EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
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Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

August 26, 2019

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. BRANDON MONTANE JEFFERSON
S.C. CASE: 79052
D.C. CASE: C-10-268351-1

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated July 9, 2019, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed July 17, 2019 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Amanda Hampton, Deputy Clerk

ORIGINAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRANDON JEFFERSON, #2508991

Defendant.

CASE NO: **A-19-793338-W**
C-10-268351-1

DEPT NO: **XXX**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **JUNE 4, 2019**
TIME OF HEARING: **8:30 AM**

THIS CAUSE having presented before the Honorable DAVID BARKER, District Judge, on the 4th day of June, 2019; Petitioner not being present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through DAVID L. STANTON, 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:

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PROCEDURAL HISTORY

On November 5, 2010, the State filed an Amended Information charging Brandon Jefferson ("Defendant") 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); Counts 2, 4, 6, 8, and 11: Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230). That same day, Defendant pleaded "not guilty."

On March 25, 2011, Defendant filed a "Motion to Suppress Unlawfully Obtained Statement" in which he argued that he did not knowingly and voluntarily waive his Miranda[1] rights and that his confession to police was coerced. The State opposed the Motion on April 6, 2011. On June 2, 2011, the Court held a Jackson v. Denno[2] hearing, during which the Court received several exhibits and testimony from Detective Matthew Demas. After entertaining argument from counsel, the Court verbally denied Defendant's Motion. A written order followed thereafter on June 16, 2011.

Meanwhile, on April 13, 2011, Defendant also filed a "Motion in Limine to Preclude Inadmissible 51.385 Evidence," in which he argued that the child victim's statements to other people regarding sexual abuse were hearsay and that admission of the statements would violate the Confrontation Clause. The State opposed the Motion on April 27, 2011, reasoning that it was premature because the availability of the child victim, as well as other witnesses, was not yet confirmed. The Court held an evidentiary hearing on the matter, thereafter, it decided that statements the victim made to her mother were admissible, but statements made to Detective Demas were not, barring additional developments. A written order denying in part and granting in part Defendant's Motion was then filed on January 17, 2012.

On October 19, 2011, Defendant filed in a proper person a Motion to Dismiss Counsel in which he expressed dissatisfaction with counsel's performance, particularly counsel's alleged disregard of Defendant's strategy suggestions. Defendant advised the Court that his issues with counsel were: 1) counsel had not given Defendant his full discovery; 2) counsel

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).
[2] 378 U.S. 368, 84 S. Ct. 1774 (1964).

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

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

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

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

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

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

years, to run concurrent with Counts 1, 4, and 9, with 769 days' credit for time served. The Court also ordered Defendant to pay $7,427.20 in restitution, and held that if he were released from prison, Defendant would be required to register as a sex offender pursuant to NRS Chapter 179D, and would be subject to lifetime supervision pursuant to NRS 179.460.

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

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

On December 22, 2015, Defendant filed, with the assistance of counsel, a Supplemental Petition for Writ of Habeas Corpus. The State responded to both on April 5, 2016. On August 3, 2016, the district court entered its Findings of Facts, Conclusions of Law and Order denying

the petition.

Petitioner appealed the findings, and the Nevada Court of Appeals affirmed in a published opinion on December 28, 2017. Jefferson v. State, 133 Nev. __, __, 410 P.3d 1000 (2017).

On May 2, 2019, Petitioner filed the instant second Petition for Writ of Habeas Corpus. The State responded on May 28, 2019. In a hearing on June 4, 2019, this Court denied the petition.

FACTUAL BACKGROUND

In the summer of 2010, Defendant and his wife, Cindy, lived together with their two children, "CJ" and Brandon Jr. CJ was five years old and Brandon Jr. was seven years old. Defendant stayed home with the children while Cindy worked at a retail store.

On September 14, 2012, Cindy and Defendant got into an argument and Defendant walked out of the apartment. Cindy could not find Defendant so she went to pick up the children from school. When the three returned back to the apartment, Cindy told her children that she and Defendant were struggling. Cindy told them that if Defendant did not come home today, Cindy was going to leave Defendant and it would just be the three of them. Cindy told them they would need to work together, stick together, and to not keep any secrets from each other. Cindy and her children did a "pinky swear" then continued eating dinner. Cindy told her children not to keep secrets from her and did "pinky promises" on other occasions as well.

Later that evening, CJ told Cindy that she had a secret to tell her. CJ told her mother that when she was at work, Defendant takes her into his bedroom and makes her suck his "tee tee" (referring to his penis). CJ also told Cindy that Defendant pulls down her pants and puts his "tee tee"[4] down "there" (referring to her private area). Cindy immediately called 9-1-1 and took CJ to the hospital.

At the hospital, CJ underwent a physical examination by Dr. Theresa Vergara. Las Vegas Metropolitan Police Department ("LVMPD") Detectives Matt Demas and Todd Katowich were dispatched to the hospital based on the 9-1-1 phone call. Once they arrived,

[4] At times in the record, "tee tee" is also spelled "ti ti."

the detectives conducted separate interviews of all three family members.

Afterwards, the detectives placed Defendant under arrest. They brought Defendant to their central detective bureau for an interview where he was first offered water and a chance to use the restroom. Defendant was advised of his Miranda warnings, stated he understood his rights and agreed to speak with the detectives.

At the outset, Defendant denied having any sexual contact with CJ. However, as the interview progressed, Defendant admitted to multiple sexual contacts with CJ. Defendant described one occasion where he was in his room, drinking alcohol, and CJ came into the room. Defendant claimed that CJ pulled his penis out of his pants and began rubbing his penis. Defendant described CJ sucking on his penis for 2-3 minutes before he pushed her head away. Defendant also stated that CJ would come into his room on other occasions, climb on top of him, pull his pants down, and rub her vagina on his penis. Defendant initially told the detectives that this only happened once, but later claimed no more than three times. The interview lasted 45 minutes.

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

CJ testified that vaginal, anal, and oral penetration occurred three more times. The second and third time happened in Defendant's bedroom and the fourth in CJ's bedroom. During the second incident, Defendant had CJ come to his bedroom and lie on the bed. Defendant stuck his penis in CJ's vagina and mouth, but did not stick his penis in her anus on this occasion. The third incident happened the same way as the first, with Defendant sticking his penis in CJ's vagina, mouth, and anus in his bedroom. The fourth incident occurred in CJ's

bedroom. Defendant came into CJ's bedroom while she was sleeping on the bottom bunk. Defendant took CJ's underwear off and put his penis in her mouth and vagina. After each incident, Defendant told CJ not to tell anyone about what happened.

ANALYSIS

I. THE PETITION IS PROCEDURALLY BARRED

The claims Petitioner raises here are barred by multiple provisions of NRS Chapter 34, and Petitioner has failed to demonstrate good cause and prejudice to overcome his defaults. The instant petition, accordingly, is denied.

A. The petition is time barred.

Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause shown for delay. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

Remittitur issued from the Nevada Supreme Court on September 3, 2014. Accordingly, Petitioner had until September 3, 2015, to file the instant petition. It was not filed until May 2, 2019. Absent a showing of good cause and prejudice, therefore, the petition is time-barred. For reasons set forth below, Petitioner has failed to demonstrate either.

B. The petition is successive.

Defendant's Petition is procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice.

NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Petitioner is now seeking a second bite at the habeas apple. On October 2, 2014, Petitioner filed a timely first habeas petition. On December 22, 2015, that petition was supplemented after this Court appointed counsel. The instant petition is Petitioner's second. The claims raised in the first were addressed in a Findings of Fact, Conclusions of Law and Order filed by this Court on August 3, 2016. Accordingly, any new claims raised by Petitioner are an abuse of the writ, and any claims which Petitioner has previously raised must be dismissed as they are successive.

