IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74988

RESPONDENT'S ANSWERING BRIEF

Appeal From a Denial of Post-Conviction Relief
Eighth Judicial District Court, Clark County

TERRENCE M. JACKSON, ESQ.
Nevada Bar #000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals because it is a post-conviction appeal from the denial of a Post-Conviction Petition for Writ of Habeas Corpus. NRAP 17(b)(3).

STATEMENT OF THE ISSUE(S)

I. Whether Anthony Castaneda's claims of ineffective assistance of trial and appellate counsel are without merit

II. Whether Anthony Castaneda failed to demonstrate cumulative error

STATEMENT OF THE CASE

The District Court outlined the procedural history below:

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 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 27, 2018, the Court discovered a clerical error in the Third Amended Judgment of Conviction and filed a nunc pro tanc 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 <…>.

AA 283-286. Defendant filed a Notice of Appeal on January 24, 2018. AA 297. The instant Appellate brief was filed on May 29, 2018.

STATEMENT OF THE FACTS

This 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.

AA 286.[1]

[1] Defendant has failed to include complete procedural history as well as the trial record of his case in his Appendix, for this reason the State will cite to the District Court's Findings of Fact which are included in the Appendix. The burden to make a proper appellate record and include documents necessary for adjudication of the issues on appeal rests with Appellant and where required documents are omitted, this Court presumes that the record supports the lower court's decision. NRAP 30 (b)(1)-(4); Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996); M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987); Raishbrook v. Bayley, 90 Nev. 415, 416, 528 P.2d 1331 (1974); Kockos v. Bank of Nevada, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

SUMMARY OF THE ARGUMENT

Defendant's counsel was effective throughout the proceedings. Defendant's counsel was not ineffective regarding witnesses—Defendant's trial counsel had no reason to call an expert. Moreover, Defendant cannot establish prejudice because it is governed by the law of the case: this Court concluded on direct appeal that Defendant was able to make the points he wanted to make without calling an expert. Additionally, trial counsel has wide discretion in deciding on which witnesses to call, and this decision is virtually unchallengeable.

Defendant's counsel was not ineffective regarding a Motion to Suppress because the district court specifically found that Defendant's claim is without merit as the search warrant was still supported by probable cause irrespective of Hines's alleged lie.

Next, defendant's counsel acted reasonably when he did not request a jury instruction based upon United States v. Flyer, 633 F.3d 911, 913 (9th Cir. 2011), because the facts of the instant case are different and such instruction would have been inappropriate.

Defendant's appellate counsel was not ineffective for not raising inadequate instruction and sufficiency of the evidence claims on appeal. A jury instruction based upon Flyer is inappropriate in this case, and Defendant's sufficiency of the evidence

claim has already been raised on his first appeal to this Court, and this Court rejected it.

Finally, 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, defendant's cumulative error claim should be denied.

ARGUMENT

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). Further, this Court reviews for abuse of discretion a district court's denial of a habeas petition without the benefit of an evidentiary hearing. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008).

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 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.

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 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.

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possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). 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. Counsel was not ineffective regarding witnesses

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." AOB 14, 18. 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, in denying Defendant's Petition for Writ of Habeas Corpus the district court found that 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." AA 290. 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. AA 290. On that same date, defense counsel requested leave of the court to call a computer expert ("Mare") to rebut Det. Ehler's testimony. Id. Defense counsel preserved the proffered expert testimony of Leon 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. Id. 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. Id. Lastly, the question of prejudice is governed by the law of the case because this Court concluded on direct appeal that Defendant was able to make the points he wanted to make without calling an expert. AA 290. Therefore, Defendant's claim is without merit.

B. Counsel was not ineffective regarding Motion to Suppress

Defendant alleges his counsel was ineffective by not filing a Motion to Suppress "based upon the defective search warrants." AOB 25. Defendant specifically alleges that his counsel should have asked for a Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676 (1978) hearing, and that the search warrant was defective due to "many false statements made by Tami Hines in support of the affidavit." AOB 26. However, the district court specifically found that Defendant's claim is without merit as the search warrant was still supported by probable cause irrespective of Hines's alleged lie. AA 291-92. 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.

Id. 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, 438 U.S. at 155, 98 S.Ct. at 2676. Defendant fails to make such a showing. Therefore, this Court should defer to the district court and find that Defendant's claim is without merit.

C. Counsel was not ineffective regarding jury instruction on criminal intent

Defendant alleges that trial counsel was ineffective for failing to proffer a jury instruction based on United States v. Flyer, 633 F.3d 911, 913 (9th Cir. 2011). AOB 29. 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. 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. AA 293. 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. Id. The images that were found in the "unallocated space" were merely duplicates of the images found on Defendant's shuttle desktop. Id. Hines testified that she has seen Defendant using the computer with the charged images at "[e]very waking hour of the day." Id. 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." Id. These testimonies, coupled with Defendant's background in computers, indicate that Defendant did in fact have access to and control over the files in question. Id. Therefore, this Court should defer to the district court's finding that a jury instruction based upon Flyer would have been inappropriate in the instant case.

/ / /

D. Defendant's appellate counsel was effective

Defendant alleges that appellate counsel was ineffective for not raising an inadequate instruction and a sufficiency of the evidence claims on appeal. AOB 33. However, this 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 his first appeal to this Court, and this Court rejected it. AA 293. Accordingly, 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, this 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.

AA 293. To the extent Defendant tried to vary his insufficiency of the evidence argument in his petition, the district court properly rejected Defendant's attempt to re-litigate an issue that has already been ruled on by this 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 claim is without merit.

II.
DEFENDANT FAILED TO DEMONSTRATE CUMULATIVE ERROR

This Court should not consider Defendant's claims of cumulative error—this Court does not endorse the 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. denial, 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.")

A cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., 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) ("[W]here 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, 552-53 (5th Cir. 2005)). Because Defendant has not demonstrated that any claim warrants relief under Strickland, there is nothing to cumulate.

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. Therefore, Defendant's claim of cumulative error should be denied.

CONCLUSION

Based on the foregoing, the State respectfully request that this Court AFFIRM district court's denial of Defendant's Petition for Writ of Habeas Corpus.

Dated this 28th day of June, 2018.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 4,939 words and 20 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of June, 2018.

Respectfully submitted

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of June, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

TERRENCE M. JACKSON, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/Mariya Malkova/jg