IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON JEFFERSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 70732

RESPONDENT'S ANSWERING BRIEF

Appeal From an Order Denying a Post-Conviction Petition for a Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is appropriately retained by the Supreme Court because it is a post-conviction appeal involving a conviction for an offense that is a Category A felony. NRAP 17(a)(2); NRAP 17(b)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying Appellant's post-conviction Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE[1]

On November 5, 2010, the State filed an Amended Information charging Brandon Jefferson ("Appellant") as follows: counts 1, 3, 5, 7, 9, and 10: Sexual Assault with a Minor Under the Age of 14 (Category A Felony – NRS 200.364; 200.366); and counts 2, 4, 6, 8, and 11: Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Defendant pleaded not guilty. See Appellant's Appendix ("AA") 3-7.

On March 25, 2011, Appellant filed a Motion to Suppress his statement to police detectives. The State opposed this motion on April 6, 2011. The district court held an evidentiary hearing on the motion on June 2, 2011. The motion was denied and the written order was filed June 16, 2011.

On April 13, 2011, Appellant filed a Motion in Limine asking the district court to exclude certain statements of the child-victim to her mother and the detective in

[1] Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." It is the Appellant's burden to provide the Court with the record necessary to rule on the issues raised. See Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (holding that it is the appellant's burden to provide complete record on appeal); Thomas v. State, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal'"); see also M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987) ("When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision."). This was not done here, and where materials were not included, citations have not been included.

this case. The State opposed this motion on April 27, 2011. The district court held an evidentiary hearing on this motion. The district court granted the motion in part and denied the motion in part. The written order was filed January 17, 2012.

On October 18, 2011, Appellant allegedly sent a letter to the Nevada State Bar stating that he had a "bit of an issue" with his attorney Bryan Cox. AA 140-141. Appellant claimed that his attorney ignored Appellant's "outlook," "lightly" verbally abused him, and said that "people like you belong in hell not prison." AA 141.

On October 19, 2011, Appellant filed a pro per Motion to Dismiss Counsel in which he expressed dissatisfaction with counsel's alleged disregard of his strategy suggestions and alleged lack of investigation. Respondent's Appendix ("RA") 1-7. Appellant makes no mention of any communication with the State Bar in this motion, or of counsel's alleged statement referenced therein. RA 1-7.

On November 1, 2011, the district court held a hearing on the motion to dismiss counsel. RA 8-22. Appellant addressed the court at the start of this hearing, and told the court that counsel had not given him all the discovery in this case, had not subpoenaed Appellant's work records, which Appellant believed were important, and had not telephoned Appellant's family members. RA 9-10. At no time did Appellant mention any communication with the State Bar or the alleged statement made by counsel. RA 8-22.

During this hearing, counsel also addressed the court, stating that "[n]otwithstanding any allegations against me, you know, I want what's best for my client." RA 9. Counsel stated that he had visited Appellant many times and had reviewed the discovery with Appellant during these visits. RA 10-11. Counsel explained that the primary issue with giving Appellant certain materials was the lack of privacy at the jail and the nature of the charges in this case. RA 10-12. Counsel also stated that he did not believe Appellant's work records were relevant to the case, and that, during his last visit with Appellant he had confirmed that there was nothing else that Appellant wanted him to investigate. RA 12-13. At no time did counsel or the court mention any communication with the State Bar. RA 8-22.

After discussion between the parties, the district court denied the motion to dismiss counsel. RA 13. The order denying the motion was filed on November 1, 2011.

On November 16, 2011, the State filed a Second Amended Information making minor grammatical and factual corrections; the document contained the same substantive charges as the Amended Information. AA 8-12.

On July 30, 2012, Appellant's jury trial began. At trial, Appellant was represented by two attorneys from the Clark County Public Defender's Office – Bryan Cox and Kevin Speed. Appellant presented evidence at trial, including the testimony of an expert witness.

On August 8, 2012, the jury found Appellant guilty of counts 1, 2, 4, 9, and 10, and not guilty of counts 3, 5, 6, 7, and 8.[2] AA 13-16.

On October 23, 2012, Appellant appeared in court with counsel for sentencing. Appellant was adjudicated guilty and sentenced to incarceration in the Nevada Department of Corrections as follows: Count 1 – Life with parole eligibility after 35 years; Count 4 – Life with parole eligibility after 10 years, concurrent to count 1; Count 9 – Life with parole eligibility after 35 years, consecutive to counts 1 and 4; and Count 10 – Life with parole eligibility after 35 years, concurrent to counts 1, 4, and 9. Appellant received credit for 749 days served. Appellant was sentenced to Lifetime Supervision should he be released from probation, parole, or imprisonment. The Judgment of Conviction was filed on October 30, 2012. AA 17-20.

On November 14, 2012, Appellant filed a Notice of Appeal. Appellant raised many issues in his appeal including, but not limited to, the denial of his motion to dismiss counsel, several rulings on the admission of different items of evidence and/or testimony, the denial of his motion to suppress, jury selection and instructions, sufficiency of the evidence, and a challenge to his sentence as cruel and unusual.

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[2] The State voluntarily dismissed Counts 2 and 11 before Appellant was sentenced.

In an unpublished order, the Nevada Supreme Court affirmed Appellant's convictions and sentence; part of this order denied Appellant's claim that the district court abused its discretion in denying his Motion to Dismiss Counsel. AA 20-38. In this regard, this Court found that "[t]he district court's inquiry [during the hearing on the motion to dismiss counsel] demonstrates the conflict was minimal and could easily be resolved." AA 35.

Additionally, this Court denied Appellant's argument that there was insufficient evidence to support the jury's verdict because "the issue of guilt was not close given the overwhelming evidence presented by the State." AA 36. Remittitur issued August 26, 2014. AA 38.

On October 2, 2014, Appellant filed a pro per Post-Conviction Petition for Writ of Habeas Corpus raising approximately nine claims, almost all of which had been previously raised in his appeal. AA 39-120. Shortly thereafter, the State filed a Motion to Appoint Counsel to assist Appellant. The district court granted the State's motion and appointed attorney Matthew Lay.

On December 22, 2015, Appellant filed, through counsel, a Supplemental Petition for Writ of Habeas Corpus. AA 121-145. The State responded to both the Petition and Supplement on April 5, 2016. On May 19, 2016, the district court denied all of the claims in Appellant's Petition for Writ of Habeas Corpus and its

Supplement. AA 207. The Findings of Fact, Conclusions of Law, and Order was filed on August 3, 2016. AA 146-175.

On September 2, 2016, Appellant filed a Notice of Appeal. AA 205-206. On January 10, 2017, the Appellant filed an Opening Brief ("AOB") challenging only: (1) the finding that his trial and appellate counsel had a conflict of interest without an evidentiary hearing, and (2) the finding that there was no cumulative error. The State responds as follows.

STATEMENT OF THE FACTS[3]

Appellant and his wife, Cindy, lived together with their two children, five year old daughter C.J. and seven year old son Brandon Jr. Appellant stayed home with the children while Cindy worked at a retail store.

Cindy and Appellant got into an argument and Appellant left their apartment. Subsequently, Cindy could not find Appellant so she picked their children up from school. When Cindy and the children returned home, Cindy told the children that she and Appellant were struggling. Cindy told them that she may leave Appellant

[3] The Statement of the Facts is summarized from the State's Answering Brief in Jefferson v. State, Docket No. 62120 and related Order of Affirmance because the documents containing the underlying facts of this case were not included in Appellant's Appendix. Appellant had the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); see, e.g., Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal); Thomas v. State, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004). The required appendix should include "[c]opies of relevant and necessary exhibits." NRAP 30(d).

and it would just be the three of them. Cindy told them they would need to work together, stick together, and not keep any secrets from each other. Cindy and her children did a "pinky promise" then continued eating dinner.

Later that evening, C.J. – their five year old daughter – told Cindy that she had a secret to tell her. C.J. told her mother that when she was at work, Appellant would take her into his bedroom and make her suck his "ti ti" (referring to his penis). C.J. also told Cindy that Appellant pulled down her pants and put his "ti ti" down "there" (referring to her vagina). Cindy immediately called 911 and took C.J. to the hospital.

At the hospital, C.J. underwent a physical examination by Dr. Theresa Vergara. Las Vegas Metropolitan Police Department Detectives Matt Demas and Todd Katowich were dispatched to the hospital based on the 911 call. Once they arrived, the detectives conducted separate interviews of Cindy and the children.

Appellant was subsequently arrested and was brought to the central detective bureau for an interview, where he was first offered water and a chance to use the restroom. Appellant was advised of his Miranda rights, stated he understood his rights, and then agreed to speak with the detectives. At the outset, Appellant denied having any sexual contact with C.J. However, Appellant then admitted to multiple sexual contacts with C.J.

Appellant described one occasion when he was in his room, drinking alcohol, and C.J. came into the room. Appellant claimed that C.J. pulled his penis out of his pants and began rubbing his penis. Appellant described C.J. sucking on his penis for 2-3 minutes before he pushed her head away. Appellant also stated that C.J. would come into his room on other occasions, climb on top of him, pull his pants down, and rub her vagina on his penis. Appellant initially told the detectives that this only happened once, but then later claimed it happened no more than three times.

At trial, C.J. testified that Appellant began sexually abusing her when she was five years old. C.J. testified that Appellant would place his penis in her vagina, in her buttocks, and in her mouth and that this occurred on multiple occasions. C.J. testified that on one particular occasion, Appellant told C.J. to come into his room while Brandon Jr. was playing video games. When C.J. got to Appellant's room, he closed the door and took off his pants. Appellant then took off C.J.'s pants and had her sit on his lap. Appellant then inserted his penis in her vagina. C.J. described that she was on the bed, sitting on Appellant's legs when this penetration occurred. C.J. stated that Appellant then "moved his penis up and down." Appellant then put his penis in her mouth and in her anus.

C.J. testified that such vaginal, anal, and oral penetration occurred three more times. The second and third time occurred in Appellant's bedroom and the fourth in her bedroom. During the second incident, Appellant had C.J. come to his bedroom

and had her lie on the bed. Appellant then inserted his penis in her vagina and mouth, but did not insert his penis in her anus on this occasion. The third incident happened the same way as the first incident, with Appellant inserting his penis in C.J.'s vagina, mouth, and anus in his bedroom. The fourth incident occurred in C.J.'s bedroom. Appellant came into C.J.'s bedroom while she was sleeping on the bottom bunk. Appellant took her underwear off and inserted his penis in her vagina and in her mouth.

After each incident, Appellant told C.J. not to tell anyone about what happened.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Appellant's Petition for Writ of Habeas Corpus and related Supplement. The district court did not err in rejecting Appellant's allegation that his counsel had a conflict of interest or his allegation of cumulative error. Further, the district court did not err in denying the request for an evidentiary hearing. Therefore, the district court's order denying the Petition for Writ of Habeas Corpus and its Supplement should be affirmed.

ARGUMENT

I.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITION FOR WRIT OF HABEAS CORPUS.

Appellant challenges the district court's denial of his claim that counsel was ineffective because of a conflict of interest without holding an evidentiary hearing,

and of his claim of cumulative error. However, the district court did not err in its handling of these issues. Therefore, the district court's order denying the Petition and Supplement should be affirmed.

A. THE DISTRICT COURT DID NOT ERR IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE.

To prevail on a claim of ineffective assistance of counsel, Appellant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Strickland requires a defendant to first demonstrate that counsel's performance was deficient, and second, that this deficiency actually prejudiced the defendant. Id. This Court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey, 112 Nev. at 987, 923 P.2d at 1107; Harrington, 131 S.Ct. at 787-88. "Surmounting Strickland's high bar is never…easy." Harrington v. Richter, 131 S.Ct. 770, 788 (2011).

With respect to the first prong, a defendant is not entitled to errorless counsel. Rather, "'[d]eficient' assistance of counsel is representation that falls below an objective standard of reasonableness." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but]

simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, ___ U.S. ___, ___, 131 S. Ct. 1388, 1403 (2012) (quotation 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"). "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).

Courts begin with the presumption of effectiveness, and Appellant 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."). "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998). Accordingly, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. "[R]elying on 'the harsh light of hindsight' to cast doubt on a trial" that took place many years ago "is precisely what Strickland and AEDPA seek to prevent." Harrington, 131 S.Ct. at 779 (citing Bell v. Cone, 535 U.S. 685, 702 (2002)).

Even if a defendant can demonstrate that counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687-89, 104 S. Ct. at 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694); see also Harrington, 562 U.S. at 104, 131 S. Ct. at 787.

Appellant argues that he was denied effective assistance of trial counsel solely because counsel had a conflict of interest because Appellant filed a complaint with the State Bar about him. AOB 7, 16-19. Appellant asserts that this conflict was imputed to his appellate counsel, also an attorney in the Clark County Public Defender's Office; this allegedly imputed conflict is the sole basis for his claim that appellate counsel was ineffective. AOB 8, 16.

The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993). A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Nev. R. Prof'l Conduct 1.7(a). A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer. Nev. R. Prof'l Conduct 1.7(a)(2). To demonstrate an error based on an alleged conflict of interest, Appellant must show that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708 (1980)).

Here, the record shows that Appellant – despite numerous opportunities – never mentioned his communication with the bar. For example, when Appellant filed a motion to dismiss counsel, he did not mention the State Bar and, instead,

raised other issues. Similarly, when the motion came on for hearing and Appellant was able to address the court, he (again) did not mention the State Bar and instead discussed the issues in his motion. These issues were discussed and resolved in court, and the motion to dismiss counsel was denied. As such, the claim that counsel had a conflict of interest is not supported by the record.

Moreover, during his direct appeal, Appellant challenged the denial of his motion to dismiss counsel but, again, did not mention any communication with the State Bar. In affirming the denial of that motion, this Court concluded that Appellant's conflict with his trial counsel was "minimal" and "could easily be resolved." AA 35.

In addition, to demonstrate an error based on an alleged conflict of interest, Appellant must show that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708 (1980)). Even assuming arguendo that a conflict of interest existed, Appellant cannot show that it "adversely affected his lawyer's performance." For example, trial counsel, among other things, filed several pre-trial motions in this case, retained and presented an expert witness at trial, and secured not-guilty verdicts on half the counts in this case.

Further, even assuming arguendo that such a conflict would be properly imputed to appellate counsel, since there was no conflict of interest of trial counsel, Appellant's claim as to appellate counsel also fails.

As such, the district court did not abuse its discretion in denying this claim and the order should be affirmed.

1. THE DISTRICT COURT DID NOT ERR IN FINDING THAT APPELLANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

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

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

NRS 34.770 (emphasis added). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).

Appellant is only entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

Appellant argues that the district court was required to hold an evidentiary hearing to determine whether his counsel was ineffective based on the alleged conflict of interest. However, as discussed supra, the claim that there was a conflict

of interest is not supported by the record. As such, the district court did not abuse its discretion in denying the request for an evidentiary hearing and the order should be affirmed.

B. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S CLAIM OF CUMULATIVE ERROR.

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 a series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even if cumulative error review is available, such a finding in the context of a Strickland claim is extraordinarily rare. See, e.g., Harris by & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). After all, "[s]urmounting Strickland's high bar is never an easy task," Padilla, 559 U.S. at 371, 130 S.Ct. at 1485, and there can be no cumulative error where Appellant fails to demonstrate any single violation of Strickland. See, e.g., Athey v. State, 106 Nev. 520, 526, 797 P.2d 956 (1990) ("[B]ecause we find no error … the doctrine does not apply here."); United States v. Sypher, 684 F.3d 622, 628 (6th Cir. 2012) ("Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to

consider, and the cumulative error doctrine does not warrant reversal"); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("[W]here individual allegations of error are not of constitutional stature or are not errors, there is nothing to cumulate.") (internal quotation omitted).

Here, Appellant's claim of cumulative error is nonsensical. Appellant identifies precisely one error that counsel allegedly made: continuing to represent Appellant after Appellant filed a State Bar complaint.[4] Therefore, even assuming arguendo that counsel did act in error in that regard, there are no additional errors to cumulate and so a claim of cumulative error is factually and legally impossible. Moreover, since Appellant has failed to demonstrate that counsel committed even that single error, as discussed supra, there can be no cumulative error. Therefore, the district court's order should be affirmed.

CONCLUSION

Based upon the foregoing, the State respectfully requests that the district court's denial of Appellant's Post-Conviction Petition for a Writ of Habeas Corpus be AFFIRMED.

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[4] Although other issues were raised in the Petition in district court, Appellant has not challenged any of the district court's denials of those other claims. As such, Appellant currently challenges only one aspect of counsel's performance. Therefore, none of the other issues raised in the Petition and its Supplement can be considered here as to cumulative error.

Dated this 6th day of February, 2017.

Respectfully submitted,

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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 4,244 words and 19 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 6th day of February, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 6th day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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