C. Grounds 1 and 3 are barred by the law-of-the-case doctrine and res judicata.

Grounds 1 and 3 have been previously raised and rejected. Those holdings are now the law of the case and governed by principles of res judicata.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The 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." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas

petition. 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)). Furthermore, this Court cannot overrule the Nevada Supreme Court, and previously litigated issues are barred by res judicata. NEV. CONST. Art. VI § 6; see Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In Ground 1, Petitioner alleges that the district court should have granted his Motion to Dismiss Counsel and Appoint Alternate Counsel because counsel failed to challenge the "State's theory that [he] was unemployed with the opportunity to commit these crimes because he was home while Ms. Lamug worked." Pet. 10. This issue has been raised before, both on direct appeal and in the first habeas petition. The Nevada Supreme Court held that (1) the conflict was minimal and (2) Petitioner's request was untimely. Jefferson, No. 62120 at 15. It also explicitly addressed counsel's failure to obtain his work records and how counsel had "explained that the work records were not relevant and that leaving the records with a client in custody is risky because nothing is private in jail." Id. It declined to find that the district court had erred. Id.

When the issue was raised again in the first habeas petition, this Court rejected it in its August 3, 2016, Findings of Fact, Conclusions of Law and Order:

> Defendant had indicated to the Court that he wanted to terminate Mr. Cox because he failed to get employment records and failed to make phone calls to Defendant's family. TT, Nov. 1, 2011, at p.3. Mr. Cox indicated that he did not think the employment records were relevant to Defendant's defense in the case. Id. at pp.5-6. This was especially true in light of the fact that there was no specific time period pled in the charging document. Id. at p.6. As a result of this exchange, the State simply advised the Court that Defendant had stated in his statement to police that he had lost his job. Id. Thus, Defendant's complaint that he wanted the Court to dismiss defense counsel because counsel failed to get Defendant's employment records was nonsensical as the employment records were not relevant to Defendant's defense as Defendant, by his own admission, was unemployed when he sexually abused his daughter.

Order at 23-24.

The Nevada Court of Appeals similarly rejected Petitioner's argument that there was a conflict of interest which arose out of the motion or the bar complaint:

> Because we hold the filing of a bar complaint does not create a per se conflict of interest that rises to the level of a violation of the Sixth Amendment, and Jefferson did not assert that the filing of the bar complaint adversely affected his counsel's behavior or caused his counsel to defend him less diligently, he did not present a conflict-of-interest claim that would entitle him to relief. The district court therefore did not err by denying his claim without conducting an evidentiary hearing. Accordingly, we affirm the district court order denying Jefferson's postconviction petition for a writ of habeas corpus.

Jefferson v. State, 133 Nev. , , 410 P.3d 1000, 1004 (Nev. App. 2017).

Because Petitioner has previously litigated the questions of whether the district court erred in denying his motion to dismiss counsel, whether there was a conflict, and whether counsel should have sought work records, Ground 1 is barred by the law of the case doctrine and res judicata.

Ground 3 is similarly barred by the law of the case doctrine and res judicata. There, Petitioner alleges that his trial and appellate counsel were ineffective for failing to adequately challenge the voluntary nature of his statement. This issue has been extensively litigated. Trial counsel filed a Motion to Suppress his statement on March 11, 2011. The district court's denial of that motion was raised on appeal. Jefferson, No. 62120 at 4 n.1 ("[T]he circumstances show Jefferson voluntarily waived Miranda."). This holding is now the law of the case.

For these reasons, Grounds 1 and 3 are barred by the law of the case doctrine in addition to the other procedural bars.

D. Petitioner's substantive claims are waived.

NRS 34.810(1)(b) reads:

> The court shall dismiss a petition if the court determines that:
> ...
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> ...
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings...[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

To the extent that any of Petitioner's claims can be construed as anything other than allegations that he received ineffective assistance of counsel at trial or appeal, they are waived for purposes of his habeas petition.

II. PETITIONER HAS FAILED TO DEMONSTRATE GOOD CAUSE AND PREJUDICE TO OVERCOME THE PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements. See Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

"To establish good cause, [a petitioner] *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128

Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).

To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Petitioner has failed to demonstrate good cause to overcome the procedural bars to his petition. First, it appears that the instant second petition is being raised solely to exhaust claims that the United States District Court for the District of Nevada found were unexhausted. Inasmuch as Petitioner is alleging that his attempt to exhaust his claims in state court provide good cause to overcome the procedural bars to his case, this fails. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) *abrogated by statute on other grounds as recognized by State v. Huebler,* 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012); Shumway v. Payne, 223 F.3d 982, 989 (9th Cir. 2000) (recognizing Washington's procedural default rules as "adequate and independent state" law that "bars her claims from federal habeas review.").

Second, Petitioner cites Martinez v. Ryan, 566 U.S.1, 132 S.Ct. 1309 (2012), and argues that his post-conviction counsel failed to fully raise his claims below. Pet. 15, 17. Petitioner apparently believes that Martinez grants him a constitutional right to effective counsel on habeas review because ineffective assistance of counsel claims cannot be raised on direct appeal and therefore constitutes good cause to overcome the procedural bars. Id. Petitioner is incorrect.

There is no right to the appointment of counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996) ("[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."). McKague specifically held that, with the exception of NRS 34.820(1)(a),[5] one does not have

[5] NRS 34.820(1)(a) requires the appointment of post-conviction counsel when a petitioner is under a sentence of death.

"[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. 112 Nev. at 164, 912 P.2d at 258.

Martinez did nothing to change this long-established rule in Nevada. Martinez created a narrow equitable exception to the procedural default rules in *federal* habeas litigation. Martinez, 566 U.S. at 14-15, 132 S.Ct. at 1319. The Martinez Court explicitly narrowed its holding: "state collateral cases on direct review from state courts are unaffected by the ruling in this case." Id. at 1320. Martinez thus does not apply in the context of NRS Chapter 34.

The Nevada Supreme Court was expressly presented with the question of whether Martinez could demonstrate good cause to overcome procedural bars:

> We have consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute "good cause" to excuse procedural defaults. See McKague, 112 Nev. at 163–65, 912 P.2d at 258; *cf.* Crump, 113 Nev. at 303 & n. 5, 934 P.2d at 253 & n. 5; Mazzan v. Warden, 112 Nev. 838, 841, 921 P.2d 920, 921–22 (1996). This is because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel." McKague, 112 Nev. at 164–65, 912 P.2d at 258.
>
> *Martinez v. Ryan does not address state procedural bars*
> Brown argues that Martinez changes this court's jurisprudence holding that ineffective assistance of post-conviction counsel provides good cause to excuse a state procedural bar only when appointment of that counsel was mandated by statute. We disagree.

Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (internal footnote omitted).

Moreover, even if Brown did not squarely foreclose any attempt to demonstrate good cause under Martinez to overcome the default rules of NRS Chapter 34, Martinez was decided on March 20, 2012, seven months before Petitioner's Judgment of Conviction was filed and several years before Petitioner filed his first post-conviction habeas petition. Accordingly, the necessary law and facts needed to bring a challenge to post-conviction counsel have been available to Petitioner since before post-conviction counsel was ever appointed. Remittitur issued from his post-conviction appeal on January 30, 2018, and the instant second petition was not mailed until March 24, 2019. Accordingly, any claim of ineffective assistance of post-conviction counsel is now itself time-barred and cannot be good cause sufficient to overcome

the procedural bars. Rippo v. State, 134 Nev. Adv. Op. 53, 423 P.3d 1084, 1094, amended on denial of reh'g, 432 P.3d 167 (Nev. 2018) ("[W]e have also recognized that an ineffective-assistance-of-counsel claim cannot be asserted as cause to excuse the procedural default of another claim for relief if the ineffective-assistance claim is itself defaulted.").

Third, Petitioner alleges that the district court's failure to hold an evidentiary hearing or address several of his previous claims are "impediments external to the defense." Pet. 6-8. Even assuming, arguendo, that this were true, Petitioner cannot demonstrate good cause because Petitioner has filed the instant second petition more than a year after remittitur issued from his appeal of the denial of his first petition. Accordingly, Petitioner's claims of good cause on pages 6-8 of the instant petition are each independently time-barred. Rippo, 134 Nev. at __, 423 P.3d at 1094.

To the extent that Petitioner is attempting to demonstrate good cause beyond an attempt to exhaust his claims and use Martinez, he similarly fails. In Ground 1, for example, Petitioner claims that counsel should have been dismissed because there was a conflict of interest. This claim has been available to—and raised by—Petitioner several times. Petitioner cannot show good cause to overcome the procedural bars to a claim that has already been litigated. In Ground 2, Petitioner is alleging for the first time that trial, appellate, and post-conviction counsel were ineffective for failing to challenge the probable cause which led to his arrest as a means of suppressing his statement. Pet. 12 ("[A]ny reasonably competent defense lawyer knows that arresting free citizens of the United States for investigation violates the Fourth Amendment."). The law and facts necessary to raise Ground 2 have similarly been available to Petitioner throughout the course of his case and cannot now demonstrate good cause to overcome the procedural bars to his untimely and successive second petition. In Ground 3, Petitioner alleges that trial, appellate, and post-conviction counsel were ineffective for failing to allege that Petitioner invoked his right to remain silent when he said, "[t]hat's about it, that's all I can say," in response to a question. Pet. 16. Again, the law and facts necessary to raise this claim have not changed throughout the course of this case, and Petitioner has failed to demonstrate good cause for failing to raise it until the untimely and successive second petition.

Finally, in Ground 4, Petitioner alleges that he is "actually, factually, and legally innocent," but the law and facts necessary to raise that claim, like with each of the other claims raised, have been available to Petitioner throughout the course of his trial. Pet. 19.

Nor can Petitioner demonstrate prejudice to overcome the bars to his claims. In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982)).

Petitioner has failed to demonstrate prejudice to overcome the procedural bars because each ground is meritless. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

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The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of 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). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 2046 n.19 (1984).

"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." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." 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). In essence, the court must "judge the reasonableness of counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Even if a defendant can demonstrate that his 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, 104 S.Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. at 2064-65, 2068).

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 v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

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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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." 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.

a. Petitioner has failed to demonstrate prejudice to overcome the procedural bars to Ground 1.

As Petitioner has previously and unsuccessfully argued that his motion to fire counsel should have been granted, he cannot demonstrate prejudice here. This Court found that there was no conflict which rendered counsel ineffective. FCL at 20-21. It relied on the Supreme Court's finding that any conflict was "minimal." Id. at 21 (citing Jefferson, No. 62120 at 15). The denial of this issue was then raised in Petitioner's post-conviction appeal and was once more rejected. Jefferson v. State, 133 Nev. __, __, 410 P.3d 1000, 1004 (Nev. App. 2017). Accordingly, Petitioner's claim that he was denied the right to "effective and conflict free counsel at all stages of a criminal prosecution" is meritless and cannot show prejudice. Pet. 9. This Court denies the instant second petition as to Ground 1.

b. Petitioner has failed to demonstrate prejudice to overcome the procedural bars to Ground 2, his claim that the police lacked probable cause to arrest him

Ground 2 is similarly meritless. The Nevada Supreme Court has held that "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that a felony has been committed by the person arrested." Washington v. State, 94 Nev. 181, 183–84, 576 P.2d 1126, 1128 (1978).

Here, the victim told her mother that her father had forced her to perform oral sex on him. Jefferson, No. 62120 at 1. Specifically, she said, "daddy makes me suck his ti ti." Tr. Evid. Hr. (12/08/2011) at 21. The victim's mother then called the police and relayed that

information to them. Jefferson, No. 62120 at 1. Sexual assault is a felony, and the forceful insertion of a penis into the mouth without consent satisfies the elements of that felony. NRS 200.366. As the victim had only one father, there was no question about Petitioner's identity. This is sufficient to demonstrate probable cause.

Petitioner asserts that the "inconsistent statements of a young girl describing sexual assault" are insufficient to satisfy probable cause, citing Stoot v. City of Everett, 582 F.3d 910, 913-14, 918-21 (9th Cir. 2009). Pet. 13. Stoot is inapposite. There, the Ninth Circuit held that while "[l]aw enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects," "three factors, taken together" determined that the statements made by the child victim were unreliable and therefore insufficient to show probable cause. Stoot, 582 F.3d at 919. First, as a four-year-old, the victim was reporting on events that happened "over a year" earlier. Id. Second, the victim's answers were inconsistent. Id. at 920. Third, the victim "at one point confused [the defendant] with another boy." Id. Rather than adopting the *per se* rule that inconsistent statements automatically make the content of the statements unreliable for a determination of probable cause, the Ninth Circuit conducted a fact-based inquiry before determining that the three factors together rendered the victim's statements unreliable. Id. at 919. The inconsistent statements, accordingly, must be taken in conjunction with everything else.

Here, unlike in Stoot, the victim was not reporting on events that happened over a year before, nor—understandably—did she confuse her father with anyone else. Indeed, the Amended Information alleged that the conduct occurred in the month leading up to the victim's disclosure to her mother. AINF at 1 (alleging that the counts occurred between August 1, 2010 and September 14, 2010); Tr. Evid. Hr. (12/08/2011) at 5-6 (testimony of victim's mother regarding conversation on September 14, 2010). While the victim did, as Petitioner correctly asserts, give inconsistent statements, this is not enough under Stoot to render the arrest unreasonable or unsupported by probable cause. The victim was "sad," "embarrassed," and a "little bit shy" when she was speaking with detectives. Id. at 35. Nevertheless, she understood the questions and gave appropriate answers to each. Id. Her statement to the police was reliable

and sufficient to support probable cause.

Because the victim was reliable and provided detectives with the facts and circumstances to reasonably believe that Petitioner had committed sexual assault, Petitioner's arrest was supported by probable cause. Accordingly, Petitioner cannot demonstrate prejudice sufficient to overcome the procedural bars to Ground 2.

c. Petitioner has failed to demonstrate prejudice to overcome the procedural bars to Ground 3.

Petitioner was asked during his voluntary statement what was "causing this behavior." Petitioner's Exhibit 3(a). In response, he answered:

> I—what—I maybe—maybe um, what—what—me not having money. You know, I having [sic] a beer every now and then. That's about it. That's all I can say.

Id.

Petitioner now is claiming that his response to this question should have been raised by trial, appellate, and post-conviction counsel as an invocation of his right to remain silent. The record belies any claim that this was an invocation of the right to remain silent. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Instead, Petitioner is saying that he had nothing more to say in response to that question. He was asked a specific question, he answered that, and then he told the detectives that his answer was complete. Indeed, immediately thereafter, the detective asked Petitioner what goes on when the victim would come to his room. Petitioner kept talking, as he had for the first twenty-six pages of the transcript:

> I don't ask her to come to my room, sir. I mean it's—I mean I give her a little hug, a little kiss or something like that.

Petitioner's Exhibit 3(a).

Petitioner's response after allegedly invoking his right is inconsistent with an unequivocal invocation as the Fifth Amendment requires. See Dewey v. State, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007) (quoting Davis v. United States, 512 U.S. 452, 461–62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (holding that police are not required to stop questioning a suspect who has waived his or her *Miranda* rights unless the suspect subsequently proffers "an

'unambiguous and unequivocal'" invocation of the right to remain silent or the right to an attorney). As the Supreme Court held, detectives had properly informed him of his rights, asked him if he understood, and received an affirmative answer. Jefferson, No. 62120, at 4 n.1. The Court, accordingly, held that Petitioner's argument that "his waiver of his Miranda rights was not voluntary ... lacks merit." Id. Although the Nevada Supreme Court has not previously addressed the particular issue Petitioner is raising in Ground 3, its finding that the statement was voluntary is still the law of the case.

Indeed, his is just another attempt at challenging the voluntary nature of his statement to the police by changing the argument. He cannot overcome the law of the case by repackaging old arguments with new facts. The Nevada Supreme Court has already held that the confession was voluntary, and that holding is now the law of the case despite Petitioner's attempts to alter his argument. "The 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." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

d. Petitioner has failed to demonstrate either good cause or prejudice to overcome the procedural bars to Ground 4, his actual innocence claim.

In his petition, Petitioner seems to be raising a claim of actual innocence. See Pet. 19-22. A review of the substantive arguments within, however, reflect that Petitioner is really only just attacking the legal sufficiency of his conviction. As explained by the United States Supreme Court, actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992).

Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530. The United States Court of Appeals for the Eighth Circuit has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v.

Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S.Ct. 853, 860 (1993)). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that *no reasonable juror* would have convicted him absent a constitutional violation." Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (emphasis added). However, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S.Ct. 851, 861 (1995).

Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S.Ct. at 861. Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, 115 S.Ct. at 861.

Here, Petitioner does not even attempt to establish factual innocence. Instead, despite asserting innocence several times, he spends the next several pages challenging (1) the admissibility of the victim's statements and (2) the State's theory of the case. Pet. 19-22. None of this information is new. Petitioner cannot overcome the procedural bars to his claim by raising information which he has known about since trial. He attempts to circumvent the procedural default rules by claiming that he had every intention of bringing these claims in his first habeas petition, but his counsel failed to do so. Pet. 20. This is not an issue extrinsic to the defense.

Moreover, to the extent that Petitioner is claiming that his first habeas counsel was ineffective, that claim is itself time barred. Rippo v. State, 134 Nev. Adv. Op. 53, 423 P.3d 1084, 1094, amended on denial of reh'g, 432 P.3d 167 (Nev. 2018) ("[W]e have also recognized that an ineffective-assistance-of-counsel claim cannot be asserted as cause to excuse the procedural default of another claim for relief if the ineffective-assistance claim is itself defaulted."). Further, as Petitioner was not facing death, he was not entitled to counsel in the initial petition, and his claim of ineffective assistance of post-conviction counsel,

therefore, would not be cognizable even if it were timely. NRS 34.750; Brown v. McDaniel, 130 Nev. 565, 567, 331 P.3d 867, 869 (2014) ("[P]ost-conviction counsel's performance does not constitute good cause to excuse the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment of that counsel was mandated by statute.").

Petitioner also fails to demonstrate prejudice. As mentioned previously, he admitted to the sexual conduct with his daughter in the police interview. The voluntary nature of his statement was upheld on appeal. Jefferson, No. 62120 (Jul. 29, 2014) at 3. Further, the victim testified in open court about the sexual abuse by her father. The Nevada Supreme Court addressed the evidence presented against Petitioner thoroughly in its Order of Affirmance:

> In this case, C.J. testified with specificity as to four separate occasions of sexual abuse—three in Jefferson's bedroom, and one in her bedroom. She testified that on each of the three occasions in the master bedroom, Jefferson put his penis in her mouth, vagina, and anus, and on the fourth occasion, in her bedroom, he put his penis in her mouth and vagina. Finally, Jefferson's own confession also supports the lewdness and sexual assault charges as he stated that *on different occasions* C.J. rubbed her vagina against his penis, touched his penis, and put his penis in her mouth.

Id. at 11-12 (emphasis added).

Regardless of whether the victim's statement should have been suppressed or the correctness of the State's theory regarding Petitioner's opportunity to commit the abuse, no reasonable jury member when presented with this evidence. Accordingly, Petitioner cannot show prejudice sufficient to overcome the mandatory procedural bars to his actual innocence claim.

III. THE MOTION TO APPOINT COUNSEL IS DENIED

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a)

(entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings;
>
> or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

This Court denies Petitioner's motion to appoint counsel. The instant petition raises issues which are not difficult, and which can be disposed of using the record as it currently stands as the issues are either time-barred, successive, barred by the law-of-the-case doctrine, or otherwise meritless. Moreover, Petitioner's pleading belies any claim that he is unable to comprehend the proceedings.

For these reasons, Petitioner's request to have counsel appointed to represent him in his untimely, successive second habeas petition is denied.

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IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

In the instant case, Petitioner's arguments are either waived, time-barred, successive, barred by the law of the case, or meritless. Accordingly, there is no need to expand the record and Petitioner's request for an evidentiary hearing is denied. To the extent that Petitioner believes he should be entitled to an evidentiary hearing to elicit additional evidence, this claim is without merit. Post-conviction evidentiary hearings are not fishing expeditions, and Petitioner's failure to present his claims with specificity at this juncture precludes him from holding an evidentiary hearing in the hopes of developing them further.

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ORDER

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

DATED this 16 day of July, 2019.

DISTRICT JUDGE

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

BY _____ for
DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #003202

hjc/SVU

Clerk of the Courts
Steven D. Grierson

200 Lewis Avenue
Las Vegas, NV 89155-1160
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August 26, 2019 Case No.: C-10-268351-1

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 07/17/2019

now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 3:18 PM on August 26, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT