IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

BRANDON MONTANE JEFFERSON,
Appellant(s),

vs.

STATE OF NEVADA,
Respondent(s),

Case No: A-19-793338-W

Docket No: 79053
Consolidated with 79052

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
BRANDON JEFFERSON #1094051,
PROPER PERSON
P.O. BOX 1989
ELY, NV 89301

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-19-793338-W **Brandon Jefferson, Plaintiff(s)**
vs.
State of Nevada, Defendant(s)

I N D E X

Case No. ~~C-19-337338-1~~

Dept. No. II

FILED
APR 10 2019
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

A-19-793338-W
Dept. XXX

BRANDON M. JEFFERSON,
Petitioner,

v.

STATE OF NEVADA et al.,
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

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(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, ELY, NEVADA 89301

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT DEPT. II CLARK COUNTY, NEVADA

3. Date of judgment of conviction: OCTOBER 30, 2012

4. Case number: C268351

5. (a) Length of sentence: MANDATORY MINIMUM OF (70) YEARS BEFORE PAROLE ELIGIBILITY

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No ✓
If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: NRS 200.366, and NRS 201.230

8. What was your plea? (check one):
(a) Not guilty ✓ (b) Guilty ____ (c) Nolo contendere ____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury ✓ (b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ✓

12. Did you appeal form the judgment of conviction? Yes ✓ No ____

13. If you did appeal, answer the following:
(a) Name of Court: THE SUPREME COURT OF NEVADA
(b) Case number or citation: 62120
(c) Result: CONVICTIONS AFFIRMED

(d) Date of result: AUGUST 26, 2014
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes ✓ No

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court: U.S. DISTRICT COURT DISTRICT OF NEVADA
(2) Nature of proceeding: PETITION FOR RELIEF FROM CONVICTION OR SENTENCE BY A STATE PRISONER, AND MOTION FOR STAY AND ABEYANCE
(3) Grounds raised: DENIAL OF COUNSEL DURING CRITICAL STAGES OF PROSECUTION, INEFFECTIVE ASSISTANCE OF COUNSEL, AND MISCARRIAGE OF JUSTICE / ACTUAL INNOCENCE. AS TO MOTION FOR STAY THAT POST CONVICTION COUNSEL (STATE) WAS INEFFECTIVE.
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No ✓
(5) Result: MOTION FOR STAY GRANTED
(6) Date of result: FEBRUARY 25, 2019
(7) If known, citations of any written opinion or date of orders entered pursuant to such result: CASE 3:18-CV-00594-HDM-CBC, DOCUMENT 31, FEBRUARY 25, 2019

(b) As to any second petition, application or motion, give the same information:
(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT
(2) Nature of proceeding: PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
(3) Grounds raised: MULTIPLE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, IRRECONCILABLE CONFLICTS OF INTERESTS WITH COUNSEL, MULTIPLE INSTANCES OF PROSECUTOR MISCONDUCT, ACTUAL / FACTUAL INNOCENCE, DENIAL OF FAIR TRIAL
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No ✓
(5) Result: PETITION DENIED
(6) Date of result: JUNE 14, 2016, AFFIRMED ON DECEMBER 28, 2017.
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: 133 NEV. Advance Opinion 105 (NEVADA COURT OF APPEALS) (2017). JEFFERSON V. STATE, Case No. C-10-268351-1 (STATE DISTRICT COURT) (2016).

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ✓ No
Citation or date of decision: 133 Nev. Advance Opinion 105
(2) Second petition, application or motion? Yes No
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes No
Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: INEFFECTIVE ASSISTANCE OF COUNSEL, DENIAL OF CONFLICT FREE COUNSEL, MISCARRIAGE OF JUSTICE / ACTUAL INNOCENCE

(b) The proceedings in which these grounds were raised: FIRST PETITION FOR STATE WRIT OF HABEAS CORPUS, FIRST PETITION FOR FEDERAL WRIT OF HABEAS CORPUS

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) POST CONVICTION COUNSEL DURING STATE PROCEEDINGS WAS INEFFECTIVE FOR FAILURE TO RAISE (IAC) CLAIMS REGARDING TRIAL AND APPELLATE COUNSEL, See Case 3:18-CV-00064-HDM-CBC

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ALL GROUNDS HEREIN NOT PRESENTED DUE TO COURTS' REFUSAL TO CONSIDER PRO SE FILINGS UNDER NRAP 46A(a) TO INCLUDE POST-CONVICTION COUNSEL'S FAILURE TO RAISE THEM

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) MOTION FOR STAY GRANTED BY U.S. DISTRICT COURT OF NEVADA TO EXHAUST CLAIMS NOT PRESENTED BY POST-CONVICTION COUNSEL, AND STATE COURTS' REFUSAL TO CONSIDER PRO SE FILINGS PURSUANT TO NRAP 46A(a). See Case 3:18-CV-00064 HDM-CBC (Doc. # 34)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ✓ No ____

If yes, state what court and case number: Case 3:18-CV-00064-HDM-CBC U.S. DISTRICT COURT, DISTRICT OF NEVADA

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: BRYAN COX (TRIAL), KEVIN SPEED (TRIAL); ANDREW CONWAY (APPEAL); and MATTHEW LAY (POST-CONVICTION)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ____ No ✓

If yes, specify where and when it is to be served, if you know: ____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

FACTS AND PROCEDURAL HISTORY

Jefferson was convicted of violating NRS. 200.366 and NRS. 201.230. He was sentenced to two consecutive terms of (35) years to life imprisonment with (10) years to life imprisonment, concurrent on the lesser included offense. The Supreme Court of Nevada affirmed his judgement of conviction on appeal in July 2014. Jefferson v. State, No. 62120 (Order of Affirmance, July 24, 2014). The Remittitur issued August 26, 2014.

On October 2, 2014, Jefferson filed in Proper Person, a timely post-conviction Petition for a Writ of Habeas Corpus. The district court appointed Counsel to represent him, and Counsel filed a Supplemental Petition. The district Court, without holding an evidentiary hearing or adressing Jefferson's claims, denied relief. The Supreme Court of Nevada issued a silent denial of Jefferson's Pro se appeal from that order which was filed July 7, 2016. The Supreme Court of Nevada transferred Jefferson's Pro se and Counseled appeal to the Nevada Court of Appeals on April 14, 2017. The Nevada Court of Appeals issued a silent denial of Jefferson's pro se appeal, and denied the appeal filed by Counsel with a formal opinion on December 28, 2017. Jefferson v. State, 133 Nev. Advance Opinion 105 (2017.) The Supreme Court of Nevada then issued Remittitur on Jandary 25, 2018.

On February 6, 2018, Jefferson filed a federal Petition for a Writ of Habeas Corpus. Jefferson v. State of Nevada, et al., Case 3:18-cv-00064-HDM-CBC. For the reasons set forth in the U.S. district Court's order, Jefferson's motion for an exhaustion stay was GRANTED. And Jefferson's return to federal Court is conditioned upon appropriately litigating his claims in State Court. See attached order of U.S. district Court.

APPLICABLE PROCEDURAL BARS.

This is Jefferson's Second Petition (Post-conviction) for a Writ of Habeas Corpus alleging IAC for trial and appeal. Jefferson believes he has good cause to excuse the procedural bars because he can demonstrate that an impediment external to the defense prevented him from complying with the procedural rules. See, NRS. 34.726(1) and NRS 34.810(2),(3). The Supreme Court of Nevada defines good cause as a substantial reason that affords a legal excuse. Hathaway v. State, 119 Nev. 248, 252 (2003).

Jefferson's "LEGAL EXCUSE" is this: The State district court did not squarely adress, first, GROUND 8(c) of Jefferson's petition. Here, Jefferson alleged that appellate counsel was ineffective for failing to present that during a hearing to Dismiss Counsel and Appoint Alternate Counsel, which Jefferson filed Pro Se, he quote: "AT THAT POINT THE PETITIONER BELIEVED HE HAD NO COUNSEL AT ALL." Petition at 27. The Supplemental brief filed by counsel, referenced that Jefferson should not have been left to present his motion without a conflicted attorney. Supp. petition at 11-12,(1-4). The State district court provided no legal opinion on whether Jefferson "HAD NO COUNSEL" at that hearing. See, Order denying petition at 23, 14-P. 24, 1-10. Jefferson v. State, Case No. C-10-268351-1 (Aug. 4, 2016).

Second, The State district court held no evidentiary hearing related to Jefferson's IAC claims in GROUND 7(B),(H). That trial and appellate counsel failed to show that police forced C. to fabricate allegations to effect an arrest. Jefferson v. state, Case No. C-10-268351-1 (2016), at P. 12, 3-P. 13, 1-3. Had an evidentiary hearing been held, in addition to police testimony about what C. told him which was not in the arrest report, Jefferson was armed with the order of this State's high court. Which states police arrested Jefferson to "CLEAR UP AN INVESTIGATION," to corroborate his assertions that police knew they had no Credible Complaint. Jefferson v. State, Case No. C-10-268351-1 (2016), at P. 19, 1-15. That assuredly, The Supreme Court of Nevada findings are in no way belied by the record. Jefferson v. State, 62120 (Order of Affirmance, P. 4 and n. 1) (2014).

