of his Supplement, Defendant alleges that trial counsel was ineffective for failing "to file a meritorious pretrial Writ of Habeas Corpus." Supplement at 7. Specifically, Defendant alleges that there was a "double jeopardy issue of charging fifteen counts for simultaneously possessing fifteen digital images," and that a pretrial Writ of Habeas Corpus would have likely been granted due to an alleged double jeopardy violation. Id. However, Defendant's claim fails as the prejudice Defendant contends occurred is purely speculative.

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. However, what pre-trial motions to file and when to object are strategic decisions, and strategic decisions are virtually unchallengeable. Doleman, 112 Nev. at 848, 921 P.2d at 280; Rhyne, 118 Nev. at 8, 38 P.3d

at 167 (2002). Moreover, the prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 475 (2000); citing State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). The facts of Defendant's case do not fit, nor does Defendant even allege that the facts fit, within any of those three categories. Accordingly, this is nothing more than a bare and baked allegation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record). Therefore, Defendant's claim is without merit.

C. Ground Three of Defendant's Supplement is Without Merit

In Ground Three of his Supplement, Defendant alleges that trial counsel was ineffective for failing "to file a meritorious motion to suppress." Supplement at 9. Specifically, Defendant alleges that there was "significant evidence of false statements in the search warrant affidavit." Supplement at 9-10. However, Defendant's claim is without merit as the search warrant was still supported by probable cause irrespective of Hines's alleged lie. In response to defense counsel's allegation of Hines committing perjury, this Court stated:

> My recollection was she said that her answer to the one question at preliminary hearing, which was: Did you immediately recognize the thumb drive -- I'm paraphrasing, of course -- as Mr. Castaneda's? She said, No. And that was -- then you said, Well, were you lying then? She said, Yes. So that's the only -- to my way of thinking as far as having heard everything, it appears to me the only thing that she admitted that she lied about was that one statement.

4 RT 128. Based on the Court's response, Defendant was not entitled to a Franks hearing since he failed to demonstrate that the investigators engaged in any misconduct. Weber v. State, 121 Nev. 554, 584, 119 P.3d 107, 127 (2005). Moreover, a search warrant cannot be overturned solely because of a witness's alleged lie, and will only be re-examined for probable cause if a defendant makes a substantial preliminary showing that the affidavit contains intentionally or recklessly false statements. Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct.

2674, 2676 (1978). Defendant fails to make such a showing. Therefore, Defendant's claim is without merit.

D. Ground Four of Defendant's Supplement is Without Merit

In Ground Four of his Supplement, Defendant alleges that trial counsel was ineffective for failing to "prepare a necessary jury instruction based upon the case of United States v. Flyer." Supplement at 10. However, a jury instruction based on Flyer would be inappropriate as Defendant's reliance on Flyer is misplaced. In Flyer, the defendant was convicted of possession of child pornography. Id. Although the defendant successfully argued that the evidence was insufficient to support his conviction, Flyer is inapplicable to the instant matter. Id. The Court in Flyer reasoned:

> Where a defendant lacks knowledge about the cache files, and concomitantly *lacks access to and control over those files*, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images.

(emphasis added). 633 F.3d at 919 (quoting United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006).

In Flyer, the Court stated that there was no evidence that the defendant "had accessed, enlarged, or manipulated any of the charged images," or that the defendant could "recover or view any of the charged images in unallocated space or that he even knew of their presence." 633 F.3d at 919-920. In the instant matter, the evidence adduced at trial supports a finding that Defendant did not lack access to and control over the files at issue. In addition to the charged images found on the thumb drive, each charged image was also found on Defendant's shuttle desktop under Defendant's user account. 3 RT 118, 132. The images that were found in the "unallocated space" were merely duplicates of the images found on Defendant's shuttle desktop. 3 RT 123, 126-127; 4 RT 68-69. Hines testified that she has seen Defendant using the computer with the charged images at "[e]very waking hour of the day." 2 RT 213. Det. Ehlers testified that if an image was in unallocated space, "it would show that a user actually had contact or interaction with it as opposed to it just being placed there or downloaded at one time, never viewed or touched." 4 RT 99. These testimonies, coupled with Defendant's

background in computers, support a finding that Defendant did in fact have access to and control over the files in question. See 4 RT 136-138. Accordingly, a jury instruction based upon Flyer would have been inappropriate. Therefore, Defendant's claim is without merit.

E. Ground Five of Defendant's Supplement is Without Merit

In Ground Five of Defendant's Supplement, Defendant alleges that appellate counsel was ineffective for not raising Ground Four and a sufficiency of the evidence claim on appeal. Supplement at 12. However, Defendant's claim fails. As discussed *supra*, a jury instruction based upon Flyer is inappropriate. Accordingly, there was no basis for appellate counsel to raise this issue on appeal.

As to Defendant's sufficiency of the evidence claim, Defendant already raised this argument on appeal to the Nevada Supreme Court, and the Nevada Supreme Court rejected it. See Castaneda v. State, Docket No. 64515 (Opinion, June 16, 2016). Accordingly, this Court should find that this issue is barred under the law of the case. See State v. Loveless, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting Wright v. Carson Water Co, 22 Nev. 304, 308, 39 P. 872, 873-874 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart."). As explained in Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See also Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

In rejecting Defendant's insufficiency of the evidence claim, the Nevada Supreme Court held the following:

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> Here, although Castaneda elicited testimony that a virus *could* have accessed the files, other testimony established that the downloads were more likely the product of conscious human endeavor. Similarly, while Castaneda's housemates at one time had access to Castaneda's desktop, other evidence indicated that they did not have access to Castaneda's password-protected user account on the desktop or his laptop. The jury also was entitled to consider that fact that the same images appeared on more than one device and that, when he saw that a detective had opened one of the illegal images, Castaneda commented that "Those are kids, I'm sorry." Viewed in the light most favorable to the State, the evidence was sufficient to support the jury's conviction of Castaneda for knowingly and willfully possessing the charged images in violation of NRS 200.730.

Castaneda, Docket No. 64515 at 16 (emphasis in original). To the extent Defendant tries to vary his insufficiency of the evidence argument in the instant petition, the Court should reject Defendant's attempt to re-litigate an issue that has already been ruled on by the Nevada Supreme Court as it constitutes an abuse of the writ pursuant to NRS 34.810(2). Regardless, such variation cannot defeat the law of the case. See Hogan v. Warden, Ely State Prison, 109 Nev. 952, 860 P.2d 710 (1993); Pellegrini, 117 Nev. at 879, 34 P.3d at 532. Accordingly, there was no basis for appellate counsel to raise this issue on appeal. Therefore, Defendant's claim is without merit.

II. DEFENDANT FAILS TO DEMONSTRATE CUMULATIVE ERROR

In Ground Six of his Petition, Defendant argues that ineffective assistance of both his trial and appellate counsel resulted in cumulative error. Supplement at 12. However, because Defendant fails to show any instances of error and fails to demonstrate cumulative error sufficient to warrant reversal, this claim is without merit.

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.").

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Nevertheless, even where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See 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.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-553 (5th Cir. 2005)). Since Defendant has not demonstrated any claim warrants relief under Strickland, there are no errors to cumulate.

In addressing a claim of cumulative error, the relevant factors are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As discussed above, the issue of guilt was not close as the evidence against Defendant was overwhelming. Even assuming that some or all of Defendant's allegations of deficiency have merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome at trial. Accordingly, even if counsel was in any way deficient, there is no reasonable probability that Defendant would have received a better result but for the alleged deficiencies. Further, Defendant certainly has not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Defendant's case. Therefore, Defendant's cumulative error claim is without merit and should be denied.

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CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court order Defendant's Supplemental Points and Authorities In Support of Petition for Writ of Habeas Corpus for Post Conviction Relief be DENIED.

DATED this 20th day of September, 2017.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 20th day of SEPTEMBER 2017, to:

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BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff/ Respondent, v. ANTHONY CASTANEDA, # 1142611, Defendant/ Petitioner.	Case No.: **C-11-272657-1** Dept. No.: **V** Date of Hearing: 10/16/2017 Time of Hearing: 9:00 a.m.

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

COMES NOW the Defendant/ Petitioner, ANTHONY CASTANEDA, by and through Counsel, TERRENCE M. JACKSON, ESQ., and submits this Reply to State's Opposition to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus.

This Reply is based upon all prior pleadings and the attached Points and Authorities and such oral argument at the time of the hearing on this matter.

Respectfully submitted this 25th day of September, 2017.

/s/ Terrence M. Jackson
TERRENCE M. JACKSON, ESQ.

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POINTS AND AUTHORITIES

I. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

The State in their Opposition to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus begins their Opposition citing four pages of boiler plate language such as . . . : "[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), and that . . . "Effective counsel does not mean errorless counsel." *Jackson v. Warden, Nevada State Prison,* 91 Nev. 430, 432.

Defendant does not expressly deny such platitudes as are recited in the State's boiler plate response. Defendant submits however those snippets of dicta cited by the State are irrelevant to this case. This is a case where *Strickland* is directly applicable.

Defendant is aware of the willingness of State prosecutors in almost every post-conviction case to attempt to trivialize or minimize every ineffective assistance of counsel claim by post conviction defendants and argue the claims are frivolous or exaggerated and would not, of course, have changed the result of a defendant's cases either at trial or on appeal. The mere assertion by the State of this familiar response is however incorrect in this case and can be easily demonstrated.

A. The Claim of Ineffectiveness Based on Failing to Even Provide Notice of an Expert Witness Is Not a Frivolous Claim. It Very Likely Prejudiced the Defendant.

The State actually argues that counsel had no reason to call an expert in this trial. Counsel in this case clearly intended to call the expert but was precluded from calling the defense expert, not because it was determined by the court that the expert's testimony was irrelevant or because the expert was unqualified, but because COUNSEL FAILED TO PROVIDE TIMELY NOTICE OF THE EXPERT TO THE STATE. (A.A. 1154-1157)

That failure of counsel was gross incompetency and it is respectfully submitted that mere

cross-examination of the State's "expert," law enforcement officer, by counsel, however great, did not cure this egregious blunder of counsel. (A.A. 1423) The State argues this issue is governed by the "law of the case," citing language from the Nevada Supreme Court's previous decision in *Castaneda v. State,* 132 Nev. Adv. Op. 44 (2016). The Nevada Supreme Court however did NOT rule on the effectiveness of *Castaneda's* counsel but merely held that it was not an 'abuse of discretion' under all the circumstances of the case for the district court to deny Defendant's request to call an unnoticed expert witness. The issue of competency of counsel under Strickland was never raised on direct appeal. Since the issue of counsel's incompetency under *Strickland* has never been resolved the evidence of his incompetency is particularly relevant to the determination of this Writ.

B. The Failure to File a Pretrial Writ of Habeas Corpus Is Also a Non-Frivolous Claim of Ineffective Assistance of Counsel Under *Strickland.* This Failure of Counsel Clearly Influenced the Results of the Trial.

The State argues that the Defendant had no grounds to file a pretrial Habeas Corpus Petition challenging the multiple charges he faced pretrial. The State in their Opposition cited two cases, *Doleman v. State,* 112 Nev. at 848 and *Rhyne v. Nevada,* 118 Nev. at 8 (2002), for the proposition that an attorney's decision on what pretrial motions to file is a strategic decision that is "virtually unchallengeable."

Even if such decisions are "virtually unchallengeable" it is respectfully submitted this case is one of the cases where filing a Motion for a pretrial Writ of Habeas Corpus was mandated. It was an absolutely essential Motion which any competent counsel would file. There was no risk to the Defendant to file such a Motion. There was substantial possibility of a positive gain for the Defendant. The Prosecutor's argument that there was no double jeopardy issue, or no issue of excessive multiple prosecutions for a single act issue, has already been directly decided in favor of the Defendant in this case by the Nevada Supreme Court on direct appeal.

The Supreme Court, in reversing 14 of the 15 counts stated:

> "The State prosecuted the images as a group and did not attempt to show, other than that there were 15 different images, individual distinct crimes of possession. *See, e.g., Pickett,* 211

> S.W.3d at 706 (holding that evidence of possessing multiple images of child pornography on a computer constituted one crime because the "State did not otherwise attempt to distinguish the offenses by showing that the crimes were separated by time or location or by otherwise demonstrating that *Pickett* formed a new intent as to each image"). This case does not require us to decide whether distinct downloads at different times and in different locations would establish separate units of prosecution as some courts have held. *See State v. Roggenbuck,* 387 S.W.3d 376, 381-82 (Mo. 2012) (distinguishing *Liberty,* 370 S.W.3d at 551, on the basis that "the charges and the evidence established only that *Liberty* possessed multiple images of child pornography at the same time," thus constituting a single offense, and upholding multiple convictions where the acts of acquiring and possessing pornography were separated by time and place); *State v. Sutherby,* 158 P.3d 91, 94 n.4 (Wash. Ct. App. 2007) (holding that the simultaneous possession of pornographic images constituted a single offense but stressing that, "We do not address special circumstances not present here, such as possession in two distinct locations or at two distinct times."), *aff'd,* 204 P.3d 916 (Wash. 2009). As in *Liberty* and *Sutherby,* we hold only that, consistent with their reasoning and the rule of lenity long established in our law, *Castaneda's* simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730." (Emphasis added)

. . .

The Defendant submits for the reasons he previously stated in his Supplemental Points and Authorities, he was extremely prejudiced because those 14 counts were not dismissed before trial.

C. The Failure to File a Motion to Suppress Was Ineffective Assistance of Counsel. This Ineffectiveness Was Highly Prejudicial to the Defendant's Case.

The State argues in their Opposition to the Supplemental Points and Authorities that even though a key witness, Tami Hines provided essential information for the search warrant, and actually admitted to making material misstatements under oath, there was not even grounds to file a Motion to Suppress and request an Evidentiary Hearing. It is respectfully submitted based upon those facts, a *Franks* hearing was absolutely necessary in this case.

It is hard to understand the Prosecutor's statement: "Moreover, a search warrant cannot be overturned solely because of a witness' alleged lie and will only be reexamined for probable cause if a defendant makes a substantial preliminary showing the affidavit contains intentionally or recklessly false statements. (State's Brief in Opposition, pg. 9) Tami Hines was not an alleged liar; she admitted lying under oath at the preliminary hearing during trial when she admitted on cross

examination what she told Detective Toohey in 2010 was a lie. (*See,* Defendant's Motion to Dismiss, July 10, 2013).

Is the prosecutor trying to infer she just made minor lies or little white lies? Why didn't defense counsel seek to have an evidentiary hearing to determine exactly what she said, how deliberately untruthful or reckless she was and how critical her lies were to establish probable cause? It was the defense counsel's failure to request such a critical motion which established most clearly his incompetence. Failure to file a meritorious Motion to Suppress must be considered ineffective assistance under *Strickland*. *See, Kimmelman v. Morrison,* 474 U.S. 365 (1986).

D. Counsel Was Ineffective for Failing to Prepare a Necessary Instruction Based Upon *United States v. Flyer*.

The State argues that the trial testimony did not support the giving of the *Flyer* instruction, trying to distinguish *Flyer* saying that in *Flyer* the court stated there was no evidence that the Defendant "had accessed, enlarged, or manipulated any of the charged images" . . . or saying that the Defendant could "recover or view any of the charged images in unallocated space, or that he even knew of their presence." 633 F.3d 919-920.

The State cited Detective Ehler's testimony that if an image was in an unallocated space, "it would show that the user actually had contact or interaction with it as opposed to just being placed there or downloaded at one time, never viewed or touched." (State's Response, pg. 10)

The State in arguing there were some facts against giving the *Flyer* instruction neglects the very low burden the Defendant needs to get his theory of the case instruction. A Defendant is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible to support it. *Williams v. State,* 99 Nev. 530, 665 P.2d 260 (1983). Despite the State's Objections there clearly was some evidence to support the *Flyer* instruction.

Counsel was deficient in not seeking a viable theory of case instructions. Modeled on the *Flyer* instruction which is valid law, it is submitted therefore the Defendant was gravely prejudiced because counsel did not seek the *Flyer* instruction.

E. Defense Counsel Was Ineffective on Appeal.

Defendant respectfully submits that the Defendant is not arguing issues previously decided by the Nevada Supreme Court. He is also not barred by the law of case from raising counsel's ineffectiveness on appeal. The case of *State v. Loveless,* 62 Nev. 372 (1944) does not directly apply or is distinguishable. Similarly *Hall v. State,* 91 Nev. 314 (1975) and *McNelton v. State,* 115 Nev. 396 (1999) can be distinguished. To the extent the *Pelligrini v. State,* 117 Nev. 860 (2001) appears to limit the right to raise a post-conviction challenge in this case to the ineffective assistance of counsel on direct appeal, Counsel submits that the *Pelligrini* case should be overruled as that decision directly denies the Defendant his Sixth Amendment right to competent counsel on appeal.

II. THE COURT SHOULD EVALUATE CUMULATIVE ERROR IN POST CONVICTION CASES.

The state with an Eighth Circuit case, *Middleton v. Roper,* 455 F.3d 838 (8th Cir. 2006), *cert. den.,* 549 U.S. 1134, 1275 S.Ct. 980 (2007), for the proposition that cumulative error does not apply to post conviction review.

The Nevada Supreme Court has not decided whether cumulative errors should be aggregated to establish a deficiency under *Strickland.* In *McConnell v. State,* 125 Nev. 249, 259, 212 P.3d 307, 318 (2008 or 9?), the Nevada Supreme Court merely stated:

> "*McConnell* claims that all the alleged errors raised in this appeal considered cumulatively rendered his conviction and sentence unfair. *McConnell* uses the cumulative-error standard that this court applies on direct appeal from a judgment of conviction. *See, e. g., Hernandez v. State,* 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."). We are not convinced that that is the correct standard, but assuming that it is, *McConnell* has not asserted any meritorious claims of error and therefore there is nothing to cumulate. We therefore conclude that the district court did not err in dismissing this claim." *Id.* 259 (Emphasis added)

. . .

The Nevada Supreme Court merely found there was no error in McConnell's case to cumulate, it did not hold that it was never proper to consider cumulative error in Habeas Corpus proceedings.

It is only logical that the more error that counsel makes the more likely it is that counsel is ineffective under *Strickland* considering both the first and second prong of *Strickland, i. e.*, (1) whether counsel's performance was so deficient it fell below an objective standard of reasonableness, and (2) that defendant was prejudiced by the deficient performance of counsel.

III. CONCLUSION.

Based upon the Defendant's Petition for Writ of Habeas Corpus and the Supplemental Points and Authorities as well as Defendant's Reply to the State's Opposition, it is respectfully submitted Defendant has established he is entitled to an Order granting his Post Conviction Petition for Writ of Habeas Corpus.

Respectfully submitted this 25th day of September, 2017.

/s/ Terrence M. Jackson
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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esquire, am a person competent to serve papers and not a party to the above-entitled action and on the 25th of September, 2017, I served a copy of the foregoing Defendant/Petitioner's, ANTHONY CASTANEDA'S, REPLY TO STATE'S OPPOSITION TO SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Petitioner/Appellant as follows:

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ANTHONY CASTANEDA
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By: */s/ Ila C. Wills*
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JOCP

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANTHONY CASTANEDA,
#2799593,

Defendant.

CASE NO: C-11-272657-1

DEPT NO: V

FOURTH AMENDED JUDGMENT OF CONVICTION
(JURY TRIAL)

The Defendant previously appeared before the Court with counsel and entered a plea of not guilty to the crimes of: COUNTS 1, 2, 3, 4, 5, 6, 7 8, 9, 10, 11, 12, 13, 14, and 15 – POSSESSION OF VISUAL PRESENTATION DEPICTING SEXUAL CONDUCT OF A CHILD (a Category B Felony), in violation of NRS 200.700 and 200.730 and the matter having been tried before a jury and the Defendant having been found guilty of said crimes; thereafter, on the 30th day of October, 2013, the Defendant was present in court for sentencing with his counsel, ERIKA D. BALLOU, Deputy Public Defender, and P. DAVID WESTBROOK, Deputy Public Defender, and good cause appearing,

THE DEFENDANT was ADJUDGED guilty of said offenses and, in addition to the $25.00 administrative assessment fee, the $760 psychosexual assessment fee, a $150.00 indigent defense civil assessment, and a $150.00 DNA analysis fee, including testing to determine genetic markers,

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Docket 74988 Document 2018-20291

Case Number: C-11-272657-1

The Defendant was sentenced as follows: COUNT 1 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC; COUNT 2 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC CONCURRENTLY TO COUNT 1; COUNT 3 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 2; COUNT 4 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 3; COUNT 5 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 4; COUNT 6 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 5; COUNT 7 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 6; COUNT 8 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 7; COUNT 9 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 8; COUNT 10 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 9; COUNT 11 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 10; COUNT 12 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 11; COUNT 13 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 12; COUNT 14 — a MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 13; COUNT 15 — a

MAXIMUM of SEVENTY TWO (72) MONTHS and MINIMUM of TWENTY EIGHT (28) MONTHS in the NDC, CONCURRENTLY TO COUNT 14.

The sentences of incarceration were SUSPENDED and the Defendant was placed on PROBATION for a FIXED TERM of FIVE (5) YEARS, under the following SPECIAL CONDITIONS:

1. Pursuant to NRS 176A.410, the following terms are imposed:

(a) Submit to a search and seizure of his person, residence or vehicle or any property under his control, at any time of the day or night, without a warrant, by any parole and probation officer or any peace officer, for the purpose of determining whether the defendant has violated any condition of probation or suspension of sentence or committed any crime;

(b) Reside at a location only if: (1) The residence has been approved by the parole and probation officer assigned to the defendant. (2) If the residence is a facility that houses more than three persons who have been released from prison, the facility is a facility for transitional living for released offenders that is licensed pursuant to Chapter 449 of MRS. (3) The defendant keeps the parole and probation officer assigned to the defendant informed of the defendant's current address.

(c) Accept a position of employment or a position as a volunteer only if it has been approved by the parole and probation officer assigned to the defendant and keep the parole and probation officer informed of the location of his position of employment or position as a volunteer.

(d) Abide by any curfew imposed by the parole and probation officer assigned to the defendant.

(e) Participate in and complete a program of professional counseling approved by the Division of Parole and Probation.

(f) Submit to periodic tests, as requested by the parole and probation officer assigned to the defendant, to determine whether the defendant is using a controlled substance.

(g) Submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant.

(h) Abstain from consuming, possession or having under his control any alcohol.

(i) Not have contact or communicate with a victim of the sexual offense or a witness who testified against the defendant or solicit another person to engage in such contact or communication on behalf of the defendant, unless approved by the Chief Parole and Probation Officer of the Chief Parole anti Probation Officer's designee and a written agreement is entered into and signed in the manner set forth in MRS 176A.401(5).

(j) Not use aliases or fictitious names.

(k) Not obtain a post office box unless the defendant received permission from the parole and probation officer assigned to the defendant.

(1) Not have contact with a person less than 18 years of age in a secluded environment unless another adult who has never been convicted• of a sexual offense is present and permission has been obtained from the parole and probation officer assigned to the defendant in advance of each such contact.

(m) Comply with any protocol concerning the use of prescription medication prescribed by a treating physician, including, without limitation, any protocol concerning the use of psychotropic medication.

(n) Not possess any sexually explicit material that is deemed inappropriate by the parole and probation officer assigned to the defendant.

(o) Not patronize a business which offers a sexually related form of entertainment and which is deemed inappropriate by the parole and probation officer assigned to the defendant.

(p) Not possess any electronic device capable of accessing the Internet and not access the Internet through any such device or any other means, unless possession of such a device or such access is approved by the parole and probation officer assigned to the defendant.

(q) Inform the parole and probation officer assigned to the defendant if the defendant expects to be or becomes enrolled as a student at an institution or higher education or changes the date of commencement or termination of his enrollment at an institution of higher education. As used in this paragraph, institution or higher education has the meaning ascribed to it in NRS 179D.045.

2. Defendant is to register as a sex offender within the first 48 hours of release.

3. If P&P is approached that Defendant has found a job that requires Internet usage, the issue must be brought back before the Court to determine the appropriate remedy.

4. Defendant is to abide by any curfew imposed by P&P.

5. Defendant is to attend counseling to address the issues related to this charge.

6. Defendant is to pay fees including the indigent defense fee.

Pursuant to statute, a special sentence of LIFETIME SUPERVISION was also imposed to commence upon release from any term of probation, parole, or imprisonment and register as a sex offender in accordance with NRS 179D.460 within 48 hours after sentencing.

THEREAFTER, a parole and probation officer provided the Court with a written statement setting forth that the Defendant has, in the judgment of the parole and probation officer, violated the conditions of probation. On the 21st day of May, 2014, the Defendant appeared in court with his counsel, P. DAVID WESTBROOK, Deputy Public Defender, and pursuant to a probation violation hearing/proceeding, and good cause appearing to amend the Judgment of Conviction,

IT WAS ORDERED that Defendant be REINSTATED to probation under the original conditions, except that the previously imposed condition of LIFETIME SUPERVISION was VACATED.

THEREAFTER, a parole and probation officer provided the Court with a written statement setting forth that the Defendant has, in the judgment of the parole and probation officer, violated the conditions of probation. On the 22nd day of June, 2015, the Defendant appeared in court with his counsel, JEFFREY T. RUE, Deputy Public Defender, and pursuant to a probation violation hearing/proceeding, and good cause appearing to amend the Judgment of Conviction,

IT WAS ORDERED that the probation previously granted to Defendant be REVOKED and in addition to the originally imposed fees, fines, and assessments, it was further ordered that the original sentence be MODIFIED to a MAXIMUM SENTENCE of SEVENTY-TWO (72) MONTHS with a Minimum Parole Eligibility of TWENTY-FOUR (24) MONTHS on each of the original counts with all counts running concurrently and TWO HUNDRED SEVENTY THREE (273) DAYS credit for time served.

THEREAFTER, on the 16th day of June, 2016, this matter came back before the Court on remand from the Nevada Supreme Court in Defendant's direct appeal, SC Case No. 64515. The Supreme Court's Order entered June 16, 2016 vacated in part the Second Amended Judgment of Conviction, finding that Defendant could only be properly charged and convicted of ONE count of POSSESSION OF VISUAL PRESENTATION DEPICTING SEXUAL CONDUCT OF A CHILD (a Category B Felony), for having simultaneously possessed fifteen digital images of children engaged in sexual conduct, in violation of NRS 200.700 and 200.730. Therefore, good cause appearing to amend the Judgment of Conviction,

IT IS HEREBY ORDERED that the Defendant is adjudged guilty of a single count of Possession of Visual Presentation Depicting Sexual Conduct of a Child (a Category B Felony), in violation of NRS 200.700 and NRS 200.730, for which the Defendant is sentenced to a MAXIMUM of SEVENTY TWO (72) MONTHS and a MINIMUM of

TWENTY FOUR (24) MONTHS in the NDC.[1] All assessments and fees previously ordered remain unchanged.

This is a *nunc pro tunc* order to correct the Third Amended Judgment of Conviction which was filed on July 19, 2016.

DATED this 17th day of January, 2018.

CAROLYN ELLSWORTH
DISTRICT JUDGE

[1] The Court notes that because the original sentences on all counts were identical and because the Court ran those sentences concurrently, this should not change the NDC's computation of Defendant's prison time.

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ANTHONY CASTANEDA, #2799593
Defendant.

CASE NO: **C-11-272657-1**
DEPT NO: **V**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **OCTOBER 16, 2017**
TIME OF HEARING: **9:00 AM**

THIS CAUSE having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 16th day of October, 2017; the Petitioner not being present, TERRENCE JACKSON, ESQ.; the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through TALEEN PANDUKHT, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

On April 20, 2011, ANTHONY CASTANEDA (hereinafter "Defendant") was charged by way of Information with 15 counts of Possession Of Visual Presentation Depicting Sexual Conduct Of A Child (Category B Felony - NRS 200.700, 200.730).

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On July 8, 2013, a jury trial convened and lasted six days. On July 16, 2013, the jury returned a guilty verdict for all 15 counts. Defendant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – a maximum of 72 months and minimum of 28 months; as to Count 2 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 1; as to Count 3 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 2; as to Count 4 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 3; as to Count 5 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 4; as to Count 6 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 5; as to Count 7 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 6; as to Count 8 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 7; as to Count 9 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 8; as to Count 10 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 9; as to Count 11 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 10; as to Count 12 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 11; as to Count 13 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 12; as to Count 14 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 13; and as to Count 15 – a maximum of 72 months and minimum of 28 months, to run concurrent to Count 14. Defendant received 160 days credit for time served. Defendant's sentence was suspended and placed on probation for a fixed 5-year term. In addition, a special sentence of lifetime supervision was imposed. On November 25, 2013, Defendant filed a Notice of Appeal. A Judgment of Conviction ("JOC") was filed on December 31, 2013.

On May 21, 2014, Defendant appeared in court with counsel for a probation violation hearing. On June 16, 2014, an Amended Judgment of Conviction ("AJOC") was filed to reflect Defendant's reinstatement to probation under the original conditions, except that the previously imposed condition of lifetime supervision was vacated.

On July 2, 2015, Defendant's probation was revoked and his original sentence was modified to a maximum of 72 months and a minimum of 24 months, on each count concurrently, with 273 days credit for time served. A Second Amended Judgment of Conviction was filed on the same date.

On July 16, 2016, the Nevada Supreme Court entered its Order vacating in part the Second Amended Judgment of Conviction, finding that Defendant could only be properly charged and convicted with one count of Possession of Visual Presentation Depicting Sexual Conduct Of A Child. On July 19, 2016, a Third Amended Judgment of Conviction was filed to reflect the Nevada Supreme Court's Order. Remittitur issued July 21, 2016.

On December 7, 2016, Defendant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On December 28, 2016, the State filed its Opposition to Defendant's Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On January 4, 2017, Defendant's motion and request were denied.

On December 20, 2016, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). On March 29, 2016, the State filed its Opposition to Defendant's Petition.

On April 26, 2017, Terrence Jackson was confirmed as counsel. On July 25, 2017, Defendant, through counsel, filed the instant Supplemental Points and Authorities In Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Supplement"). The State filed an Opposition to Defendant's Supplemental Points and Authorities in Support of Petition For Writ of Habeas Corpus for Post-Conviction Relief on September 20, 2017. Defendant filed a Reply to State's Opposition to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief on September 25, 2017.

On January 17, 2018, the Court discovered a clerical error in the Third Amended Judgment of Conviction and filed a *nunc pro tunc* Fourth Amended Judgment of Conviction which conformed to the previous order of the Court which had modified the underlying sentence at the time of revocation of probation on June 22, 2015.

The Court denied Defendant's Petition for Writ of Habeas Corpus on October 16, 2017, as follows.

FACTUAL BACKGROUND

The Nevada Supreme Court, in its Order of Affirmance, filed on July 21, 2016, summarized the facts of the instant matter as follows:

> The charges against Defendant originated in a report by a former housemate of his to the Las Vegas Metropolitan Police Department ("Metro"). The former housemate reported that, after moving out of Defendant's house, she and her boyfriend found mixed in with their belongings a USB flash drive similar to one Defendant customarily kept on his key chain. When they opened the flash drive, they discovered that it held copies of Defendant's driver's license, birth certificate, Social Security card and military records, as well as a file of pornographic images, some depicting children.
>
> Metro obtained a search warrant to view the contents of the flash drive. On the flash drive, in addition to Defendant's identification, detectives found a subfolder named "girl pics." This subfolder contained pornographic images, including several that an FBI database established as known images of child pornography downloadable from the World Wide Web. Based on this evidence, detectives obtained a search warrant for Defendant's home and home computers. The home computers, a desktop and a laptop, contained each of the child pornography images found on the flash drive and several additional known images of child pornography as well, for a total of 15 separate depictions, with most being found on both the desktop and the laptop. Defendant was interviewed by a detective while the search was underway. After the interview concluded, he came into the room where another detective had one of the illegal images open on the computer. Reportedly, Defendant saw what was on the screen and said, "Those are kids, I'm sorry."
>
> The State charged Defendant with 15 counts of knowingly and willfully possessing 15 image files depicting sexual conduct of a child in violation of NRS 200.730. Before trial, the State and Defendant stipulated not to publish the charged images in open court but, rather, to put copies of them into evidence in a sealed envelope for the jury to examine if it so chose. They further stipulated, quoting language from NRS 200.730, that each of the 15 charged images depicted a child "under the age of 16 years as the subject of a sexual portrayal or engaging in, or simulating, or assisting others to engage in or simulate, sexual conduct."
>
> After a six-day trial, the jury convicted Defendant on all 15 counts. The district court judge sentenced Defendant to a minimum of 28 months and maximum of 72 on each count, the sentences to run concurrently. The district court suspended the sentences and placed Defendant on probation for a 5-year term.

ANALYSIS

I. DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL ARE WITHOUT MERIT

"[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, 563 U.S. 170, 189, 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 as it relates to a guilty plea, 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, 686-687, 104 S.Ct. 2052, 2063-2064 (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 687-688, 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."). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics," Donovan, 94 Nev. at 675, 584 P.2d at 711, but rather, the court must determine whether counsel made a "sufficient inquiry into the information...pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

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 (quotations and citations 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 111-112, 131 S.Ct. at 791-792 (internal quotation marks and citations omitted).

For claims of ineffective assistance of appellate counsel, the prejudice prong is slightly different. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104

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S.Ct. at 2065). A claim of ineffective assistance of appellate counsel must still satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751-754, 103 S.Ct. 3308, 3312-3314 (1983). The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-52, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

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). Here, this Court finds Defendant's arguments fall far short of satisfying Strickland.

A. Ground One of Defendant's Supplement is Without Merit

In Ground One of his Supplement, Defendant alleged that trial counsel was ineffective for failing to "notice a necessary expert witness," and failing to contact "any of the employees who worked for Defendant's software security services company SpyBox." Supplement at 2-6. Specifically, Defendant alleged that the expert counsel consulted "would have rebutted Detective Ehler's critical testimony." Id. However, deciding which witnesses to call is a virtually unchallengeable decision. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Additionally, as to Defendant's expert witness claim, the United States Supreme Court stated that a defense expert witness is not required solely because the State used an expert witness. Harrington, 562 U.S. at 111, 131 S.Ct. at 791 ("Strickland does not enact Newton's third law

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for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.").

In the instant matter, defense counsel argued at trial that the late notice of a rebuttal expert was warranted because Det. Ehlers's testimony strayed from what was included in his report. Jury Trial - Day 4 Recorder's Transcript ("4 RT"), filed December 20, 2013, 57-66. Defendant's trial counsel cannot be ineffective for Det. Ehlers's unanticipated testimony. See Harrington, 562 U.S. at 110, 131 S.Ct. at 791 ("an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities"). Moreover, Defendant's assertion is misguided as Defendant's trial counsel had no reason to call an expert.

On July 11, 2016, at the very outset of Det. Ehler's cross-examination, defense counsel attacked Det. Ehlers's testimony on direct examination. 4 RT 20. On that same date, defense counsel requested leave of the court to call a computer expert ("Mare") to rebut Det. Ehler's testimony. 4 RT 57-66. Defense counsel preserved the proffered expert testimony of Leon Mare ("Mare") by filing an Offer of Proof Regarding Defendant's Motion to Call a Computer Expert to Rebut Detective Ehlers' Surprise Trial Testimony on October 7, 2013. However, even if Mare testified, this Court finds Defendant is still unable to establish any prejudice because trial counsel successfully argued each of the arguments Mare would have made during Det. Ehlers's cross- examination and re-cross. 4 RT 21-27, 27-31, 32-33, 47-49, 50, 51-52, 75-77, 104-105; see Offer of Proof Regarding Defendant's Motion to Call a Computer Expert to Rebut Detective Ehlers' Surprise Trial Testimony, filed on October 7, 2013, 4-5. Lastly, the question of prejudice is governed by the law of the case because the Nevada Supreme Court concluded on direct appeal that Defendant was able to make the points he wanted to make without calling an expert. NV Supreme Court Clerk's Certificate/Judgment, filed July 7, 2016. Therefore, Defendant's claim is without merit.

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B. Ground Two of Defendant's Supplement is Without Merit

In Ground Two of his Supplement, Defendant alleged that trial counsel was ineffective for failing "to file a meritorious pretrial Writ of Habeas Corpus." Supplement at 7. Specifically, Defendant alleged that there was a "double jeopardy issue of charging fifteen counts for simultaneously possessing fifteen digital images," and that a pretrial Writ of Habeas Corpus would have likely been granted due to an alleged double jeopardy violation. Id. However, this Court finds Defendant's claim fails as the prejudice Defendant contends occurred is purely speculative.

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. However, what pre-trial motions to file and when to object are strategic decisions, and strategic decisions are virtually unchallengeable. Doleman, 112 Nev. at 848, 921 P.2d at 280; Rhyne, 118 Nev. at 8, 38 P.3d at 167 (2002). Moreover, here the defendant did not suffer any prejudice as the trial court sentenced the defendant to the same sentence for all 15 counts and ran the sentences concurrently, and thereafter the Supreme Court granted the defendant's appeal which resulted in the Judgment of Conviction being revised to reflect conviction of a single count. Therefore, Defendant's claim is without merit.

C. Ground Three of Defendant's Supplement is Without Merit

In Ground Three of his Supplement, Defendant alleged that trial counsel was ineffective for failing "to file a meritorious motion to suppress." Supplement at 9. Specifically, Defendant alleged that there was "significant evidence of false statements in the search warrant affidavit." Supplement at 9-10. However, this Court finds that Defendant's claim is without merit as the search warrant was still supported by probable cause irrespective of Hines's alleged lie. In response to defense counsel's allegation of Hines committing perjury, this Court stated:

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> My recollection was she said that her answer to the one question at preliminary hearing, which was: Did you immediately recognize the thumb drive -- I'm paraphrasing, of course -- as Mr. Castaneda's? She said, No. And that was -- then you said, Well, were you lying then? She said, Yes. So that's the only -- to my way of thinking as far as having heard everything, it appears to me the only thing that she admitted that she lied about was that one statement.

4 RT 128. Based on the Court's response, Defendant was not entitled to a Franks hearing since he failed to demonstrate that the investigators engaged in any misconduct. Weber v. State, 121 Nev. 554, 584, 119 P.3d 107, 127 (2005). Moreover, a search warrant cannot be overturned solely because of a witness's alleged lie, and will only be re-examined for probable cause if a defendant makes a substantial preliminary showing that the affidavit contains intentionally or recklessly false statements. Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676 (1978). Defendant fails to make such a showing. Therefore, this Court finds that Defendant's claim is without merit.

D. Ground Four of Defendant's Supplement is Without Merit

In Ground Four of his Supplement, Defendant alleges that trial counsel was ineffective for failing to "prepare a necessary jury instruction based upon the case of United States v. Flyer." Supplement at 10. However, a jury instruction based on Flyer would be inappropriate as Defendant's reliance on Flyer is misplaced. In Flyer, the defendant was convicted of possession of child pornography. Id. Although the defendant successfully argued that the evidence was insufficient to support his conviction, this Court finds that Flyer is inapplicable to the instant matter. Id. The Court in Flyer reasoned:

> Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images.

(emphasis added). 633 F.3d at 919 (quoting United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006).

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In Flyer, the Court stated that there was no evidence that the defendant "had accessed, enlarged, or manipulated any of the charged images," or that the defendant could "recover or view any of the charged images in unallocated space or that he even knew of their presence." 633 F.3d at 919-920. In the instant matter, the evidence adduced at trial supports a finding that Defendant did not lack access to and control over the files at issue. In addition to the charged images found on the thumb drive, each charged image was also found on Defendant's shuttle desktop under Defendant's user account. 3 RT 118, 132. The images that were found in the "unallocated space" were merely duplicates of the images found on Defendant's shuttle desktop. 3 RT 123, 126-127; 4 RT 68-69. Hines testified that she has seen Defendant using the computer with the charged images at "[e]very waking hour of the day." 2 RT 213. Det. Ehlers testified that if an image was in unallocated space, "it would show that a user actually had contact or interaction with it as opposed to it just being placed there or downloaded at one time, never viewed or touched." 4 RT 99. These testimonies, coupled with Defendant's background in computers, support this Court's finding that Defendant did in fact have access to and control over the files in question. See 4 RT 136-138. Accordingly, a jury instruction based upon Flyer would have been inappropriate. Therefore, this Court finds that Defendant's claim is without merit.

E. Ground Five of Defendant's Supplement is Without Merit

In Ground Five of Defendant's Supplement, Defendant alleged that appellate counsel was ineffective for not raising Ground Four and a sufficiency of the evidence claim on appeal. Supplement at 12. However, this Court finds that Defendant's claim fails. As discussed supra, a jury instruction based upon Flyer is inappropriate. Accordingly, there was no basis for appellate counsel to raise this issue on appeal.

As to Defendant's sufficiency of the evidence claim, Defendant already raised this argument on appeal to the Nevada Supreme Court, and the Nevada Supreme Court rejected it. See Castaneda v. State, Docket No. 64515 (Opinion, June 16, 2016). Accordingly, this Court finds that this issue is barred under the law of the case. See State v. Loveless, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting Wright v. Carson Water Co, 22 Nev. 304,

308, 39 P. 872, 873-874 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart."). As explained in Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See also Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532(2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

In rejecting Defendant's insufficiency of the evidence claim, the Nevada Supreme Court held the following:

> Here, although Castaneda elicited testimony that a virus could have accessed the files, other testimony established that the downloads were more likely the product of conscious human endeavor. Similarly, while Castaneda's housemates at one time had access to Castaneda's desktop, other evidence indicated that they did not have access to Castaneda's password-protected user account on the desktop or his laptop. The jury also was entitled to consider that fact that the same images appeared on more than one device and that, when he saw that a detective had opened one of the illegal images, Castaneda commented that "Those are kids, I'm sorry." Viewed in the light most favorable to the State, the evidence was sufficient to support the jury's conviction of Castaneda for knowingly and willfully possessing the charged images in violation of NRS 200.730.

Castaneda, Docket No. 64515 at 16 (emphasis in original). To the extent Defendant tries to vary his insufficiency of the evidence argument in the instant petition, this Court rejects Defendant's attempt to re-litigate an issue that has already been ruled on by the Nevada Supreme Court as it constitutes an abuse of the writ pursuant to NRS 34.810(2). Regardless, such variation cannot defeat the law of the case. See Hogan v. Warden, Ely State Prison, 109 Nev. 952, 860 P.2d 710 (1993); Pellegrini, 117 Nev. at 879, 34 P.3d at 532. Accordingly, there was no basis for appellate counsel to raise this issue on appeal. Therefore, this Court

finds Defendant's claim is without merit.

II. DEFENDANT FAILS TO DEMONSTRATE CUMULATIVE ERROR

In Ground Six of his Petition, Defendant argued that ineffective assistance of both his trial and appellate counsel resulted in cumulative error. Supplement at 12. However, because Defendant failed to show any instances of error and fails to demonstrate cumulative error sufficient to warrant reversal, this Court finds that his claim is without merit.

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 where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See 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.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-553 (5th Cir. 2005)). Since Defendant has not demonstrated any claim warrants relief under Strickland, there are no errors to cumulate.

In addressing a claim of cumulative error, the relevant factors are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As discussed above, the issue of guilt was not close as the evidence against Defendant was overwhelming. Even assuming that some or all of Defendant's allegations of deficiency have merit, he has

failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome at trial. Accordingly, even if counsel was in any way deficient, there is no reasonable probability that Defendant would have received a better result but for the alleged deficiencies. Further, Defendant certainly has not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Defendant's case. Defendant's sentence was not changed by the Supreme Court Order. Moreover, this Court ran all of Defendant's counts concurrent. Therefore, this Court finds that Defendant's cumulative error claim is without merit and is thus denied.

ORDER

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

DATED this 18th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 18th day of January, 2018, to:

TERRENCE JACKSON, ESQ. terry.jackson.esq@gmail.com

TALEEN PANDUKHT, ESQ. taleen.pandukht@clarkcountyda.com

BY Shelby Lopaze
Shelby Lopaze, Judicial Executive Assistant

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1/24/2018 2:38 PM
Steven D. Grierson
CLERK OF THE COURT

NOASC
TERRENCE M. JACKSON, ESQ.
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624 South Ninth Street
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Terry.jackson.esq@gmail.com
Counsel for Anthony Castaneda

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. ANTHONY CASTANEDA, #2799593, Defendant.	District Case No.: C-11-272657-1 Dept.: V **NOTICE OF APPEAL**

NOTICE is hereby given that the Defendant, ANTHONY CASTANEDA, by and through his attorney, TERRENCE M. JACKSON, ESQ., hereby appeals to the Nevada Supreme Court, from the Findings of Fact, Conclusions of Law and Order, file-stamped JANUARY 18, 2018.

Defendant, ANTHONY CASTANEDA, further states he is indigent and requests that the filing fees be waived.

Respectfully submitted this 24th day of January, 2018.

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
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Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for *Anthony Castaneda*

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CERTIFICATE OF SERVICE

I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and on the 24th day of January, 2018, I served a true, correct and e-filed stamped copy of the foregoing: Defendant, ANTHONY CASTANEDA'S, NOTICE OF APPEAL as follows:

[X] Via Electronic Service (Odyssey eFile and Serve) to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals, located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

STEVEN S. OWENS
Chief Deputy D.A. - Criminal
APPELLATE DIVISION
steven.owens@clarkcountyda.com

ANTHONY CASTANEDA
35 West Owens, Apt. # 308B
Las Vegas, NV 89030

ADAM P. LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

COPY

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1/25/2018 10:33 AM
Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

ANTHONY CASTANEDA,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-11-272657-1

Dept No: V

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

PLEASE TAKE NOTICE that on Janury 18, 2018, 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 January 25, 2018.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 25 day of January 2018, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Anthony Castaneda # 2799593
330 S. Casino Center Blvd.
Las Vegas, NV 89101

Terrence M. Jackson, Esq.
624 S. Ninth St.
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ANTHONY CASTANEDA, Defendant.	CASE NO. C-11-C272657-1 DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 4, 2017

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTION TO WITHDRAW COUNSEL/DEFENDANT'S MOTION FOR THE APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: TALEEN R. PANDUKHT
Chief Deputy District Attorney

For the Defendant: JENNIFER A. FRASER
Deputy Public Defender

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 4, 2017, 9:23 A.M.

* * * * *

THE COURT: Case Number C272657, State of Nevada versus Anthony Castaneda. So this is the defendant's pro-per motion to withdraw counsel, or dismiss the Public Defender's Office as counsel. And so I'm going to grant that.

MS. FRASER: Okay.

THE COURT: He's also got on this morning – and of course he's not present, as he's in custody in the –

MS. FRASER: Mm-hmm.

THE COURT: – Nevada Department of Corrections. He also had a motion for appointment of counsel and request for an evidentiary hearing, which I'm denying without prejudice, as those are premature at this point.

He has filed his petition for –

MS. FRASER: Mm-hmm.

THE COURT: – post-conviction petition, a writ of habeas corpus. I signed the order and that's – that was filed or is – it hasn't been scanned in yet, but I filed it to order the State to do the response. So once I see the response –

MS. PANDUKHT: I – the State did file an opposition to that, Your Honor.

THE COURT: No, you filed an opposition to the – this motion.

MS. PANDUKHT: Oh, to this motion. Okay.

THE COURT: But I'm talking about the petition.

MS. PANDUKHT: Oh, okay.

THE COURT: So I'm denying the petition because it –

MS. PANDUKHT: Okay.

THE COURT: – I mean the motion because it's premature, but it's without prejudice because I want to see – I want you to address the –

MS. PANDUKHT: Yes.

THE COURT: – his petition that he has filed first.

MS. PANDUKHT: And that's on –

THE COURT: And then I'll decide whether I think that there's really a need for appointment of counsel or an evidentiary hearing.

MS. PANDUKHT: When is the petition hearing set for?

THE COURT: It's –

MS. PANDUKHT: Not yet or –

THE COURT: I don't think it's set.

MS. PANDUKHT: I don't see it on the calendar for a future date.

THE CLERK: Let me look.

THE COURT: That's because – it should have been set on the order. I signed that before I left on vacation.

MS. PANDUKHT: And they didn't send me the file. I just have a few papers.

THE CLERK: I do – oh, yes, I – no, I don't show it. I do not show it set at this point.

THE COURT: And I think – I think the reason for that is I signed the order and it went back to the Clerk's Office, and they have to set the hearing.

LAW CLERK: I don't think they've done that yet.

THE COURT: And they haven't done it. It's like they're backed up from the holiday.

MS. PANDUKHT: Oh.

THE COURT: Maybe they let too many people go home. I don't know what. And I –

MS. PANDUKHT: Okay.

THE COURT: I did drop 88 judgments –

MS. PANDUKHT: But it –

THE COURT: – of conviction on them before I left.

MS. PANDUKHT: Merry Christmas. So it has been filed though, his petition has been filed?

THE COURT: The petition's been –

MS. PANDUKHT: Okay.

THE COURT: – filed, and I signed the order asking the State to do the return.

MS. PANDUKHT: Okay.

THE COURT: And then that also has the date for the hearing, but because the Clerk's Office hasn't –

MS. PANDUKHT: Okay.

THE COURT: – scanned it and everything, I can't tell you what it is yet.

MS. PANDUKHT: Okay.

THE COURT: But it's the normal, what, 45 days, so –

MS. PANDUKHT: I'll let them know as well.

THE COURT: – it'll get calendared –

MS. PANDUKHT: Okay.

THE COURT: – by the Clerk's Office.

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MS. PANDUKHT: Thank you.

PROCEEDING CONCLUDED AT 9:27 A.M.

* * * * * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case to the best of my ability.

Lara Corcoran

LARA CORCORAN
Court Recorder/Transcriber

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2/15/2018 4:15 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ANTHONY CASTANEDA,

Defendant.

CASE NO. C-11-C272657-1

DEPT. NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 16, 2017

RECORDER'S TRANSCRIPT RE:
ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff: TALEEN R. PANDUKHT
Chief Deputy District Attorney

For the Defendant: TERRENCE M. JACKSON, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

LAS VEGAS, NEVADA, MONDAY, OCTOBER 16, 2017, 9:16 A.M.

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THE COURT: Case Number C272657, State of Nevada versus Anthony Castaneda.

MR. JACKSON: Good morning, Your Honor.

THE COURT: Good morning, Mr. Jackson. And this is the time set for argument on the petition for a writ of habeas corpus, and I've read your supplemental petition as well as the State's opposition and your reply. Do you want to add anything or say anything?

MR. JACKSON: I'll just be very brief. There's a number of issues we raise. The accumulation of issues that – the most important I think is that the defendant did not raise what we characterize as the Flyer instruction. I think there was at least some evidence to support it, and I think it's valid case law in this jurisdiction, based on Ninth Circuit Case of Flyer.

The State I think mischaracterizes the burden. They said there wasn't enough evidence to support it. It's a very low burden with your theory-of-case instruction. As long as there's some evidence to support it, such an instruction should be given.

As to the other issues, I think we have briefed them fairly thoroughly. It's our opinion that when you look at the totality of issues in this case, the defense did not meet the Strickland standard of reasonable competent counsel and the defendant was prejudiced thereby.

This was a very serious case. Counsel needed a zealous and competent – or rather the defendant needed zealous and competent advocacy. And we raised several, I think, significant issues concerning counsel's lack of full

competency in this matter. And based on that, based on each of the issues we raise, we think there was sufficient error, that the defendant did not get competent representation, and his case should be reversed because of that.

I'll submit it with that and with the – all the points and authorities that have been submitted by both sides.

THE COURT: All right. State.

MS. PANDUKHT: Thank you, Your Honor. The defense attorney who tried this case was David Westbrook, who is on the Special Victims Unit for the Public Defender's Office, and he's been doing that position for numerous years. And to call him anything short of zealous would be a misstatement. I think he's one of the most zealous attorneys I have ever encountered at the Public Defender's Office or in general.

Specifically, with regard to the Flyer instruction, the reason that the defense didn't request this instruction, as stated in our opposition, was because there wasn't evidence of that, because the defendant did have access, because the images were not only on his thumb drive, but they were also on his desktop under his user's account. And you had, on top of that, a witness who said that he was using that computer every single day. I think she said every waking hour of the day. So that was the reason why he didn't request that instruction.

Defense counsel didn't specifically raise any of the other issues that were briefed, in terms of any specificity, but I believe that there is no reason to have an evidentiary hearing in this case, because every issue is belied by the record or is barred by doctrine of the case, because – or law of the case, because the Supreme Court even – for instance, with the computer expert, the Supreme Court even concluded that the defendant was able to make the points he wanted without calling

an expert, and they even found that that issue lacked merit.

So I'll submit it on that. I think our opposition speaks for itself as well.

MR. JACKSON: I'd just like to say one thing in response. I definitely was not making any personal comment towards defense counsel. In fact, if I do anything wrong in a case, I expect counsel to criticize my action. It's not – certainly not a personal attack on Mr. Westbrook, and if counsel interprets it as such, they're greatly mistaken. I know the Court knows that as well.

When I handle one of the post-conviction matters, it's to criticize the work of counsel in a case, not any personal attack. And counsel seems to take umbrage at my raising different points that I think should have been raised. And I might have been doing it even a little bit longer than Mr. Westbrook in handling these types of cases as well. So I'll just submit it with that.

THE COURT: Well, since the Court has – knows both of you well, as far as your work, I would say that you are both equally zealous lawyers on behalf of your clients. And having been opposite you as a litigator, Mr. Jackson, I certainly know that, and I've seen Mr. Westbrook in a couple of cases now, and so he is also very zealous. And so you're to be both commended for that.

I would agree, however, with the State, frankly, and all of – for the reasons and arguments that are set forth in detail in the State's opposition. You know, this case, basically the defense that was presented was essentially to imply that the witnesses, the roommates, if you will, who discovered the thumb drive which ultimately led to the rest of the case and evidence, that those people were lying and trying to set him up, and that, you know, it was their doing. The jury chose to believe those witnesses. And the Flyer is inapposite, because that was a sufficiency of the evidence case and here there was plenty of evidence.

The State's also correct that the Supreme Court already indicated that there was sufficient evidence presented through the cross-examination, et cetera, and that there wasn't a requirement – there wasn't a need for an expert. And so, you know, I just don't think that there's – I don't think there's also a showing of prejudice in this case.

There's – there was some discussion about how there would have been something different on sentencing perhaps. Well, you'll also recall that the Court, frankly, thinking that what I was going to see later coming down the pike was that the Court ruled just as it did, and so I sentenced anticipating that and ran everything concurrent, so it was just the same. The sentence was not changed by the appeal ruling by the Supreme Court.

So for all those reasons, which are also set forth in detail in the, you know, papers of the State, the petition is denied.

PROCEEDING CONCLUDED AT 9:24 A.M.

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case to the best of my ability.

Lara Corcoran

LARA CORCORAN
Court Recorder/Transcriber