Third, The State district Court did not adress GROUND B(A), Petition at P. 26 where Jefferson alleged IAC of trial and apellate Counsel as quote: " APPELLATE COUNSEL ALSO FAILED TO ENLIGHTEN THE COURT THAT DURING INTERROGATION THE PETITIONER ATTEMPTED TO END THE INTERVIEW, BUT THE DETECTIVES REFUSED HIM THAT RIGHT. THE PETITIONER DID NOT RESTART THE INTERVIEW IT WAS THE DETECTIVE WHO IN FACT ASKED A QUESTION." See also Petition at P.18 where Jefferson alleged IAC because trial counsel failed to present that his statement was Coerced because quote: " WHEN HE TRIED TO INVOKE THE RIGHT TO SILENCE HE WAS IGNORED." GROUNDS 6, 7(H) respectively. The state district Court relied on a procedural bar that is not independent of federal law. See Jefferson v. State, Case No. C-10-268351-1 (2016), at P.5, 1-16. And Compare With, Withrow v. Williams, 507 U.S. 680, 693 (1993).

Further, The Supreme Court of Nevada was never Presented with the question of Whether disregarded Jefferson's Verbal invocation of Miranda, which the district court has suggested. Ultimately, the State district Court Provided no legal opinion of this matter as it related to Jefferson's insufficient evidence challenge, that trial counsel failed to raise. See Order, Case No. C-10-268351-1 (2016), (P. 8. 19 - P. 9, 1-2), and (P. 17, 26 - P. 18-19, 1-14). Lastly, GROUND B (A), Order at P. 22, 5-24. Here, the district Court does not adress why appellate, like trial Counsel, never raised that Police ignored Jefferson when he invoked his right to remain silent.

Jefferson learned prior to final disposition of this case that his appointed post conviction attorney was neglectful. And filed his own pro se appellate brief re-raising these claims. The State high Court, pursuant to NRAP 46A(a), denied that appeal without comment.

It is under these circumstances, that a state remedy is still possibly available for Jefferson. Jones v. McDaniel, 320 Fed. Appx. 784 (9th Cir. 2009). Jefferson points to not only to what occured as a "LEGAL EXCUSE" in filing his second petition, he cites the plain language of Lozada v. State, 110 Nev. 349, 353 (1994); and NRAP 17(a)(6) as impediments external to the defense.

Lozada, 110 Nev. at 353 (1994), states that the impediment external to the defense which permitted the petitioner to raise the issue again was simply the Courts error in rejecting the claim the first time it was presented. If that claim had merit, the denial of relief by the district court and the subsequent denial of relief by this court, would constitute an impediment external to the defense that would excuse appellant's default in presenting the same claim in a successive petition. Therefore, we must determine whether appellant presented a viable claim for relief in his petition for post conviction relief.

Jefferson submits that under Lozada, Hathaway, and Passamisi v. Dir., Nev. Dep't of Prisons, 105 Nev. 63, 66 (1989), the district court erred it not adressing Jefferson's same claim IAC allegations, denying relief, and without an evidentiary hearing. Jefferson submits The Supreme Court of Nevada erred in not liberally construing his pro se appeal from denial of post conviction relief asserting IAC claims. See, Erickson v. Pardus, 551 U.S. 89, 94 (2007). For the proposition that under NRS 34.750(1), which provides for the discretionary appointment of counsel to represent non-capital habeas petitioners, and no requirement that the petitioner's counsel be effective. When Jefferson learned his counsel raised no allegations of IAC, Jefferson knew, frankly, that his lawyer was not to be relied on. Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th Cir. 2008). And took action in his interest. Holland v. Florida, 130 S.Ct. 2549, 2557-59, 2565, 2568 (2010).

Finally, because whether Jefferson's trial lawyer was actively, actually or limited by his own personal interests due to the conflict after Jefferson tried to fire him, presented a mixed question of law and fact, required by the legislature to be determined by the Supreme Court of Nevada. NRAP 17(a)(6), and Cuyler v. Sullivan, 446 U.S. 335, 342 (1980), Not the Nevada Court of Appeals. It is for the legislature to make policy as to the assignment of cases in Nevada Courts and Jefferson's case should have been heard by The state's high court. Jefferson asks this court to find he has demonstrated a legal excuse to proceed a second time in this court based on the above because these were circumstances he could not control.

GROUND 1

I allege that my state court convictions and sentences are unconstitutional, in violation of my. Sixth and Fourteenth Amendment rights to effective and conflict free counsel at all stages of a criminal prosecution based on these facts:

Tuesday, November 1, 2011 the court heard a pro se motion to "DISMISS COUNSEL AND APPOINT ALTERNATE COUNSEL." See, (TT. 11-01-11, pgs. 344-58). The court stated it was suprised by the motion because it came a couple of days before calender call. Trial counsel, (herein after Mr. Cox), claimed not to be suprised because Jefferson expressed concerns, but not with standing the allegations against him it was Jefferson's motion to argue. (TT. pg 345).

without counsel, Jefferson informed the court that counsel was refusing to investigate whether Jefferson was at work around the time the last incident was supposed to have occured, that Cox was not sharing discovery, and that Jefferson did not feel comfortable with Cox because of things he had said to Jefferson. (TT. 345-46).

Jefferson submits that Cox's responses and conduct to Jefferson's charge was antagonistic. See, U.S. v. Wadsworth, 830 F.2d 1500, 1510-11 (9th cir. 1987); and U.S. v. Adelzo-Gonzalez, 268 F.3d 772, 79 (9th cir 2001). Mr. Cox openly opposed the motion to substitute him by making clear he had not assisted Jefferson in filing the motion, and would be taking an adversarial stance to it. He asserted that because all inmates were stealing from each other, and informing on each other, he would not allow Jefferson to have his discovery. (TT. 347). Based on this response of Mr. Cox, Jefferson submits the only fair inference to be drawn is that Mr. Cox did not trust Jefferson and compared him to the likes of a jailhouse thief and snitch.

Mr. Cox is on this record as not understanding the relevance of a police incident report purporting Jefferson as a suspect last seen wearing a "WHITE CHEF SHIRT", "BLACK PANTS", and employed at "COLLEGE PARK REHAB" as a "KITCHEN WORKER." Because this report contains the social security numbers of Jefferson's children and ex-wife, Jefferson respectfully requests to produce it at an evidentiary hearing. (TT. 348-49). Williams v. Taylor, 529 U.S. 420, 437 (2000); and James v. Ryan, 679 F.3d 960 (9th cir. 2012).

Similerily, this incident reports reflects that Jefferson's ex-wife (Ms. Lamug) was employed at the "CHILDRENS PLACE" with Mondays, Tuesdays, and Fridays as days off. This is significant because Detective Demas testified at trial that the minor witness told him that the last time she had been assaulted by Jefferson had been "APPROXIMATELY SEVEN OR EIGHT DAYS, SO OVER THE FIVE DAY PERIOD." (TT, AUG. 6, 2012, p. 44, 11-16). Because seven or eight days prior to Jefferson's arrest on SEPT. 14, 2010, would have been either Monday, SEPT. 6, 2010, or Tuesday, SEPT. 7, 2010, Mr. Cox owed it to Jefferson to embrace Demas' testimony and demonstrate to the jurors that if they would believe this detective they should also find that Ms. Lamug was placed at the scene. And yet she never claimed to hear or see something like this occuring in her own bedroom, in the bed she shared with Jefferson to show that Jefferson is factually innocent, or to raise reasonable doubt about the time period set forth by the state through Demas. See, Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999); Holsomback v. White, 133 F.3d 1382, 85-86 (11th Cir. 1998), and Bennett v. Cate, 407 Fed. Appx. 213-15 (9th Cir. 2010).

The point Jefferson is trying to make is that Cox is on this record during this hearing effectively waiving any defense to the state's theory that Jefferson was unemployed with the opportunity to commit these crimes because he was home while Ms. Lamug worked. Cox is on record waiving any defense to the admissability of Ms. Lamug's and Brandon Jr.'s hearsay testimony, and waiving any rebuttal to Detective Demas's trial testimony. By refusing to investigate this Police report he foreclosed the potential to keep hearsay and other misleading information out of this trial.

As a consequence, Mr. Cox quit working on Jefferson's behalf when he failed to appear at a Status Conference and hearing to determine the scope of a defense expert witnesses testimony. See, (TT, JULY, 26, 2012, p. 1-4). Here, Jefferson had been for all practical purposes, left to the devices and will of a prosecutor as both Mr. Cox and Co-Counsel Mr. Speed were totally absent. U.S. v. Cronic, 466 U.S. 648, 658-59 (1984).

This court should conclude that Jefferson's case had been literally expedited to whom ever happened to be in the courtroom and was a public defender. This court should conclude that the U.S.Const. Amend VI right to counsel guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings. Delgado v. Lewis, 223 F.3d 976, 980-81 (9th Cir. 2000), and reject any proposition that focuses on the pervasiveness of the error in this case as Jefferson alleges deprivation of counsel during a critical stages of this prosecution. See, Musladin v. Lamarque, 555 F.3d 830, 36-36 (9th Cir. 2009).

In the wake of a Motion to Dismiss Mr. Cox; a Bar Complaint against Mr. Cox; a Complaint in The U.S. District Court for Nevada about Mr. Cox's failure to investigate and present Miranda violations and a Multiplicitous criminal complaint filed against Jefferson by the state; (Case 2:12-cv-00504-GMN-PAL); and letters to immediate supervisor, it should not be a coincidence that ultimately Mr. Cox had no difficulty putting whatever he had scheduled in his own personal or professional intrests before Jefferson's Sixth Amendment right to Counsel and Fourteenth Amendment right to Procedural Due Process of Law. Mr. Cox pulled a NO SHOW on Jefferson, and accordingly, this Court should presume prejudice because in the end it is about Mr. Cox's performance, not the trial judge. Mickens v. Taylor, 535 U.S. 162, 66, 179 (2002)(J, Kennedy Concurring opinion).

GROUND 2

I allege that my state court convictions and sentences are Unconstitutional in violation of my Sixth and Fourteenth Amendment rights to effective assistance of trial, appellate, and post-conviction Counsel. And Procedural Due process of Law based on these facts:

September 14, 2010. Ms. Lamug calls police to accuse Jefferson of sexually assaulting the minor witness in this case. (C.). Detectives' Matthew Demas and Todd Katowich are dispatched to Sunrise Hospital and conduct seperate interviews of C. Brandon Jr., and Ms Lamug. See(TT, Aug. 1, 2012, p. 113, 19- p. 118.). The Detectives' and an uniformed officer, all visibly armed, meet Jefferson in front of his apartment. (TT, Aug. 1, 2012, p. 118, 2-20.).

Detective Katowich's testimony at trial is that Jefferson had been placed under arrest and transported to the "Central Detective Bureau," and although he was not certain if either he or Demas transported Jefferson to this building, He admits that He and Demas made first contact with Jefferson. See, (TT, Aug. 3, 2012, p. 84, 22 - p. 85, 1-12.). Eventually, Katowich testifies that He and Demas interrogated Jefferson at this building while Jefferson was handcuffed to a bar. (TT, Aug. 3, 2012, p. 87, 4 - p. 88, 1-10.).

In relation to this arrest, Jefferson would ask the Court to take notice of the findings made by The Supreme Court of Nevada, and afford to it the Presumption of Correctness:

"IN THIS CASE, DETECTIVES EXPLAINED TO JEFFERSON THAT HE WAS IN THEIR CUSTODY AND THAT THEY WERE TRYING TO CLEAR UP AN INVESTIGATION." See, Case No. 62120, P. 4 and n. 1, July 29, 2014. For the purposes of this petition this is marked as Exhibit 2(a).

For an on point, but objective view of Jefferson's challenge to this tactic of detectives, See, U.S. v. Norris, 428 F.3d 907, 913 (9th Cir. 2005). Unlike Norris, these detectives met Jefferson in front of his apartment. Without incident, explanation, or Jefferson's consent detectives handcuffed Jefferson. They Searched Jefferson, put him in the backseat of an unmarked vehicle, and transported him to the "Central Detective Bureau." Jefferson was put in an interrogation room, handcuffed to a Steel bar and advised: "WERE TRYING TO CLEAR UP AN INVESTIGATION."

Unlike Norris, Jefferson was never told he was free to leave. Jefferson was never told that he was not in Custody. Jefferson was never told his participation was a matter of choice, but was in restraints the entire time. Jefferson was given the choice of Cooperating or going to Jail and before being advised of Miranda.

Why would Mr. Cox not file a motion to Suppress evidence obtained through an arrest effectuated for "INVESTIGATION?" What was the strategy? Strickland v. Washington, 466 U.S. 668, 687 (1984); and Kimmelman v. Morrison, 477 U.S. 365, 375, 384 (1986). The only way to find out would be through an evidentiary hearing. However, any reasonably competent defense lawyer knows that arresting free citizens of the United States for investigation, violates the Fourth Amendment.

See, Hayes v. Florida, 470 U.S. 811, 815-16 (1985); Taylor v. Alabama, 457 U.S. 687-694 (1982); Dunaway v. New York, 442 U.S. 200, 212, 216 (1979); Brown v. Illinois, 422 U.S. 590, 605 (1975), and Davis v. Mississippi, 344 U.S 721, 726-27 (1969). Compare with findings in Exhibit 2(a).

There is more. Detectives did not take Jefferson to jail at first blush because they had obvious reasons to doubt the truthfulness of Ms. Lamay's hearsay account of Jefferson's criminal activity:

Q: When you initially asked her about whether or not anybody had touched her inappropriately, what was her answer?

DEMAS: She said no

Q: NO. How many times did she say no, do you recall?

DEMAS: Maybe twice, I believe.

Q: Maybe two or three times?

DEMAS: It's possible, yes.

Q: Okay. Now, at one point later on in the interview you finally indicated, well, this is what your mom told us. Is that fair to say?

DEMAS: NO. I never led her on by saying what the mom said.

Q: I'm sorry, perhaps I asked the question incorrectly. Did you at one point ask the question regarding whether or not somebody had touched her, and her response was, MY MOM CALLED THE POLICE AND SAID MY DAD MADE ME TOUCH ALL HIS PRIVATES. DO YOU RECALL THAT?

DEMAS: I RECALL THAT, YES HER SAYING THAT.

This was an exchange between Mr. Cox and detective Demas at a 51.385 hearing Conducted (Dec. 8, 2011, P.48, 8-22). For the purposes of this petition it is marked Exhibit 2(b). Any reasonably competent defense attorney knows police may not rely on uncorroborated, inconsistent statements of a young girl describing sexual assault as probable cause to arrest an individual for interrogation. See, Stout v. City of Everett, 582 F.3d 910, 913-14, 918-921 and n.11 (9th Cir. 2009).

Any reasonably competent defense attorney knows that police may not withhold potentially exculpatory information from Prosecutors, or demonstrate reckless disregard for the truth which may include ignoring facts tending to dissipate Probable cause. See, U.S. v. Ortiz-Hernandez, 427 F.3d 567, 574 (9th Cir. 2005); White v. McKinley, 605 F.3d 525, 538-39 (8th Cir. 2010); and Franks v. Delaware, 438 U.S. 154, 171-72 (1978).

Detective Demas omitted from his arrest report that C. stated possibly up to three times that she had not been sexually assaulted, but that her mother was responsible for these accusations toward Jefferson. The "Declaration of Arrest" contains Jefferson's Social Security number and he requests of this Court to produce it through an evidentiary hearing.

Jefferson submits that Mr. Cox failed to file and prosecute a motion to suppress Jefferson's DNA; incriminating statements; blood samples; fingerprints; and bedding gathered from his apartment due to detectives placing him under arrest and/or in custody for an investigatory purpose, to include the concealment from the district attorney of statements implicating Ms. Lamay as the source of this complaint by a minor witness (c.) in this case. See, Exhibits 2 (a), (b). Had Mr. Cox done so, and the Court found in Jefferson's favor, The State could not use his DNA; statement; blood samples; fingerprints or bedding even excerpts of C.'s suppressed statement to prosecute this trial. Because they could similarly offer up no testimony about this evidence from virtually its entire witness list.

This court should conclude in that scenario, under these circumstances, the probability exists that without this evidence or testimony from police and other public servants in this trial the jury would have reached a different verdict. And the prejudice prong of Strickland, 466 U.S. at 691-94 (1984), is satisfied here. Jefferson would ask this Court to impute these contentions to appellate counsel as well for her failure to raise this ground on direct appeal, see, Smith v. Robbins, 528 U.S. 259, 285-86, 287-88 and n. 3 (2000).

On October 2, 2014, Jefferson filed, in proper person, a timely Post-Conviction Petition for Writ of Habeas Corpus. Shortly thereafter, Attorney Matthew Lay was appointed to assist Jefferson with his IAC claims within the petition on October 28, 2014. See,(Conclusions of Law and Order, Aug. 4, 2016, p. 4, 19-27, Case No C-10-268351-1, Dept. IV.). Here, the court acKnowledge that Jefferson had asserted IAC claims in ground 7(B) of his petition alleging that police forced C. to "fabricate allegations to effect an arrest." See,(Conclusions of Law and Order, Aug. 4, 2016, p. 12, 3-p.13, 1-3). It should be noted that in concluding Mr. Cox made a strategic decision not to challenge Jefferson's arrest, the court without holding an evidentiary hearing, wrote in pertinent: " BUT UPON BEING TOLD THAT DETECTIVES ALREADY KNEW WHAT CJ TOLD HER MOTHER, CJ WENT INTO DETAIL ABOUT THE SEXUAL ABUSE COMMITTED AGAINST CJ." (Order, Aug. 4, 2016, p. 13, 1-3). This is not detective Demas' testimony and assuming facts not in the record in order to manufacture a reasonable strategic decision for trial Counsel should not be afforded the presumption of correctness. See, Amado v. Gonzalez, 758 F.3d 1119, 1130 (9th Cir. 2014); Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003); and Miller-EL v. Cockrell, 537 U.S. 322, 346 (2003). Demas testified C. was never told what Ms. Lamug had said about Jefferson, See,(Exhibit 2(b), P.48, 8-22), or otherwise. C. was never "LED ON!"

In adressing Ground 7(H), the Court again recognizing that Jefferson was complaining IAC related to police utilizing a false complaint to arrest Jefferson, downplayed the claim as being "futile", and "NOT SUFFICIENTLY ARTICULATED AS CLAIMS OF IAC." See, (Order, Aug. 4, 2016, P. 18, 1-13)

This is the point, and reason why Jefferson is filing a same claim successive petition. Martinez v. Ryan, 566 U.S. 1, 9 (2012), Provides that IAC by state post-conviction counsel at initial review collateral proceedings may establish cause for a prisoners Procedural default of a claim of ineffective assistance at trial. See also, Trevino v. Thayer, 133 S.ct. 1911, 1918 (2013). The State of Nevada is bound by the orders of Martinez and Trevino under the Fourteenth Amendment to the U.S. Constitution: "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." This Court should find Post Conviction Counsel Mr. Lay ineffective for failing to raise or "ARTICULATE" Jefferson's IAC claim regarding trial and appellate counsel's failure to raise fourth Amendment issues discussed above.

GROUND 3

I allege my state court convictions and sentences are unconstitutional in violation of my Sixth and Fourteenth Amendment rights to the effective assistance of trial, appellate, and post-conviction Counsel. And Substantive Due Process of Law based on these facts:

September 14, 2010. Detectives placed Jefferson under arrest for investigation and advise him that he had the right to remain silent. Anything he said could be used against him in in court. Jefferson replied he understood that right. (EXHIBIT 2(a)). Police immediately accuse Jefferson of crime. Upon several denials, police resort to collateral threats that if Jefferson wanted to be around his children in the future, he needed to confess. Jefferson's response to this impermissable threat, See, Griffin v. Strong, 983 F.2d 1540, 1544 (10th Cir. 1993); Brown v. Harrell, 644 F.3d 969, 980-81 (9th Cir. 2011), and People v. Medina, 25 P.3d 1216, 1224, 1225-26 (Colorado 2001)(citing, Lynum v. Illinois, 372 U.S. 528 (1963).), WAS Quote: "I - WHAT - I MAYBE MAYBE UM, WHAT - WHAT - ME NOT HAVING MONEY. YOU KNOW, I HAVING A BEER EVERY NOW AND THEN. THATS ABOUT IT, THAT'S ALL I CAN SAY."

For the purposes of this petition this is marked EXHIBIT 3(a). In Jefferson's first state petition for Writ of Habeas Corpus, he alleged he received IAC for both trial and appeal because neither lawyer raised the issue of detectives continuing their interrogation with out first honoring Jefferson's right to remain silent or providing fresh Miranda warnings in violation of Michigan v. Mosley, 423 U.S. 96, 100 07 (1975); Grooms v. Keeney, 826 F.2d 883, 886 (9th Cir. 1987). Jefferson's statements to detectives "THAT'S ABOUT IT. THAT'S ALL I CAN SAY." Were sufficient for a reasonable officer to know the right to silence had been asserted. See, U.S. v. Gomez, 725 F.3d 1121, 1124-25 (9th Cir. 2013)("I CAN'T TALK" sufficient to invoke silence); Anderson v. Terhune, 516 F.3d 781, 787-791 (9th Cir. 2008)("I PLEAD THE FIFTH" sufficient to invoke silence.); and Allan v. State, 38 P.3d 175-79 (Nev. 2002)("I DON'T HAVE ANYTHING TO SAY." Sufficient to invoke silence). The State District Court held this IAC claim procedurally barred, and otherwise did not adress it, See, (Conclusions of Law and Order, Aug. 4, 2016. P. 5, 1-16, P. 22, 5-24). without an evidentiary hearing.

Post conviction Counsel Mr. Lay did not brief the State District Court or the Supreme Court of Nevada about the IAC related to this issue. Jefferson relying on Erickson v. Pardus, 551 U.S. 89, 94 (2007); Rainey v. Varner, 603 F.3d 189, 200 (3d Cir. 2010); and U.S. v. Weeks, 653 F.3d 1188, 1206 (10th Cir. 2011). Believed that the Supreme Court of Nevada would liberally construe his PRO SE appeal as fairly reading to assert IAC claims. The court refused. Because Mr. Lay did not raise any of the issues in this Same Claim successive petition, Jefferson is requesting an order from this court deeming his services, in fact a disservice or otherwise ineffective under Martinez v. Ryan, 566 U.S. 1, 9 (2012).

To be sure, eliminating habeas review of Miranda issues would not prevent a state prisoner from simply converting his barred Miranda claim into a due process claim that his conviction rested on an involuntary confession. See, Withrow v. Williams, 507 U.S. 680, 693 (1993). Thus, this court may not consult its own precedents, rather than those of the United States Supreme Court in assessing a habeas claim governed by 28 U.S.C. Sec. 2254. See, White v. Woodall, 134 S.Ct. 1697, 1702 and n.2 (2014). For example, in Sessoms v. Grounds, 768 F.3d 882, 884-87 n.5 and n.6 (9th Cir. 2014). The Panel adressed the state's use of a confession obtained in violation of Miranda without inquiry into the petitioner's claim that Counsel was ineffective to present it.

Further, in a Same claim successive petition, there can be no default where Jefferson did raise the IAC issue in relation to this confession, and his unlawful arrest for investigation with less than trustworthy information, and both the State district Court and State Supreme court denied the claims the first time it was presented. Lozada v. State, 110 Nev. 349, 353 (1994). In addition, Jefferson is not sure how "LAW OF THE CASE" bars an issue that has never been raised or adjudicated. No opinion from any court for this case exists specifically as to whether police violated Jefferson's verbally asserted right to remain silent. (EXHIBIT 3(a).) Hence, Jefferson's IAC claims.

Jefferson has attached the order of the U.S. District Court to support his claims that it has been sufficiently proven that Mr. Lay did not consult or notify Jefferson of his actions, and that Jefferson did all he could do in attempt to alert this judiciary to his IAC claims. And he should be permitted to exhaust his claims.

Under Martinez, 561 U.S. at 9 (2012), Jefferson believes this ineffective assistance of trial counsel claim is substantial, has merit, and should have been briefed by Mr. Lay for this Court the first time around. This Court should find cause for his failure to do so including on appeal to The Supreme Court of Nevada once Jefferson's Petition was denied. This Court should conclude the coerced confession used by the State was prejudicial to Jefferson's defense.

Specifically, for example, Jefferson was processed at the County Jail on September 14, 2010. However, Jefferson was detained for (34) days without an initial appearance. See, Powell v. Nevada, 511 U.S. 79-85 (1994); and Higazy v. Templeton, 505 F.3d 161, 170-173 (2d Cir. 2007). If this Court concludes that a Miranda violation occured, it should also find that detective Demas affirmatively misrepresented to prosecutors that he lawfully obtained a confession from Jefferson in his "DECLARATION OF ARREST." That Demas' perjury continued at the Jackson v. Denno, 378 U.S. 368 (1964), hearing that was conducted on: (Jun. 2, 2011, p. 20, 6-8). Demas was asked by the state:

Q: "Did he ever say to you that he didn't want to talk to you anymore or that he was done speaking with you?"

DEMAS: "NOPE."

This court should find Demas perjured himself at this trial on the same question as well. (TT, Aug. 6, 2012, p. 96, 7 - p. 97, 1.). this court should conclude the prosecutor was encouraging or permitting this perjury for the plain fact that he is a Lawyer and reasonably should have known, like trial counsel, that Demas ignored Jefferson's right to remain silent. EXHIBIT 3(a). The State repeatedly stressed this confession as evidence that Jefferson was guilty from its opening statements to the jury (Aug. 1, 2012, p. 118, 19 - p. 119, 1-12); Through Detective Katowich (TT, Aug. 3, 2012, p. 91, 15 - p. 127, 1-15); Through Detective Demas' testimony (TT, Aug. 6, 2012, p. 51, 4 - p. 56, 1-16.); The tape recording of Jefferson (TT, Aug. 6, 2012, p. 55-56); Through Demas again (TT, Aug. 6, 2012, p. 73, 23 - p. 121, 1-15); its closing arguments (TT, Aug. 8, 2012, p. 72, 6 - p. 87); Rebut closing argument (TT, Aug. 8, 2012, p. 117, 6 - p. 126, 1-12); and finally sentencing where the State relies solely on the confession in urging the court to impose consecutive sentences for which Jefferson received. (TT, Oct. 29, 2012, p. 4, 13-18). Mr. Cox admits the confession made an easier case for the state during sentencing. (TT, Oct. 23, 2012, p. 6, 9-25).

"HE DOES A VOLUNTARY INTERVIEW WHERE HE'S MIRANDIZED. AT NO POINT THROUGH THE ENTIRE INTERVIEW DOES HE SAY, I DON'T WANT TO TALK TO YOU ANYMORE, I AM OVER SPEAKING WITH YOU, I DON'T WANT YOU IN MY SPACE. LEAVE. THAT'S ALL HE HAD TO SAY; THAT'S ALL HE HAD TO DO." (TT, Aug. 6, 2012, P. 78, 24 - P. 79, 1-3). This court should hold the state to its concessions. Russell v. Rolfs, 893 F.2d 1033, 1038 39 (9th Cir. 1990). Or find the state complicit in condoning perjury, because if the prosecutor would boast in this manner, then it is likely she knew Demas and Katowich violated Jefferson right to silence and lied about it. Demas testified he had conducted up to (1000) suspect interviews. (TT, Aug. 6, 2012, P. 100, 15-22). Thus, he knew what Jefferson meant when he said: "THAT'S ABOUT IT. THAT'S ALL I CAN SAY." (EXHIBIT 3(a)). And the state did too.

Jefferson is asking this court to conclude the confession had a substantial and injurious affect on the verdict under Brecht v. Abrahamson, 507 U.S. 619, 639 (1993); Milke v. Ryan, 711 F.3d 998, 1024 (9th Cir. 2013); and Hays v. Farwell, 482 F. Supp. 2d 1180, 1193, 1197 (D. Nev. 2007)(where a detective testified the petitioner confessed to molesting his eight year old daughter later proven to be untrue, could have materially affected the verdict and relief on that claim was warranted.).

GROUND 4

I allege that my state court convictions and sentences are unconstitutional in violation of my EIGHTH and FOURTEENTH Amendment rights because Jefferson is actually, factually, and legally innocent. Refusal to consider his claims will result in a MISCARRIAGE of JUSTICE based on these facts:

On (Dec. 8, 2011, P. 46, 8-22), detective Demas confirms under oath that C. told him up to three times that no person had inappropriate sexual contact with her, that he never led C. on as to her mother's hearsay about Jefferson, but that C. explained to him that her mother was the one accusing Jefferson of forcing her to perform sex acts on him. The trial judge held as a result of Demas' repetitive questioning C.'s statement implicating Jefferson to be untrustworthy and inadmissable for trial. (Dec. 8, 2011, P. 65). The prosecutor heard Demas' testimony and continued to prosecute this case. On (Aug. 3, 2012, P. 116, 18 - P. 118, 1-19) The Prosecutor here, through Detective Katowich's testimony explained the interview techniques used on C. were designed "TO ELICIT THE TRUTH." Which was false. And the jury did not know it.

Alcorta v. Texas, 355 U.S. 28 (1957); Browning v. Baker, 871 F.3d 942, 956 (9th Cir. 2017).

On (TT, Aug. 6, 2012, p. 44, 11-16), The prosecutor, through Detective Demas, was able to introduce part of C.'s recorded statement to explain away lack of physical evidence. The rule of Completeness is applicable in this context because C.'s statement to Demas were made for the purpose of gathering evidence to use at this trial. U.S v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996).

Because C.'s Statement was recorded and recounted by Demas in the formal setting of a trial, C.'s statement had become testimonial. See, Whorton v. Bockting, 549 U.S. 406, 420 (2007). It would appear to be a double standard to allow the State to use the recorded statement, but not allow Jefferson to use it, and Demas' out of the presence of the jury's testimony, to corroborate Brandon Jr.'s trial testimony. (TT, Aug. 2, 2012, p. 146, 21 - p. 147, 1-5).

Here, while Brandon Jr. was being cross-examined he admitted in direct relation to what C. told her mother about Jefferson, " WELL, IT'S ACTUALLY MY MOM TELLING MY RELATIVES." Jefferson Should be permitted to introduce C.'s recorded statement to show that C. had been improperly influenced by police. Guam v. McGravey, 14 F.3d 1344, 1349-50 (1994); that C. was vunerable to police Suggestibility, See Felix v. State, 109 Nev. 151, 182 (1993); and to ask her whether her statement to Demas about Jefferson was false. Maryland v. Craig, 497 U.S. 836, 861, 68 (1990) (J. Scalia dissent). See also. Patterson v. State, 107 P.2d 481, 483 (Nev. 1995).

In Murray v. Carrier, 477 U.S. 478, 497 (1986), The court held the defendant was entitled to remand to determine if a rape victim's statements contained material that would establish Carrier's actual innocence. Jefferson seeks remand under Carrier because not only has he alleged IAC for Counsels' failure at any time to use C.'s statement to establish his innocence at trial, but he has also alleged these attorneys' failed to use C.'s statement to ascertain whether it justified his arrest for investigation, or whether Demas' omissions of portions of the Statement were exculpatory enough to call into question the Sufficiency of the Criminal Complaint. Mindful, post-conviction counsel never raised this claim despite Jefferson's intentions that he do so in the first petition.

C.'s out of court Statement, Demas' testimony, and Brandon Jr.'s testimony support Jefferson's defense. That Ms. Lamug was the one saying unspeakable things about him.

This court should conclude that the disclosure of this suppressed evidence and police testimony may have produced a different result. Turner v. U.S., 137 S.ct. 1885, 1893 (2017); and Buck v. Davis, 137 S.ct. 759, 776 (2017). Had this jury heard C.'s Statement and Demas' explanations for his behavior, Jefferson believes that at least one juror could have found that Demas and Katowich knew that Jefferson had not sexually assaulted C., but coerced her into accusing him anyway. See, Devereaux v. Perez, 218 F.3d 1045, 1056-63 (9th cir. 2000)(dissent). Jefferson believes that at least one juror could have reasoned in the alternative that Demas' continued questioning of C., steamrolling over her denials and Statment that her mom was saying this about Jefferson, until she changed her story was objectively unreasonable. See, Camereta v. Greene, 588 F.3d 1011, 1017, 1032 (9th cir. 2009), vacated in part by, 563 U.S. 692 (2011). The U.S. Supreme court held only that Camereta need not obtain a warrant before interviewing a suspected child sex abuse victim. It did not disturb the finding of objective unreasonableness related to the police badgering the child to accuse her father of molesting her.

Jefferson believes at least one juror, under the circumstances, would have reasoned that Jefferson was entitled to the inference that C. had nothing adverse to report. See, Wallis v. Spencer, 202 F.3d 1126, 1134-35, 1139 (9th cir. 1999), and that based on Demas' testimony at the (Dec. 8, 2011, p. 48, 8-22) hearing, Jefferson had demonstrated that Detectives should have known he was innocent and would not have convicted him. See, Devereaux v. Abbey, 263 F.3d 1070, 1076-77 (9th Cir. 2001)(citing Pyle v. Kansas, 317 U.S. 213, 216 (1942).).

Jefferson offers Demas' Sworn testimony about information he withheld from the prosecutor which was available, but not used at this trial to assert that failure to consider his claims may result in a fundamental miscarriage of Justice. McCleskey v. Zant, 499 U.S. 467, 494 (1991). That he is actually, factually innocent. Schlup v. Delo, 513 U.S. 298, 324 (1995).

See also, Jaramillo v. Stewart, 340 F.3d 877, 883-84 (2003); Majoy v. Roe, 296 F.3d 770, 774-76 (9th cir. 2002); and Corriger v. Stewart, 132 F.3d 463, 477-79 (9th cir. 1997). Jefferson should be permitted to let a jury know what police did not tell the District Attorney at the first instance.

In addition, the state may not rely on inadmissable evidence because it implies that the prosecution has other facts establishing Jefferson was guilty. See, U.S. v. Sanchez-Lima, 161 F.3d 545, 548 (9th cir. 1998); U.S. v. Simtob, 901 F.2d 799, 805 (9th cir. 1990); U.S. v. Sanchez, 176 F.3d 1214, 1219-1225 (9th cir. 1999); Ocampo v. Vail, 649 F.3d 1098, 1117 (9th cir. 2011); Jones v. Basinger, 635 F.3d 1030, 1052-56 (7th cir. 2010). The prosecutor emphasized that G talked to police in closing arguments despite never introducing that recording to explain away a lack of physical evidence. (TT, Aug. 8, 2012, p. 111, 1-15).

Evidence not presented at trial was a police report stating that Jefferson was employed, and not unemployed which was the state's working theory. Where Jefferson was (7-8) days prior to his arrest was relevant to his defense. The police report states Ms. Lamug was home during these times and the jury did not know that. Because they saw photos of the apartment, that jury could have reasoned that Ms Lamug should have known about the alleged abuse right then. Hart, 174 F.3d at 1070 (9th cir. 1999). Evidence not presented at trial was Demas' sworn testimony, which he did not share with the prosecutor, concerning G's denials and indications that her mom was saying Jefferson did these things. Had the jury heard this evidence, and that police hid it, there is a fifty-one percent chance they would have voted Jefferson not guilty on all counts. Hays v. Farwell, 482 F.Supp.2d at 1189, 1194-95 (D.Nev. 2007).

Jefferson is asking this court to consider his claims of IAC and attorney abandonment on the merits because the danger exists that he was constructively denied counsel. Police reports and police testimony never heard make a colorable claim that he is factually innocent. And the coerced confession should be addressed under Withrow, 507 U.S. at 693 (1993), as a matter of due process. Hays, 482 F.Supp.2d at 1193, 97 (D.Nev. 2007); and Sossamon, 768 F.3d at 884-87 (9th cir. 2014). Jefferson asks this court to GRANT his writ. And under NRS 34.500(2),(7), that he be released.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 24th day of the month of March of the year 2019.

Brandon M. Jeff
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

BRANDON M. JEFFERSON #1094051
Petitioner

Attorney for petitioner

23

CERTIFICATE OF SERVICE BY MAIL

I, BRANDON M. JEFFERSON, hereby certify pursuant to N.R.C.P. 5(b), that on this 24th day of the month of March, of the year 2014 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

CLERK OF COURT
Respondent prison or jail official

200 LEWIS AVE, 3rd Floor
LAS VEGAS, NEVADA 89155
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

CLARK COUNTY DISTRICT ATTORNEY
District Attorney of County of Conviction

200 LEWIS AVE, 3rd Floor
LAS VEGAS, NEVADA 89155
Address

Brandon M. Jefferson
Signature of Petitioner

24

AFFIRMATION PURSUANT TO NRS 239B.030

I, BRANDON M. JEFFERSON, NDOC# 1094051,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE

ATTACHED DOCUMENT ENTITLED PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION),

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY

PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 24th DAY OF March, 20 19.

SIGNATURE: Brandon M. Jeff

INMATE PRINTED NAME: BRANDON M. JEFFERSON

INMATE NDOC # 1094051

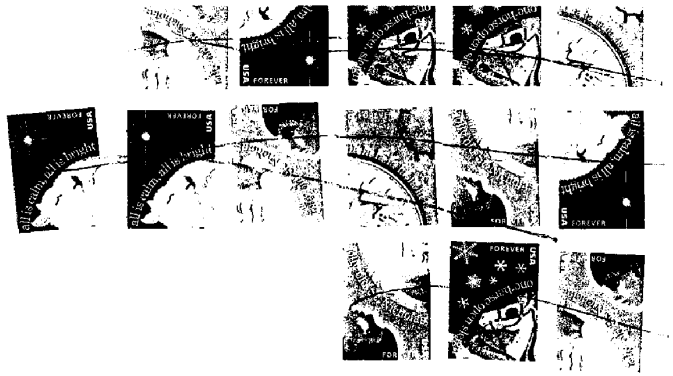
INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

BRANDON M. JEFFERSON # 1094051

ELY STATE PRISON

P.O. Box 1989

ELY, NEVADA 89301



STEVEN D. GRIERSON, Clerk of the Court

200 LEWIS AVENUE, THIRD FLOOR

LAS VEGAS, NEVADA 89155

BRANDON M. JEFFERSON
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

FILED
APR 10 2019
CLERK OF COURT

IN THE EIGHTH DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRANDON M. JEFFERSON
Petitioner,
vs.
, Warden; State of Nevada,
Respondents.

CASE NUMBER: A-19-793338-W
Dept. XXX

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, BRANDON M. JEFFERSON the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings, or

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APR 10 2019
CLERK OF THE COURT

(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at ELY STATE PRISON ELY, NV 89301, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 24th day of March, 2019.

Brandon M. [illegible]

In Proper Person

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on March 24, 20 19, he served a copy of the foregoing Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

District Attorney's Office
Address: 200 Lewis Ave, 3rd Floor
Las Vegas, NV 89155

Warden
Address: 100 North Carson Street
Carson City, NV 89710

Brandon M. Jones
Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

(Title of Document)

filed in District Court Case number C268351

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Brandon M. Jefferson
Signature

March 24, 2014
Date

BRANDON M. JEFFERSON
Print Name

PRISON INMATE # 1094051
Title

Case No. C268351

Dept. No. II

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRANDON M. JEFFERSON, Petitioner, vs. STATE OF NEVADA, et al., Respondents.	Case No. C268351 PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION INDEX AND EXHIBITS

Petitioner BRANDON M. JEFFERSON, respectfully submits the following exhibits in support of his petition for a state Writ of Habeas Corpus.

No.	DATE	DOCUMENT	COURT	CASE NO.
1	02.25.19	Order U.S. District Court Nevada Granting Motion	U.S. District Court, Nevada	3:18-CV-00064-HDM-CBC
2(a)	07.29.14	Order of Affirmance Page No.(4) and note(1)	Nevada Supreme Court	62120
2(b)	12.09.11	Motion in Limine to Preclude Inadmissable S1.385 evidence. Page No. 48	District Court, Clark County	C268351
3(a)	09.14.10	Statement of Brandon M. Jefferson Page No. 27	District Court Clark County	C268351

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

BRANDON M. JEFFERSON,

Petitioner,

v.

STATE OF NEVADA, et al.,

Respondents.

Case No. 2:18-cv-00064-HDM-CBC

ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by Brandon M. Jefferson. On July 20, 2018, respondents filed a motion to dismiss Jefferson's habeas petition (ECF No. 1) arguing that the petition improperly incorporates claims not included or attached to the petition and that the petition includes claims that are unexhausted. ECF No. 16. In response, Jefferson filed both an opposition to the motion to dismiss (ECF No. 21) and a motion requesting an exhaustion stay (ECF No. 25). For reasons that follow, the court will grant the motion for a stay and deny the motion to dismiss as moot.

I. *The exhaustion requirement.*

Respondents argue Jefferson has failed to fully exhaust state court remedies for Grounds 1, 3, 4, and 5 of his federal habeas petition. A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v.*

Boerckel, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.1981).

A habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To achieve exhaustion, the state court must be "alerted to the fact that the prisoner [is] asserting claims under the United States Constitution" and given the opportunity to correct alleged violations of the prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). A claim is not exhausted unless the petitioner has presented to the state court the same operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the petitioner presents to the federal court facts or evidence which place the claim in a significantly different posture than it was in the state courts, or where different facts are presented at the federal level to support the same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988).

II. *Exhaustion analysis of petitioner's claims.*

In Ground 1, Jefferson alleges he was deprived of his Sixth Amendment right to counsel at a critical stage of his criminal proceedings, namely, at the hearing on his motion to dismiss counsel and appoint alternate counsel. ECF No. 1, pp. 8, 20. In his direct appeal, Jefferson argued the trial court erred in denying the motion. ECF No. 19-9, p. 67-68; ECF No. 19-21, p. 16. In his state habeas proceeding, he argued the trial court erred by finding that his trial counsel and appellate counsel "did not actively represent conflicting interests that adversely affected counsel's performance." ECF No. 20-13, p. 14-29; ECF No. 20-16.

Thus, Ground 1 is based on a different legal theory than the claims Jefferson presented to the state courts. In fact, he concedes as much in his petition. *See* ECF No. 1, p. 20 ("[The claim] is based on the same facts in the original pleading and only changes the legal theory."). Accordingly, Ground 1 is unexhausted. *See Rose v. Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005) (holding that an ineffectiveness claim predicated on counsel's failure to challenge the constitutionality of a confession does not exhaust underlying claim that post-arrest statements were unconstitutionally obtained).

Grounds 3 and 4 each raise ineffective assistance of counsel (IAC) claims. In Ground 3, Jefferson alleges he was deprived of effective assistance of trial and appellate counsel because counsel failed to assert a Fourth Amendment violation in relation to his arrest. ECF No. 1, pp. 11, 30. In Ground 4, he claims his trial and appellate counsel were ineffective by not arguing a violation of *Michigan v. Mosley*, 423 U.S. 96 (1975), in relation to the admission of statements made after he told police "that's all I can say." *Id.*, pp. 13, 36.

In Nevada, IAC claims "are properly raised for the first time in a timely first post-conviction petition." *See Pellegrini v. State*, 34 P.3d 519, 534 (Nev. 2001). In Jefferson's state post-conviction proceeding, neither Ground 3 nor Ground 4 were included in his counsel's arguments to the Nevada Supreme Court on appeal. ECF No. 20-13. Jefferson did raise the arguments in brief he filed pro se. ECF No. 20, pp. 15-21, 24-28. By rule, however, the state appellate court considered only the claims presented in the brief filed by counsel. *See* Nev. R. App. P. 46A; ECF No. 20-16. In addition, it does not appear that the claims were presented to the state district court in either petitioner's initial petition for writ of habeas corpus (ECF No. 19-23) or the supplemental petition filed by his appointed counsel (ECF No. 19-29). *See Davis v. State*, 817 P.2d 1169, 1173 (Nev. 1991) (ground not presented to or considered by district court in post-conviction proceeding need not be considered by the appellate court). Thus, Jefferson did not fairly present the claims for exhaustion purposes. *See Roettgen v. Copeland*, 33

F.3d 36, 38 (9th Cir. 1994) ("Submitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation.") (citation omitted).

In Ground 5, Jefferson alleges he was deprived of his constitutional right to a fair trial. ECF No. 1, pp. 17, 45. In support of the claim, Jefferson claims the victim's initial testimony at trial exculpated him but the trial court allowed the prosecutor to repeat questions to the victim until she testified favorably for the prosecution. He also contends the prosecutor made several references to a statement the victim made to the police that the trial court had suppressed. He further alleges that exculpatory information about which a police detective testified at an evidentiary hearing was omitted from the arrest report and not presented to the jury.

In his direct appeal, Jefferson argued the State presented insufficient evidence to prove the crimes charged beyond a reasonable doubt. ECF No. 19-9, p. 55-61. Rather than citing the issues described above, however, he pointed to inconsistencies in the testimony of the State's witnesses, a lack of physical evidence, and the unreliability of his confession. In his state habeas proceeding, no claim resembling Ground 1 was included in his counsel's arguments to the Nevada Supreme Court on appeal. ECF No. 20-13. Jefferson's pro se brief contained a similar claim (ECF No. 20, p. 29-32), but as noted, was not an adequate means of satisfying the exhaustion requirement.

Based on the foregoing, the court concludes that Grounds 1, 3, 4, and 5 remain unexhausted.[1]

III. *Petitioner's motion for a stay.*

With his motion for a stay, Jefferson asks the court to stay proceedings in this case and hold them in abeyance while he returns to state court to exhaust his claims. ECF No. 25. The Supreme Court has condoned the "stay and abeyance" procedure,

[1] The court agrees that Jefferson's attempt to incorporate into his petition "all grounds and arguments that relate back to the direct appeal following conviction, his original pro se petition for writ of habeas corpus..., and supplemental writ of habeas corpus" is improper and will be disregarded. *See* LSR 3-3; Rule 2(c) of the Rules Governing Habeas Corpus Cases Under Section 2254.

under limited circumstances, when a pending habeas petition contains unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). *Rhines* allows habeas petitioners to preserve unexhausted claims for review notwithstanding the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 275. A stay is appropriate only when the court determines (1) "there was good cause for the petitioner's failure to exhaust his claims first in state court," (2) the unexhausted claims are not "plainly meritless," and (3) there is no indication the petitioner "engaged in intentionally dilatory litigation tactics." *Id.* at 277-78. With respect to the good cause for failure to exhaust requirement, the court must consider whether petitioner has "set forth a reasonable excuse, supported by sufficient evidence, to justify that failure." *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014).

Jefferson argues good cause for his failure to exhaust exists because "he properly insisted on preserving and presenting" his claims to the Nevada Supreme Court, but his state habeas counsel presented "incomplete arguments." ECF No. 25, p. 3. In *Blake*, the court held that ineffective assistance of post-conviction counsel can be good cause for a *Rhines* stay. *Blake*, 745 F.3d at 983-84. The court noted that the Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012), had held that "IAC by state post-conviction counsel 'at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.'" *Id.* (quoting *Martinez*, 566 U.S. at 9). The *Blake* court reasoned that *Rhines*'s good cause standard "cannot be any more demanding than a showing of cause under *Martinez*." Id.

Respondents argue that *Blake* does not assist Jefferson because Jefferson's good cause argument focuses on the omissions of state post-conviction counsel on appeal. Respondents note that the holding in *Blake*, given its reliance on *Martinez*, extends only to ineffective assistance of counsel in "initial-review collateral proceedings" and "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings." *Martinez*, 566 U.S. at 16. As noted, however, the IAC claims in Grounds 3 and 4 were not properly raised in the lower court either. In

addition, *Blake* does not *limit* what may amount to good cause (i.e., a "reasonable excuse") for failure to exhaust. The court merely held that a showing good cause that meets the *Martinez* standard will, perforce, also meet the *Rhines* standard. *See Blake*, 745 F.3d at 984 ("In sum, we hold that the *Rhines* standard for IAC-based cause is not any more demanding than the cause standard articulated in *Martinez*.").

Here, Jefferson's initial pro se petition for writ of habeas corpus in the state district court included IAC claims, but not the claim now advanced as Grounds 3 or Ground 4. ECF No. 19-23. The supplemental petition filed by appointed counsel focused on the alleged conflict of interest between Jefferson and his trial and appellate counsel and made only brief reference to the IAC claims Jefferson raised in his pro se petition. ECF No. 19-29. About three months after the supplemental petition was filed, Jefferson sent a letter and payment to the state district court clerk requesting a copy. ECF No. 33, p. 16. The petition was denied shortly thereafter. ECF No. 19-32.

The pro se opening brief Jefferson filed on July 7, 2016, in the Nevada Supreme Court included the claims now advanced as Grounds 3 and 4. ECF No.20. He sent a letter to the Nevada Supreme Court in late-March 2017, complaining that, despite the court's remand in August 2016 for the purpose of appointing counsel, he had "not heard from any attorney or the respondent about this appeal." ECF No. 30, p. 18. At that point, his appointed counsel had already filed an opening brief, and the State had filed an answering brief. ECF Nos. 20-13 and 20-14. Thus, it appears appointed counsel did notify or consult with Jefferson regarding the issues to be presented in the district court or on appeal.

Given the foregoing circumstances, Jefferson has a reasonable excuse, supported by sufficient evidence, for his failure to exhaust unexhausted claims. This is not a matter of petitioner claiming only that he was "under the impression" that his counsel had exhausted the relevant claims. See *Wooten v. Kirkland*, 540 F.3d 1019, 1024 n. 2 (9th Cir.2008) (finding petitioner's alleged ignorance of failure to exhaust unjustified because counsel had mailed him a copy of his state petition, which did not

include the unexhausted claim and he did not claim his counsel was ineffective for failing to include the claim). The record demonstrates that Jefferson, upon discovering his appointed counsel omitted IAC claims from his post-conviction proceeding in the lower court, tried to present them to the Nevada Supreme Court. In addition, Jefferson can make a plausible argument that his state post-conviction counsel was ineffective by failing to present any IAC claims other than the one premised on the alleged conflict of interest.

With respect to the remaining *Rhines* factors, respondents offer no argument that either has not been met. Based on this court's review of the record, there is no indication that Jefferson has engaged in intentionally dilatory tactics. In addition, at least one of his unexhausted claims is not plainly meritless. Thus, the court will grant his request for a stay.

IV. *Respondents' motion to strike.*

Subsequent to the completion of briefing on respondents' motion to dismiss, Jefferson filed a "notice to present pertinent material," with which he asked the court "to observe Respondent's exhibit no. 105." ECF No. 29. In response, respondents filed a motion asking the court to either "strike the notice as a fugitive document" or permit the respondents an opportunity to file a sur-rebuttal. ECF No. 32.

The exhibit in question is the supplemental petition for writ of habeas corpus filed by Jefferson's post-conviction counsel. ECF No. 19-29. Because the exhibit was already part of the record and necessarily included in the court's exhaustion analysis, Jefferson's notice did not impact the court's decision on respondents' motion to dismiss. Accordingly, respondents' motion to strike or file a sur-rebuttal will be denied.

IT IS THEREFORE ORDERED that petitioner's motion for stay and abeyance (ECF No. 25) is GRANTED. This action is STAYED pending exhaustion of petitioner's unexhausted claims.

IT IS FURTHER ORDERED that the grant of a stay is conditioned upon petitioner further litigating his state post-conviction petition or other appropriate proceeding in state

court and returning to federal court with a motion to reopen within 45 days of issuance of the remittitur by the Supreme Court of Nevada at the conclusion of the state court proceedings.

IT IS FURTHER ORDERED that respondents' motion to dismiss (ECF No. 16) is DENIED as moot and without prejudice.

IT IS FURTHER ORDERED that respondents' motion to strike (ECF No. 32) is DENIED.

IT IS FURTHER ORDERED that all pending motions for extension of time (ECF Nos. 6, 10, 15, 22, 24, and 27) are GRANTED *nunc pro tunc* as of their respective filing dates.

IT IS FURTHER ORDERED that petitioner's motion for entry of default (ECF No. 11) and motion for sanctions (ECF No. 13) are DENIED.

IT IS FURTHER ORDERED that the Clerk shall administratively close this action, until such time as the court grants a motion to reopen the matter.

DATED this 25th day of February, 2019.

Howard D McKibben

UNITED STATES DISTRICT JUDGE

exonerate him. Thus, nothing about the detectives' tactics appears coercive or likely to produce a false confession.

Jefferson's arguments that the detectives impermissibly implied that the prosecutor would be informed that he refused to cooperate, and threatened to take away his children are equally unavailing. The detectives indicated that if the DNA showed something different than what Jefferson had told them, then the DA would be aware of the discrepancy, which would likely be bad for Jefferson. But that is not the equivalent of a threat to inform the DA that Jefferson was not cooperating. Likewise, the detectives told Jefferson that, given the allegations against him, he might not be able to be around his children for a while. However, this statement was only made in response to Jefferson's own questions regarding his children. This was not a coercive tactic to get Jefferson to confess, but merely a true statement of the current situation.[1]

[1]Jefferson's argument to this court appears to conflate two separate legal issues—waiver of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and whether his statement was voluntary. To the extent that Jefferson is also arguing that his waiver of his *Miranda* rights was not voluntary, we conclude that argument lacks merit. "A valid waiver of rights under *Miranda* must be voluntary, knowing, and intelligent." *Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006). "[T]he question of whether a waiver is voluntary is a mixed question of fact and law that is properly reviewed de novo." *Id.* In this case, detectives explained to Jefferson that he was in their custody and that they were trying to clear up an investigation. They then read him his *Miranda* rights, and asked him if he understood, to which he replied yes. The detectives began asking him questions, and he responded without further prompting. Thus, the circumstances show Jefferson voluntarily waived *Miranda*.

MR. MERBACK: Objection. Argumentative. He's -- what he wants to hear is not the issue here.

THE COURT: Sustained.

Q (By Mr. Cox) Okay. Did you give an answer that's consistent with - that she didn't know the answer - that she did know the difference - that there was differences between their privates?

A Yes.

Q When you initially asked her about whether or not anybody had touched her inappropriately, what was her answer?

A She said no.

Q No. How many times did she say no, do you recall?

A Maybe twice, I believe.

Q Maybe two or three times?

A It's possible, yes.

Q Okay. Now, at one point later on in the interview you finally indicated, well, this is what your mom told us. Is that fair to say?

A No. I never led her on by saying what the mom said.

Q I'm sorry, perhaps I asked the question incorrectly. Did you at one point ask the question regarding whether or not somebody had touched her, and her response was, my mom called the police and said my dad made me touch all his privates. Do you recall that?

A I recall that, yes, her saying that.

MR. COX: Court's indulgence.

Q (By Mr. Cox) Now, you asked her about whether or not anything had came out - had come out of his penis. Do you recall that?

A: ~~They're not—they're going to take my kids away, aren't they?~~

Q: No. Not at this point, they're not. They—they are with your wife right now. So,no but like I said, they're not going to—they're not going to throw us—you know, until they know—you have to tell us what's causing it. We know what happened. Okay?

A: (No Audible Response)

Q: In other words, once we know what's causing it, we can figure out what will keep this from happening again. Until we know what will keep this from happening again, your kids aren't safe with you right now because you make bad decisions sometimes. So we need to know what's causing those bad decisions so that you can be around your kids in the future. If we don't know what's causing those bad decisions we—how can we fix the problem?

A: There's anything to be with my kids, sir.

Q: So,--_____ we want to know is what's causing this behavior.

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

Q: What goes through you—

A: ___--

Q: --when—when you ask her to come to your room? What goes on?

A: 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—

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DISTRICT COURT
CLARK COUNTY, NEVADA

Brandon Jefferson,

Petitioner,

vs.

State of Nevada,

Respondent,

Case No: A-19-793338-W
Department 30

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on April 10, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 4th day of June, 2019, at the hour of 8:30 AM o'clock for further proceedings.

District Court Judge

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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**

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On 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

[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 years, to run concurrent with Counts 1, 4, and 9, with 769 days' credit for time served. The

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

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 herein responds.

STATEMENT OF THE FACTS[4]

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"[5] 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, the detectives conducted separate interviews of all three family members.

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[4] This Statement of the Facts was based on the State's Answering Brief in Jefferson v. State, No. 62120 (Order of Affirmance, Jul. 29, 2014).

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

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.

ARGUMENT

I. THE INSTANT 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, should be 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.

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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 instant 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.

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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, __ U.S.__, 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),[6] one does not have

[6] 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, 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 should deny 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. THIS COURT SHOULD DENY THE MOTION TO APPOINT COUNSEL

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 should deny 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 should be denied.

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 should be 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 should preclude him from holding an evidentiary hearing in the hopes of developing them further.

CONCLUSION

For these reasons, the State respectfully requests that the petition be denied.

DATED this 28th day of May, 2019.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 28th day of MAY, 2019, to:

BRANDON JEFFERSON, BAC#1094051
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

BRANDON M. JEFFERSON #1094051
PRO SE
ELY STATE PRISON, P.O. BOX 1989
ELY, NEVADA 89301

BRANDON M. JEFFERSON,
Petitioner,

VS

THE STATE OF NEVADA, et.al.,
Respondent.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

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

DEPT. NO: XXX
14A

NOTICE OF APPEAL

Notice is hereby given that BRANDON M. JEFFERSON, Petitioner above named, hereby appeals to The Supreme Court of Nevada from the Order denying petitioners Second post-conviction Petition for Writ of Habeas Corpus.

Entered in this action on the 16TH day of June 2019.

BRANDON M. JEFFERSON #1094051
ELY STATE PRISON
P.O. Box 1989
ELY, NEVADA 89301

CERTIFICATE OF SERVICE BY MAIL

I, BRANDON M. JEFFERSON, hereby certify pursuant to Rule 5(b) of the N.R.C.P., that on this 16TH day of June 2019, I served a true and correct copy of the above entitled **NOTICE OF APPEAL** postage paid and adressed as follows:

EIGHTH JUDICIAL DISTRICT COURT
200 LEWIS AVENUE, 3rd floor
Las Vegas, NV 89155

OFFICE OF THE DISTRICT ATTORNEY
200 LEWIS AVENUE, 3rd floor
P.O. BOX 552212
Las Vegas, NV 89155

Signature Brandon M. Jefferson

print name BRANDON M. JEFFERSON #1094051
Ely State prison
P.O. Box 1989
Ely, NV 89301

AFFIRMATION PURSUANT TO NRS. 239B.030

I, BRANDON M. JEFFERSON, Certify that I am the undersigned individual and that the attached document entitled NOTICE OF APPEAL does not contain the Social Security numbers of any persons, under the pains and penalties of perjury. DATED this 16TH day of JUNE 2019.

Signature Brandon M. Jefferson

Print name BRANDON M. JEFFERSON #1094051

ELY STATE PRISON
P.O. Box 1989
Ely, NV 89301

Brandon M. Jefferson #1094051

E.S.P.

P.O. Box 1989

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LAS VEGAS NV 890

17 JUN 2019 PM 3 L

USA FOREVER

Steven Grierson, Clerk

Eighth Judicial District Court

200 Lewis Avenue, Third floor

Las Vegas, NV 89155

89101-630000

ELY STATE PRISON

JUN 16 2019

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRANDON M. JEFFERSON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-19-793338-W

Dept No: XXX

CASE APPEAL STATEMENT

1. Appellant(s): Brandon M. Jefferson

2. Judge: Jerry A. Wiese

3. Appellant(s): Brandon M. Jefferson

Counsel:

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

4. Respondent (s): State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: April 10, 2019

9. Date Commenced in District Court: April 10, 2019

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 20 day of June 2019.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brandon M. Jefferson

ORIGINAL

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6/20/2019 4:33 PM
Steven D. Grierson
CLERK OF THE COURT

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200 Lewis Avenue
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Attorney for Plaintiff

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

[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 _____ day of June, 2019.

DISTRICT JUDGE

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

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

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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

[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

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Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

BRANDON JEFFERSON,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-19-793338-W

Dept No: XXX

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

PLEASE TAKE NOTICE that on July 17, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 18, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 18 day of July 2019, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:
Brandon Jefferson # 1094051
P.O. Box 1989
Ely, NV 89301

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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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

[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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 04, 2019**

A-19-793338-W Brandon Jefferson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

June 04, 2019 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Barker, David **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Vanessa Medina

RECORDER:

REPORTER:

PARTIES PRESENT: Stanton, David L. Attorney

JOURNAL ENTRIES

- Plaintiff not present.

Court NOTED, it was in receipt of the original petition and opposition filed, Defendant was currently serving a life sentence with parole eligibility after 35 years as a result of a jury conviction on or about 07/30/12, having been convicted, Defendant appealed the conviction and sentence. Defendant had filed a first petition for writ of habeas corpus that was timely, thus denied. COURT FURTHER NOTED, this was Defendant's second successive petition, with no new issues, it was procedurally barred and ORDERED, Petition DENIED. The State directed to prepare and submit an Order for signature.

CLERK'S NOTE: The above minute order has been distributed to:
Brandon Jefferson #1094051
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated August 26, 2019, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 169.

BRANDON M. JEFFERSON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-19-793338-W

Dept. No: XXX

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 5 day of September 2019.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk