

FILED

FEB 06 2020

CLERK OF COURT

NOAS

Mark Zana # 1013790

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner In Pro Se

Electronically Filed
Feb 12 2020 02:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Mark Zana,)

A-19-804193-W

Petitioner,)

Case No. A-19-804193-W

-vs-)

Dept. No. XVII

THE STATE OF NEVADA,)

Respondent.)

NOTICE OF APPEAL

NOTICE IS GIVEN that Petitioner, Mark Zana,
in pro se, hereby appeals to the Nevada Supreme Court the
Findings of Fact, Conclusions of Law and Order Denying /
Dismissing Petition for Writ of Habeas Corpus, as filed/entered
on or about the 31ST day of January, 2020, in the above-
entitled Court.

Dated this 31ST day of January, 2020.

Mark Zana

Mark Zana # 1013790

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner In Pro Se

RECEIVED

FORM 24.064 FEB 10 6 2020

CLERK OF THE COURT

1 CERTIFICATE OF SERVICE

2 I do certify that I mailed a true and correct copy of the
3 foregoing NOTICE OF APPEAL to the below address(es) on this
4 31ST day of January, 2020, by placing same in the
5 U.S. Mail via prison law library staff:
6
7
8
9
10
11
12
13
14
15
16

17 Mark Zana
18 Mark Zana #1013796
19 Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

20 Petitioner In Pro Se

21 AFFIRMATION PURSUANT TO NRS 239B.030

22 The undersigned does hereby affirm that the preceding
23 NOTICE OF APPEAL filed in District Court Case No. A-19-804193-W
24 does not contain the social security number of any person.
25

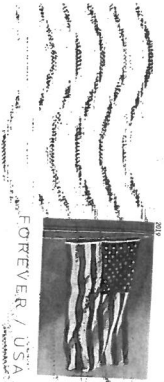
26 Dated this 31ST day of January, 2020.

27 Mark Zana
28 Mark Zana

Petitioner In Pro Se

Alaska Road #1013726
LCC
206 Prison Road
Lovelock, NV 89419

RENO NV 895
09 FEB 2020 PM 2:17



INMATE LEGAL
MAIL CONFIDENTIAL

8th Judicial District Court
Clark County
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Las Vegas, NV 89155

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1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 MARK ZANA,

10 Plaintiff(s),

11 vs.

12 WARDEN BAKER,

13 Defendant(s),

Case No: A-19-804193-W

Dept No: XVII

14
15
16 **CASE APPEAL STATEMENT**

17 1. Appellant(s): Mark Zana

18 2. Judge: Michael Villani

19 3. Appellant(s): Mark Zana

20 Counsel:

21 Mark Zana #1013790
22 1200 Prison Rd.
23 Lovelock, NV 80419

24 4. Respondent (s): Warden Baker

25 Counsel:

26 Steven B. Wolfson, District Attorney
27 200 Lewis Ave.
28 Las Vegas, NV 89155-2212

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

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

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

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

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: No
10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: October 22, 2019

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

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

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 7 day of February 2020.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Amanda Hampton

21 Amanda Hampton, Deputy Clerk
22 200 Lewis Ave
23 PO Box 551601
24 Las Vegas, Nevada 89155-1601
25 (702) 671-0512

26 cc: Mark Zana
27
28

CASE SUMMARY

CASE NO. A-19-804193-W

Mark Zana, Plaintiff(s)
vs.
Warden Baker, Defendant(s)

§
§
§
§
§

Location: **Department 17**
 Judicial Officer: **Villani, Michael**
 Filed on: **10/22/2019**
 Cross-Reference Case Number: **A804193**

CASE INFORMATION

Related Cases
 05C218103 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **10/22/2019 Open**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-19-804193-W
 Court Department 17
 Date Assigned 10/22/2019
 Judicial Officer Villani, Michael

PARTY INFORMATION

Plaintiff

Zana, Mark

Lead Attorneys

Pro Se

Defendant

Warden Baker

Getler, Stephanie M.
Retained
 702-471-2739(W)


DATE

EVENTS & ORDERS OF THE COURT


INDEX

EVENTS


10/22/2019

 Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Zana, Mark
Post Conviction


10/22/2019

 Memorandum
 Filed By: Plaintiff Zana, Mark
Memorandum of Law


11/04/2019

 Order for Petition for Writ of Habeas Corpus
Order for Petition for Writ of Habeas Corpus


12/17/2019

 Response
State's Response to Defendant's Petition for Writ of Habeas Corpus and Memorandum of Law, and State's Countermotion to Dismiss Pursuant to Laches

12/19/2019

 Motion
 Filed By: Plaintiff Zana, Mark
Motion for Briefing Schedule




12/20/2019

 Clerk's Notice of Hearing
Notice of Hearing

CASE SUMMARY
CASE NO. A-19-804193-W

12/20/2019	 Motion Filed By: Plaintiff Zana, Mark <i>Motion for Briefing Schedule</i>
01/06/2020	 Motion Filed By: Plaintiff Zana, Mark <i>Motion for Sanctions Against the State for Misrepresenting the Facts to the Court</i>
01/06/2020	 Reply Filed by: Plaintiff Zana, Mark <i>Petitioner's Reply to State's Response</i>
01/13/2020	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
02/06/2020	 Response <i>State's Response to Petitioner s Motion for Sanctions Against the State for Misrepresenting the Facts to the Court</i>
02/06/2020	 Notice of Appeal Filed By: Plaintiff Zana, Mark <i>Notice of Appeal</i>
02/07/2020	 Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusions of Law and Order</i>
02/07/2020	 Notice of Entry Filed By: Defendant Warden Baker <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
02/07/2020	 Case Appeal Statement Filed By: Plaintiff Zana, Mark <i>Case Appeal Statement</i>

HEARINGS

01/02/2020	 Petition for Writ of Habeas Corpus (8:30 AM) (Judicial Officer: Villani, Michael) Denied; Journal Entry Details: <i>Defendant not present. COURT ORDERED, matter UNDER ADVISEMENT. NDC CLERK'S NOTE: A copy of this minute order has been mailed to: Mark Zana #1013790 Lovelock Correctional Center 1200 Prison Road Lovelock, NV 89419 /sr 01/08/2020 CLERK'S NOTE: Minute order corrected to reflect this matter was taken Under Advisement by the Court. aw 1/15/2020 CLERK'S NOTE: The above minute order has been distributed to: Mark Zana #1013790, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419. aw 1/15/2020;</i>
01/15/2020	 Minute Order (2:30 PM) (Judicial Officer: Villani, Michael) <i>Minute Order Re: Deft's Post-Conviction Petition for Writ of Habeas Corpus</i> Minute Order - No Hearing Held; Minute Order Re: Deft's Post-Conviction Petition for Writ of Habeas Corpus Journal Entry Details: <i>See Minute Order dated January 17, 2020.;</i>
01/17/2020	 Minute Order (3:46 PM) (Judicial Officer: Villani, Michael)

CASE SUMMARY

CASE NO. A-19-804193-W

Minute Order - No Hearing Held;

Journal Entry Details:

Defendant's Post-Conviction Petition for Writ of Habeas Corpus came before this court on January 2, 2020, whereupon took the matter under further advisement. After considering all pleadings and arguments, the Court renders its decision as follows: The Court adopts that State's procedural history. Petitioner's Judgment of Conviction was filed January 2, 2008. The conviction was affirmed October 20, 2009. Accordingly, the filing of the Petition is untimely pursuant to NRS 34.726. Further, this is Petitioner's second Petition, and it is successive pursuant to NRS 34.810 as it fails to allege new or different grounds for relief beyond those which were already decided on the merits. Even if this Petition was timely, it fails on the merits. Grounds 2, 3 & 7 are not claims involving ineffective of counsel and are therefore inappropriate in a post-conviction proceeding. Further, said claims should have been brought up in the first Petition. Ground 4 was addressed on appeal and therefore barred by the doctrine of res judicata. The remaining grounds for relief, if not already addressed, deal with the applicability of Castaneda v State, 132 Nev. 434, 373 P.3d 108 (2016). Petitioner does not claim or set forth sufficient facts for a claim of actual innocence or of legal innocence. Nothing in Castaneda establishes that it is to be applied retroactively. Even if it is applied retroactively, this Petition is untimely as Castaneda was decided in 2016 and the instant Petition was not filed until October 22, 2019. Petitioner's general claims of ineffective assistance of appellate counsel are untimely and bare and naked claims. He fails to identify sufficient facts to establish ineffectiveness of counsel that would have produced a different result. The State has alleged laches pursuant to NRS 34.800. Petitioner has not overcome the rebuttable presumption of prejudice. The Court finds that good cause does not exist to overcome the procedural bars for timeliness and the successive nature of the Petitions. Lastly, the Court does not find any errors to cumulate. Even if there were errors, their cumulative effect would not have been sufficient to warrant relief. Therefore, Court ORDERED, Petition DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21. Clerk's Note: The above Minute Order has been distributed to: Stephanie Getler, ESQ. and mailed to: Mark Zana #1013790 Lovelock Correctional Center 1200 Prison Road Lovelock, NV 89419 ;

01/21/2020



Motion (8:30 AM) (Judicial Officer: Villani, Michael)

Plaintiff's Motion for Briefing Schedule

Moot; Plaintiff's Motion for Briefing Schedule

Journal Entry Details:

Court noted decision was entered on January 17, 2020, in this matter and ORDERED, matter OFF CALENDAR. NDC CLERK'S NOTE: The above minute order has been distributed to: Mark Zana #1013790, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419. aw;

02/11/2020

Motion (8:30 AM) (Judicial Officer: Villani, Michael)

Events: 01/06/2020 Motion

Plaintiff's Motion for Sanctions Against the State for Misrepresenting the Facts to the Court

DISTRICT COURT CIVIL COVER SHEET

A-19-804193-W
Dept. XVII

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Mark Zana	Defendant(s) (name/address/phone): Warden Baker
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

October 22, 2019

Date

PREPARED BY CLERK

Signature of initiating party or representative

See other side for family-related case filings.

ORIGINAL

Electronically Filed
2/7/2020 10:03 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

FFCO

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

MARK ZANA,
#1875973

Defendant.

CASE NO: A-19-804193-W
05C218103

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: JANUARY 2, 2020
TIME OF HEARING: 8:30 AM

THIS CAUSE having presented before the Honorable MICHAEL VILLANI, District Judge, on the 2nd day of January, 2020; Petitioner not being present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STEPHANIE GETLER, 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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DEPT 17 ON

JAN 29 2020

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On August 7, 2007, the State filed an Amended Information charging Petitioner Mark
4 Zana with 21 counts: Counts 1-9 – Lewdness with a Child Under the Age of 14 and Counts
5 10-21 – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the
6 Age of Sixteen.

7 On August 13, 2007, a jury found Petitioner guilty of Count 1 – Open or Gross
8 Lewdness, Counts 2, 6, 7 – Lewdness with a Child Under the Age of 14, and Counts 11, 13-
9 17 – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the Age
10 of Sixteen.

11 On December 20, 2007, Petitioner was sentenced as follows: Count 1 – 12 months in
12 Clark County Detention Center; Count 2 – life with a minimum parole eligibility of 10 years
13 in Nevada Department of Corrections (“NDC”), to run concurrent with Count 1; Count 6 – life
14 with a minimum parole eligibility of 10 years in NDC, to run consecutive to Count 2; Count 7
15 – life with a minimum parole eligibility of 10 years in NDC, to run concurrent with Count 6;
16 Count 11 – 12 to 36 months in NDC, to run consecutive to Count 6; Count 13 – 12 to 36
17 months in NDC, to run consecutive to Count 11; Count 14 – 12 to 36 months in NDC, to run
18 concurrent with Count 13; Count 15 – 12 to 36 months in NDC, to run concurrent with Count
19 14; Count 16 – 12 to 36 months in NDC, to run concurrent with Count 15; and Count 17 – 12
20 to 36 months in NDC, to run concurrent with Count 16; with 107 days credit for time served.
21 The court further sentenced Petitioner to lifetime supervision and ordered him to register as a
22 sex offender within 48 hours of sentencing or release from custody. Judgment of Conviction
23 was filed on January 2, 2008.

24 Petitioner filed a direct appeal. On September 24, 2009, the Nevada Supreme Court
25 affirmed Petitioner’s conviction. Remittitur issued on October 20, 2009.

26 On December 14, 2009, Petitioner filed a pro per Petition for Writ of Habeas Corpus.
27 The State filed a Response on January 21, 2010. On February 4, 2010, the district court denied
28 Petitioner’s Petition without prejudice and ordered that Petitioner may re-file with more

1 specificity. An Order to that effect was filed on February 26, 2010.

2 Petitioner appealed the district court's denial of his Petition. On September 29, 2010,
3 the Supreme Court ruled that the district court erred in denying Petitioner's Petition without
4 holding an evidentiary hearing or appointing counsel and reversed and remanded on that basis.
5 Remittitur issued on October 25, 2010.

6 On November 3, 2010, Petitioner filed a Motion to Waive Appointment of Counsel.
7 On November 9, 2010, the district court appointed Patricia Palm as counsel. On December 7,
8 2010, a hearing was held on Petitioner's Motion to Waive Appointment of Counsel. Petitioner
9 stated he did not wish to have counsel or stand-by counsel appointed. At this time, the court
10 ordered Ms. Palm excused from representation.

11 On January 11, 2011, the district court held a modified Faretta canvass, Petitioner
12 formally waived his right to counsel on the record, the court granted Petitioner's request to
13 represent himself, appointed James Oronoz as standby counsel, and set a briefing schedule.

14 On February 7, 2011, Petitioner filed a Supplemental Petition. The State filed a
15 Response on April 8, 2011.

16 On July 21, 2011, the district court denied Petitioner's Petition for Writ of Habeas
17 Corpus.

18 Petitioner appealed and the Nevada Supreme Court affirmed the decision on May 9,
19 2012. Remittitur issued on June 11, 2012.

20 Petitioner filed the instant Petition for Writ of Habeas Corpus on October 22, 2019. The
21 State filed a response on December 17, 2019. A hearing on Petitioner's Petition was held on
22 January 2, 2020 and the matter was taken under advisement. On January 6, Petitioner filed a
23 reply. On January 17, 2020, the court issued a decision.

24 ANALYSIS

25 **I. PETITIONER'S PETITION IS PROCEDURALLY BARRED**

26 A petitioner must raise all grounds for relief in a timely filed first post-conviction
27 Petition for Writ of Habeas Corpus, otherwise the claims are waived and procedurally barred.
28 Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). "A court must dismiss a habeas

1 petition if it presents claims that either were or could have been presented in an earlier
2 proceeding, unless the court finds both cause for failing to present the claims earlier or for
3 raising them again and actual prejudice to the petitioner.” Id. Where a petitioner does not show
4 good cause for failure to raise claims of error upon direct appeal, the district court is not obliged
5 to consider their merits in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d
6 1025 (1975). Further, substantive claims—even those disguised as ineffective assistance of
7 counsel claims—are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117
8 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner’s
9 Second Petition is procedurally barred, without a showing of good cause and prejudice, and is
10 dismissed.

11 **A. This petition is time-barred pursuant to NRS 34.726.**

12 A petitioner must challenge the validity of their judgment or sentence within one year
13 from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant
14 to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and begins to
15 run from the date the judgment of conviction is filed or remittitur issues from a timely filed
16 direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson
17 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). “Application of the statutory
18 procedural default rules to post-conviction habeas petitions is mandatory,” and “cannot be
19 ignored [by the district court] when properly raised by the State.” State v. Eighth Judicial Dist.
20 Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in
21 Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late
22 despite evidence presented by the defendant that he purchased postage through the prison and
23 mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002).
24 Absent a showing of good cause and prejudice, courts have no discretion regarding whether to
25 apply the statutory procedural bars.

26 Here, the Judgment of Conviction was filed on January 2, 2008 and the Nevada
27 Supreme Court affirmed that judgment on October 20, 2009. Accordingly, Petitioner had until
28 October 20, 2010 to file a Petition for Writ of Habeas Corpus and this Petition is over nine

1 years late.

2 **B. This petition is successive pursuant to NRS 34.810.**

3 Courts must dismiss successive post-conviction petitions if a prior petition was decided
4 on the merits and a defendant fails to raise new grounds for relief, or if a defendant does raise
5 new grounds for relief but failure to assert those grounds in any prior petition was an abuse of
6 the writ. NRS 34.810(2); See Riker, 121 Nev. at 231, 112 P.3d at 1074. In other words, if the
7 claim or allegation was previously available through reasonable diligence, it is an abuse of the
8 writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct.
9 1454, 1472 (1991). “Successive petitions may be dismissed based solely on the face of the
10 petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions
11 will only be decided on the merits if the defendant can show good cause and prejudice for
12 failing to raise the new grounds in their first petition. NRS 34.810(3); Lozada v. State, 110
13 Nev. 349, 358, 871 P.2d 944, 950 (1994).

14 Here, Petitioner filed a timely first petition on December 14, 2009. The district court
15 denied that petition on July 21, 2011. The Nevada Supreme Court affirmed that decision on
16 June 11, 2012. Therefore, the filing of this second petition, containing new claims, is an abuse
17 of the writ

18 **C. Petitioner’s grounds 2, 3 and 7 are waived.**

19 Claims other than challenges to the validity of a guilty plea and ineffective assistance
20 of trial and appellate counsel p raised on direct appeal “or they will be considered waived in
21 subsequent proceedings.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994)
22 (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d
23 222 (1999)).

24 Here, Petitioner’s grounds 2, 3 and 7 are waived because they are not alleging
25 ineffective assistance of counsel. Specifically, grounds 2 and 3 challenge the validity of
26 charging Petitioner with 12 counts of Possession of Visual Presentation Depicting Sexual
27 Conduct of a Person Under the Age of 16 under NRS 200.730 was illegal pursuant to
28 Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (20016). Ground 7 raises a claim of

1 prosecutorial misconduct. None of these claims were raised on direct appeal or in Petitioner's
2 first timely Petition for Writ of Habeas Corpus. Moreover, none of them allege ineffective
3 assistance of counsel. Therefore, they are waived.

4 **D. Petitioner's ground 4 is barred by the doctrine of res judicata**

5 *Res judicata* precludes a party from re-litigating an issue which has been finally
6 determined by a court of competent jurisdiction. Exec. Mgmt. v. Ticor Titles Ins. Co., 114
7 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581,
8 598, 879 P.2d 1180, 1191 (1994)); Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237,
9 239 (1948) (recognizing the doctrine's availability in criminal proceedings). "The law of a
10 first appeal is law of the case on all subsequent appeals in which the facts are substantially the
11 same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85
12 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided
13 by a more detailed and precisely focused argument subsequently made after reflection upon
14 the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine,
15 issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini
16 v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396,
17 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada
18 Supreme Court. NEV. CONST. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark.
19 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State,
20 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file
21 motions with the same arguments, his motion is barred by the doctrines of the law of the case
22 and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

23 Petitioner claims he is entitled to a new trial because of juror misconduct. Specifically,
24 Petitioner argues that a juror conducted outside internet research in an effort to determine the
25 ages of the victims in the pictures and told their fellow jurors about their efforts. Petition at 8-
26 13. The Nevada Supreme Court considered and rejected this claim on direct appeal.
27 Specifically, the Court held that while the juror's behavior was inappropriate, "the misconduct
28 did not prejudice the jury's decision" because "the information obtained through the juror's

1 independent research was vague, ambiguous, and only discussed for a brief time.” Order of
2 Affirmance at 7-8. Petitioner now takes issue with the Nevada Supreme Court’s interpretation
3 of those facts, alleging that the court misunderstood the situation. Petition at 8. However, as
4 the court has already decided the issue, it will not be relitigated a decade later.

5 **E. Application of the procedural bars is mandatory.**

6 The Nevada Supreme Court has specifically found that the district court has a duty to
7 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
8 disregard them. In Riker, the Court held that “[a]pplication of the statutory procedural default
9 rules to post-conviction habeas petitions is mandatory,” and “cannot be ignored when properly
10 raised by the State.” 121 Nev. at 231–33, 112 P.3d at 1074–75. Ignoring these procedural bars
11 is considered an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076.
12 Riker justified this holding by noting that “[t]he necessity for a workable system dictates that
13 there must exist a time when a criminal conviction is final.” Id. at 231, 112 P.3d 1074 (citation
14 omitted); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003)
15 (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural
16 default rules nor can they empower a court to disregard them).

17 In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the
18 procedural default rules are mandatory when it reversed the district court’s grant of a
19 postconviction petition for writ of habeas corpus. 129 Nev. 559, 566, 307 P.3d 322, 326
20 (2013). There, the Court ruled that the defendant’s petition was untimely and successive, and
21 that the defendant failed to show good cause and actual prejudice. Id. Accordingly, the Court
22 reversed the district court and ordered the defendant’s petition dismissed pursuant to the
23 procedural bars. Id. at 567, 307 P.3d at 327.

24 **II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME THE**
25 **PROCEDURAL BARS**

26 To show good cause for delay under NRS 34.726(1), a defendant must demonstrate the
27 following: (1) “[t]hat the delay is not the fault of the petitioner,” and (2) that the petitioner will
28 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726(1)(a)-(b); NRS

1 34.810(3). Good cause is a “substantial reason; one that affords a legal excuse.” Hathaway v.
2 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235,
3 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a defendant must demonstrate that
4 “an impediment external to the defense prevented their compliance with the applicable
5 procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause
6 exists if a defendant can establish that the factual or legal basis of a claim was not available to
7 him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at
8 506-07. Once the factual or legal basis becomes known to a defendant, they must bring the
9 additional claims within a reasonable amount of time after the basis for the good cause arises.
10 See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726
11 applies to successive petitions). A claim that is itself procedurally barred cannot constitute
12 good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077. See also Edwards v. Carpenter, 529 U.S.
13 446, 453 120 S. Ct. 1587, 1592 (2000).

14 Here, Petitioner has failed to show good cause as to why the court should consider any
15 of his procedurally barred claims. All of the facts and circumstances needed to raise these
16 claims were available well before now, particularly considering that the majority of his claims
17 occurred before Petitioner was ever convicted. Regarding grounds 2 and 3, while Petitioner
18 claims that he has good cause for why he waited to bring them because of a 2016 Nevada
19 Supreme Court decision, he still cannot establish what impediment external to him necessitated
20 him waiting three years after that decision to raise the claims. As such, Petitioner has failed to
21 show good cause.

22 **III. PETITIONER HAS NOT SHOW PREJUDICE TO OVERCOME THE** 23 **PROCEDURAL BARS**

24 To establish prejudice, petitioners must show “not merely that the errors of [the
25 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
26 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
27 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
28 Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). “Bare” and “naked” allegations are

1 not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record.
2 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it
3 is contradicted or proven to be false by the record as it existed at the time the claim was made.”
4 Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A proper petition for post-
5 conviction relief must set forth specific factual allegations supporting the claims made and
6 cannot rely on conclusory claims for relief. N.R.S. 34.735(6). Failure to do so will result in a
7 dismissal of the petition. Id. “The petitioner is not entitled to an evidentiary hearing if the
8 record belies or repels the allegations.” Colwell v. State, 18 Nev. 807, 812, 59 P.3d 463, 467
9 (2002) (citing Evans, 117 Nev. at 621, 28 P.3d at 507).

10 **A. Petitioner’s Grounds 1, 2 and 3 fail.**

11 In Grounds 1, 2, and 3, Petitioner alleges that because the Nevada Supreme Court in
12 Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (2016) altered how many counts a defendant
13 could be charged with for possession of visual presentation depicting sexual conduct of child
14 pursuant to NRS 200.730, he is entitled to relief. Specifically, in Ground 1 he alleges that he
15 is actually innocent on this basis; in Ground 2 that he was illegally charged with 12 instead of
16 1 count of possession of visual presentation depicting sexual conduct of child; and in Ground
17 3, that double jeopardy was violated because he was charged multiple times for a single crime.
18 All claims are meritless because the Castaneda decision is inapplicable to Petitioner’s case.

19 First, Petitioner’s Ground 1 of actual innocence fails because he is claiming legal, not
20 factual innocence. Actual innocence means factual innocence not mere legal insufficiency.
21 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley,
22 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a
23 crime, a petitioner “must show that it is more likely than not that no reasonable juror would
24 have convicted him absent a constitutional violation.” Calderon v. Thompson, 523 U.S. 538,
25 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup, 513 U.S. at 316, 115 S.
26 Ct. at 861). Petitioner is claiming legal innocence of all except one count of possession of
27 visual presentation depicting sexual conduct of child. Further, Petitioner cannot show that even
28 if the rule set out in Castaneda applied to his case, that he would not have been convicted.

1 Petitioner was convicted of six counts of possession of visual presentation depicting sexual
2 conduct of child, showing that the jury concluded that he did possess child pornography. There
3 was never a question that Petitioner did in fact possess images. In fact, the only issue the jury
4 appears to have had was how old the females in the images were. As such, Petitioner's claim
5 made in Ground One is meritless and denied.

6 Petitioner's claim in grounds 2 and 3 that he was illegally charged and sentenced for
7 multiple counts for one crime is also meritless. In 2016, the Nevada Supreme Court in
8 Castaneda held that simultaneous possession of multiple images constitutes a single violation
9 of NRS 200.730 unless there is proof of individual distinct crimes of possession. Id. at 444,
10 373 P.3d 115. This case is inapplicable to Petitioner because it was decided eight years after
11 he was convicted, and Petitioner has failed to make any claim that this case should be applied
12 retroactively.

13 The Nevada Supreme Court has adopted a general retroactivity framework based upon
14 the United States Supreme Court's holding in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060
15 (1989). Clem v. State, 119 Nev. 615, 626–30, 81 P.3d 521, 529–32 (2008); Colwell v. State,
16 118 Nev. 807, 59 P.3d 463 (2002). The Teague Court held that with narrow exception, “new
17 constitutional rules of criminal procedure will not be applicable to those cases which have
18 become final before the new rules are announced.” 489 U.S. at 310, 109 S. Ct. at 1075
19 (emphasis added). A court's interpretation of a statute is not a matter of constitutional law and
20 should not be applied retroactively. See, Branham v. Baca, 134 Nev. 814, 817, 434 P.3d 313,
21 316 (2018); See also, Nika v. State, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008). As
22 Castaneda altered how many charged of possession of visual presentation depicting sexual
23 conduct of child could be filed against a defendant, it did not announce a new rule of criminal
24 procedure and is therefore not retroactive.

25 Petitioner was charged with 12 counts of possession of visual presentation depicting
26 sexual conduct of child in 2005, over a decade before the Nevada Supreme Court decided
27 Castaneda. Moreover, Petitioner does not provide specific facts that the State could not prove
28 individual instances of possession of each image. As such, his claim that had the rule

1 announced in Castaneda applied to Petitioner, he would not have been convicted is a bare and
2 naked claim suitable for summary denial under Hargrove. Moreover, the pictures were saved
3 on separate computers and there were multiple victims in the photos—perhaps as many as
4 ten—as opposed to just one person. Therefore, it stands to reason that the photos were taken
5 at different times, thereby possessed at different instances. Jury Trial – Day 5, 11-20 & 241-
6 55. As such, Petitioner’s claims in Grounds 2 and 3 fail.

7 **B. Petitioner’s Ground 4: Jury Misconduct fails.**

8 Petitioner next argues that the Nevada Supreme Court misinterpreted the facts
9 surrounding the juror misconduct. Petition at 8. Specifically, Petitioner claims that the court
10 incorrectly believed that the jury misconduct involved a single failed attempt at an internet
11 search to compare the ages of the victims in the pictures to other faces on pornography sites.
12 Petition at 8. Petitioner argues that the juror in question actually conducted several successful
13 internet searches and that the transcripts, which the Nevada Supreme Court reviewed,
14 confirmed this. Petition at 11-13.

15 As discussed above, due to the law of the case doctrine, this court cannot disturb the
16 conclusions of the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Additionally,
17 Petitioner’s claim that the court misinterpreted the evidence is meritless. The Order of
18 Affirmance explains that while there was juror misconduct, it was not prejudicial enough to
19 warrant a new trial because the juror’s search and discussion of it with other jurors was
20 ambiguous and did not affect the outcome of the case. Order of Affirmance at 9. Specifically,
21 the Court explained:

22 Upon review of the juror’s testimony at the hearing, it is clear that the
23 jury only briefly discussed the fruitless search and then continued with
24 its deliberation for at least a few more hours. Moreover, the fruitless
25 search was highly ambiguous; there are many possible interpretations
26 of the extrinsic information that the juror presented and this resulted
in little, if any, probative information being relayed to the other jurors.
Furthermore, although the issue that motivated the search—the ages
of the females depicted in the photographs on Zana’s computer—was
material, the fruitless search could in no way affect the jury’s inquiry.

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1 Because the search's implications are ambiguous, it could not speak
2 to a material issue in the case. Information so ostensibly irrelevant
could not prejudice the average, hypothetical juror.

3 Order of Affirmance at 9.

4 It is clear that the court's reference to any fruitless search was a comment to the fact
5 that the searches did not help the juror come to a conclusion about the ages of the females in
6 the pictures. Therefore, Petitioner's claim that the jurors were able to compare the ages of the
7 females in the pictures at issue to the ages of other females online is belied by the record.

8 **C. Petitioner's Ground 5: Ineffective Assistance of Counsel before, during, and**
9 **after trial fails.**

10 The United States Supreme Court has long recognized that "the right to counsel is the
11 right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104
12 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
13 (1993). To prevail on a claim of ineffective assistance of trial counsel, a petitioner must prove
14 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
15 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
16 P.2d at 323. Under the Strickland test, a petitioner must show first that his counsel's
17 representation fell below an objective standard of reasonableness, and second, that but for
18 counsel's errors, there is a reasonable probability that the result of the proceedings would have
19 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
20 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
21 part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach
22 the inquiry in the same order or even to address both components of the inquiry if the defendant
23 makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

24 "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559
25 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective
26 assistance in any given case. Even the best criminal defense attorneys would not defend a
27 particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question
28 is whether an attorney's representations amounted to incompetence under prevailing

1 professional norms, “not whether it deviated from best practices or most common custom.”
2 Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). “Effective counsel does
3 not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
4 competence demanded of attorneys in criminal cases.’” Jackson, 91 Nev. at 432, 537 P.2d at
5 474 (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

6 The court begins with the presumption of effectiveness and then must determine
7 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
8 ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). This
9 analysis does not indicate that the court should “second guess reasoned choices between trial
10 tactics, nor does it mean that defense counsel, to protect himself against allegations of
11 inadequacy, must make every conceivable motion no matter how remote the possibilities are
12 of success.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v.
13 Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). The role of a court in considering alleged
14 ineffective assistance of counsel is “not to pass upon the merits of the action not taken but to
15 determine whether, under the particular facts and circumstances of the case, trial counsel failed
16 to render reasonably effective assistance.” Id. In essence, the court must “judge the
17 reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as
18 of the time of counsel’s conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

19 Counsel cannot be deemed ineffective for failing to make futile objections, file futile
20 motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d
21 1095, 1103 (2006). “Strategic choices made by counsel after thoroughly investigating the
22 plausible options are almost unchallengeable.” Dawson v. State, 108 Nev. 112, 117, 825 P.2d
23 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial
24 counsel has the “immediate and ultimate responsibility of deciding if and when to object,
25 which witnesses, if any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8,
26 38 P.3d 163, 167 (2002).

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1 Based on the above law, the role of a court in considering allegations of ineffective
2 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
3 whether, under the particular facts and circumstances of the case, trial counsel failed to render
4 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
5 (1978). This analysis does not mean that the court should “second guess reasoned choices
6 between trial tactics nor does it mean that defense counsel, to protect himself against
7 allegations of inadequacy, must make every conceivable motion no matter how remote the
8 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
9 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
10 cannot create one and may disserve the interests of his client by attempting a useless charade.”
11 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

12 Even if a petitioner can demonstrate that his counsel's representation fell below an
13 objective standard of reasonableness, he must still demonstrate prejudice by showing a
14 reasonable probability that, but for counsel's errors, the result of the trial would have been
15 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
16 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
17 sufficient to undermine confidence in the outcome.” Id.

18 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
19 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
20 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims
21 of ineffective assistance of counsel asserted in a petition for post-conviction relief must be
22 supported with specific factual allegations, which if true, would entitle the petitioner to relief.
23 Hargrove, 100 Nev. at 502, 686 P.2d at 225. “Bare” and “naked” allegations are not sufficient,
24 nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part,
25 “[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to
26 allege specific facts rather than just conclusions may cause your petition to be dismissed.”
27 (emphasis added).

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1 Here, Petitioner alleges several grounds of ineffective assistance of counsel, all of
2 which are bare and naked claims suitable only for summary denial under Hargrove. First,
3 Petitioner claims that counsel failed to challenge the number of charges for possession of
4 visual presentation depicting sexual conduct of child. Petition at 15. This claim is meritless
5 because, as discussed above, at the time Petitioner was charged at tried for those crimes, it was
6 appropriate for a defendant to be charged with one count per image found.

7 Next, Petitioner complains that trial counsel did not investigate or evaluate the
8 witnesses' character for truthfulness and that this prejudiced him because the jury's verdict
9 depended on whether they believed the victim's testimony. Petition at 16. Petitioner's claim
10 that counsel failed to obtain a psychological evaluation of the witnesses is a bare and naked
11 claim because Petitioner does not identify which witnesses should have been evaluated, cannot
12 show how an evaluation would have changed the outcome, and cannot show how that choice
13 was anything other than a reasonable strategic choice because that evaluation could have very
14 well bolstered those witnesses' credibility. Petitioner's claim that counsel did not call
15 witnesses in support of his character is likewise a bare and naked claim as Petitioner does not
16 identify which witnesses counsel could have called or what those witnesses would have
17 testified to. Moreover, Petitioner failed to show how trial counsel's decision not to call
18 character witnesses was anything other than a reasonable strategic decision because doing so
19 would have opened the door to attacks on Petitioner's character from the State.

20 Third, Petitioner's claim that trial counsel did not question Melissa Marcovecchio and
21 Amber Newcomb about their inconsistent statements to the police is a bare and naked claim.
22 Petition at 17. Petitioner does not explain how their statements to the police differed or
23 conflicted with their testimony at trial. Moreover, Petitioner's claim is belied by the record.
24 Specifically, trial counsel did cross examine Melissa Marcovecchio about how she told the
25 police that she did not think Petitioner was a child molester. Jury Trial – Day 3 at 185. Trial
26 counsel cross examined Amber Newcomb on her credibility as well when he showed Ms.
27 Newcomb her statement to the police and pointed out the inconsistencies to the jury. Jury Trial
28 – Day 3 at 266. As such, Petitioner's claim that his attorney failed to attack the credibility of

1 the victims is belied by the record.

2 Fourth, Petitioner claims that trial counsel did not object to the prejudicial hearsay
3 statements of Jillian Lozano or Ann Marcovecchio. Petition at 17. This claim is also bare and
4 naked because Petitioner does not identify what statements were hearsay. Moreover,
5 Petitioner's claim fails because Petitioner does not complain that any statements were
6 inadmissible, he only complains that they were prejudicial which does not make a statement
7 inadmissible absent an exception.

8 Fifth, Petitioner's claim that trial counsel's failure to obtain a copy of the search warrant
9 for Petitioner's cell phone to use to bolster their claim that the search warrant of Petitioner's
10 him was invalid is a bare and naked claim. Petition at 17. Petitioner does not explain what
11 information in the cell phone search warrant would have made their claim that the home search
12 warrant was in valid. Petitioner does not even claim that the search warrant for his cell phone
13 was invalid. Further, Petitioner cannot show how this alleged failure impacted the outcome at
14 trial. As such, this claim is bare and naked and suitable for summary denial under Hargrove.

15 Petitioner's sixth claim that trial counsel was ineffective because he did not call the
16 investigators from the Henderson Sexual Assault Division is a bare and naked claim. Petition
17 at 17-18. Petitioner does not explain what specific witnesses trial counsel should have called
18 or how that would have reasonably changed the outcome at trial. Accordingly, Petitioner's
19 claim is suitable for summary denial under Hargrove.

20 Seventh, Petitioner's claim that counsel did not get a copy of Petitioner's computer hard
21 drive which would have called into question the victim's truthfulness is a bare and naked
22 claim. Petition at 18. Petitioner does not explain what information on that computer would
23 have impacted the victim's truthfulness or how it would have changed the outcome at trial.

24 Finally, Petitioner's claim that trial counsel failed to tell him that he could appeal pre-
25 trial rulings even if he accepted the plea deal is meritless. Petition at 19. Counsel cannot be
26 ineffective for accurately informing Petitioner about the law. Courts must dismiss a petition if
27 a petitioner plead guilty and the petitioner is not alleging "that the plea was involuntarily or
28 unknowingly entered, or that the plea was entered without effective assistance of counsel."

1 NRS 34.810(1)(a). As such, if Petitioner had accepted the plea negotiation, he could not have
2 appealed the court's pre-trial ruling and Petitioner fails to provide authority stating otherwise.

3 Therefore, all of Petitioner's claims of ineffective assistance of trial counsel are
4 meritless or bare and naked claims that do not entitle him to relief.

5 **D. Petitioner's Ground 6: Ineffective Assistance of Counsel on Direct Appeal fails**

6 The Strickland test also applies to whether appellate counsel can be deemed ineffective.
7 Smith v. Robbins, 528 U.S. 259, 263, 120 S.Ct. 746, 752 (2016). A petitioner must show that
8 his counsel was objectively unreasonable in failing to find and argue arguable issues and that
9 there was a reasonable probability that, but for counsel's failure, the petitioner would have
10 prevailed on appeal. Id. at 286, 120 S.Ct. at 765. Appellate counsel is not ineffective for failing
11 to raise frivolous claims. Jones v. Barnes, 463 U.S. 745, 745, 103 S.Ct. 3308, 3309 (2016). In
12 fact, appellate counsel should not raise every claim, and should instead focus on their strongest
13 ones in order to maximize the possibility of success on appeal. Smith at 288, 120 S.Ct. at 766.
14 A finding of ineffective assistance of appellate counsel is generally only found when issues
15 not raised on appeal are clearly stronger than those presented. Id.

16 Here, Petitioner's claims of ineffective assistance of appellate counsel fails because the
17 claims Petitioner expected appellate counsel to raise are meritless. As discussed above,
18 Petitioner was legally charged with 12 counts of possession of a visual presentation depicting
19 sexual conduct of child. Next, Petitioner's claim that appellate counsel misrepresented the
20 facts surrounding the juror misconduct issue to the court fails because he does not explain how
21 exactly appellate counsel represented the facts or how the court misinterpreted them. As
22 discussed above, the Nevada Supreme Court concluded that any search performed by the jury
23 was so ambiguous that it did not impact the verdict and Petitioner does not explain where in
24 the record the juror said he actually compared the ages of the females in Petitioner's photos to
25 the ages of other females on the internet. Next, Petitioner's claim that appellate counsel failed
26 to raise the issue of prosecutorial misconduct fails because, as discussed below, Petitioner's
27 claim of prosecutorial misconduct is both bare and naked, and meritless. Finally, Petitioner
28 cannot show that appellate counsel had a conflict of interest and attempted to hide his own

1 ineffectiveness fails because Petitioner failed to establish that appellate counsel was actually
2 ineffective. Thus, as none of the alleged claims would have made Petitioner successful on
3 appeal, appellate counsel cannot be deemed ineffective.

4 **E. Petitioner's Ground 7: Prosecutorial Misconduct fails.**

5 The Nevada Supreme Court employs a two-step analysis when considering claims of
6 prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).
7 First, the Court determines if the conduct was improper. Id. Second, the Court determines
8 whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct
9 unless "the remarks ... were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905
10 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054
11 (1993)).

12 With respect to the second step, this Court will not reverse if the misconduct was
13 harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-
14 error review depends on whether the prosecutorial misconduct is of a constitutional dimension.
15 Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments
16 on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness
17 as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d
18 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986)). When
19 the misconduct is of constitutional dimension, this Court will reverse unless the State
20 demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d
21 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only
22 if the error substantially affects the jury's verdict." Id.

23 "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct
24 may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004)
25 (citing King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining
26 prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict
27 when considered in the context of the trial as a whole; or 2) seriously affects the integrity or
28 public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

1 Here, the specific instances raised by Petitioner are insufficient to meet the high
2 standard for reversal due to prosecutorial misconduct. Petitioner makes the following claims
3 of prosecutorial misconduct, claiming that they prevented him from preparing for trial,
4 attacking the police investigation, or impeaching State witnesses: (1) the State ignored defense
5 requests to obtain copies of the cell phone search warrant; (2) the State asked the court to take
6 exculpatory evidence away from Petitioner which prevented his ability to impeach witnesses;
7 (3) the State introduced pictures of unrelated events into evidence and failed to disclose those
8 pictures to defense prior to trial; (4) that the State intentionally withheld the search warrant of
9 Petitioner's cell phone; (5) the State did not provided defense the report made by their
10 testifying expert 21 days before trial; (6) the State illegally charged Petitioner with 12 counts
11 of possession of a visual presentation depicting sexual conduct of person under 16; (7) the
12 State improperly plead counts 10 through 21, visual presentation depicting sexual conduct of
13 person under 16; (8) the State elicited prejudicial hearsay statements; and (9) the State
14 misrepresented the facts surrounding the juror misconduct issue at appeal. Petition at 21-25.

15 First, Petitioner's claim that the State ignored defense requests to obtain copies of the
16 cell phone search warrant is bare and naked. Petitioner provides no dates of when this request
17 was ignored and does claim that defense never obtained a copy of the search warrant. Petitioner
18 does not even explain what information in the search warrant would have impacted the verdict
19 at trial. As such, Petitioner's claim is suitable for summary denial.

20 Second, Petitioner's claim that the State asked the court to take exculpatory evidence
21 away from Petitioner which prevented his ability to impeach witnesses is a bare and naked
22 claim. Petitioner does not state what that evidence was, why the State wanted to take it from
23 Petitioner, why the court agreed to the request, and how specifically it prevented Petitioner
24 from impeaching a witness.

25 Third, Petitioner's claim that the State introduced pictures of unrelated events into
26 evidence and failed to disclose those pictures to defense prior to trial is a bare and naked claim.
27 Petitioner does explain what those pictures were, whether they were inadmissible, whether
28 defense counsel objected to their admission, or how the pictures influenced the jury's verdict.

1 Fourth, Petitioner's claim that the State intentionally withheld the search warrant of
2 Petitioner's cell phone is meritless because Petitioner cannot show that defense counsel never
3 received the search warrant, or if that withholding prejudiced him by impacting the evidence
4 Petitioner could present at trial.

5 Fifth, Petitioner's claim that the State did not provided defense the report made by their
6 testifying expert 21 days before trial is meritless. Petitioner acknowledges that the expert in
7 question never prepared a report, which they are not required to do. Therefore, there was
8 nothing for the State to disclose and the State cannot be held to error for not providing a report
9 that does not exist.

10 Sixth, Petitioner's claim that the State illegally charged Petitioner with 12 counts of
11 possession of a visual presentation depicting sexual conduct of person under 16 is meritless.
12 As discussed at length, Petitioner was legally charged with 12 counts of possession of a visual
13 presentation depicting sexual conduct of person under 16, therefore the State cannot be held
14 to have erred for following the law. Petitioner's seventh claim that the State improperly plead
15 counts 10 through 21, visual presentation depicting sexual conduct of person under 16 is
16 meritless for the same reasons.

17 Eighth, Petitioner's claim that the State elicited prejudicial hearsay statements is bare
18 and naked. Petitioner does not explain what those statements were, which witnesses made the
19 hearsay statements, or whether those statements were even inadmissible. All Petitioner alleges
20 is that the statement was prejudicial, which is not grounds to exclude a statement. Moreover,
21 Petitioner cannot show that, had those statements not been admitted, the verdict would have
22 been different.

23 Ninth, Petitioner's claim that the State misrepresented the facts surrounding the juror
24 misconduct issue on appeal is bare and naked because Petitioner does not explain what the
25 State represented to the Nevada Supreme Court. Moreover, as discussed above, the court
26 correctly found that there was no prejudice for the juror misconduct.

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1 Thus, Petitioner cannot show that he would be prejudiced if the court did not consider
2 his prosecutorial misconduct claim because all of his claims are either bare and naked or
3 meritless.

4 **IV. THE STATE AFFIRMATIVELY PLEAD LACHES**

5 NRS 34.800 creates a rebuttable presumption of prejudice to the State if “[a] period
6 exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing
7 a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
8 filing of a petition challenging the validity of a judgement of conviction...”. See NRS
9 34.800(2). To invoke the presumption, the statute requires the State plead laches and move to
10 dismiss. NRS 34.800(2).

11 The U.S. Supreme Court has long recognized the societal interest in the finality of
12 criminal adjudication. Schlup v. Delo, 513 U.S. 298, 300, 115 S.Ct. 851, 854 (1995).
13 Consideration of the equitable doctrine of laches is necessary in determining whether a
14 petitioner has shown “manifest injustice” that would permit a modification of a sentence. Hart
15 v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000), overruled on other grounds by Harris
16 v. State, 130 Nev. 435, 329 P.3d 619, (2014). In Hart, the Nevada Supreme Court stated:
17 “Application of the doctrine to an individual case may require consideration of several factors,
18 including: (1) whether there was an inexcusable delay in seeking relief (2) whether an applied
19 waiver has arisen from the petitioner’s knowing acquiescence in existing conditions; and (3)
20 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.
21 631, 633, 584 P.2d 672, 673-674 (1978).

22 Here, the State affirmatively plead laches. The Judgment of Conviction was filed in
23 2008 and remittitur issued in 2009—over a decade ago. This delay creates a rebuttable
24 presumption of prejudice to the State. Petitioner is challenging the effectiveness of trial and
25 appellate counsel. All of these claims are waived because they should have been raised in
26 Petitioner’s First Petition. That first petition was denied on July 21, 2011 and Petitioner offers
27 no justifiable explanation for the six-year delay in raising these claims. Because the this
28 Petition was filed over five years after the entry of the Judgment of Conviction, Petitioner’s

1 unexplained delay presents several significant prejudices to the State. The State will be
2 prejudiced by a time-consuming and expensive trial or hearing where extensive forensic
3 evidence and live testimony from officers and witnesses may need to be presented. The State
4 is further prejudiced from the delay since evidence might have been destroyed and witness'
5 memories may suffer, should the State even be able to locate them. Accordingly, Petitioner
6 must overcome the rebuttable presumption of prejudice to the State and because he failed to
7 provide any arguments to overcome this presumption, this Court denies habeas relief.

8 **V. THERE IS NO CUMULATIVE ERROR**

9 The Nevada Supreme Court has not endorsed application of its direct appeal cumulative
10 error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243,
11 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review.
12 Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S.
13 Ct. 980 (2007) (“a habeas petitioner cannot build a showing of prejudice on series of errors,
14 none of which would by itself meet the prejudice test.”).

15 Even if applicable, a finding of cumulative error in the context of a Strickland claim is
16 extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and
17 through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that
18 there can be no cumulative error where the petitioner fails to demonstrate any single violation
19 of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) (“where individual
20 allegations of error are not of constitutional stature or are not errors, there is ‘nothing to
21 cumulate.’”) (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps,
22 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th
23 Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief, there are no
24 errors to cumulate.

25 Under the doctrine of cumulative error, “although individual errors may be harmless,
26 the cumulative effect of multiple errors may deprive a defendant of the constitutional right to
27 a fair trial.” Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v.
28 State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d

1 1288, 1289 (1985). The relevant factors to consider in determining “whether error is harmless
2 or prejudicial include whether ‘the issue of innocence or guilt is close, the quantity and
3 character of the error, and the gravity of the crime charged.’” Id., 101 Nev. at 3, 692 P.2d at
4 1289.

5 Here, because none of Petitioner’s claims have merit, no less any legal basis, there are
6 no errors to cumulate. The issue of Petitioner’s guilt is not close. Finally, the crimes Petitioner
7 was convicted of are egregious because they involved sexual conduct or exploitation of
8 children when Petitioner was in a position of authority as a teacher.

9 **VI. PETITIONER IS NOT ENTITLED TO POST-CONVICTION COUNSEL**

10 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
11 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
12 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
13 Supreme Court specifically held that with the exception of NRS 34.820(1)(a) (entitling
14 appointed counsel when petitioner is under a sentence of death), one does not have “any
15 constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164,
16 912 P.2d at 258.

17 Although NRS 34.750 gives courts the discretion to appoint post-conviction counsel,
18 that discretion should be used only to the extent “the court is satisfied that the allegation of
19 indigency is true and the petition is not dismissed summarily.” NRS 34.750. NRS 34.750
20 further requires courts to “consider whether: (a) the issues are difficult; (b) the Defendant is
21 unable to comprehend the proceedings; or (c) counsel is necessary to proceed with discovery.”
22 Id.

23 Here, Petitioner is not entitled to counsel. First, all of his claims are procedurally barred
24 and otherwise meritless. Moreover, Petitioner’s claims are not complex and no additional
25 discovery is needed. As such, Petitioner’s request for counsel is denied.

26 //

27 //

28 //

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied; and the State's Motion to Dismiss Pursuant to Laches is granted.

DATED this 31 day of January, 2020.



DISTRICT JUDGE

MICHAEL P. VILLANI

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

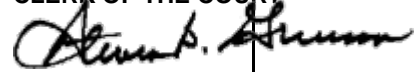


BY


STEPHANIE GEYLER
Deputy District Attorney
Nevada Bar #014203

for

hjc/SVU



NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MARK ZANA,

Petitioner,

vs.

WARDEN BAKER,

Respondent,

Case No: A-19-804193-W

Dept No: XVII

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

PLEASE TAKE NOTICE that on February 7, 2020, 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 February 7, 2020.

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 7 day of February 2020, 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:

Mark Zana # 1013790
1200 Prison Rd.
Lovelock, NV 89419

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

ORIGINAL

Electronically Filed
2/7/2020 10:03 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

FFCO

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

MARK ZANA,
#1875973

Defendant.

CASE NO: A-19-804193-W
05C218103

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: JANUARY 2, 2020
TIME OF HEARING: 8:30 AM

THIS CAUSE having presented before the Honorable MICHAEL VILLANI, District Judge, on the 2nd day of January, 2020; Petitioner not being present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STEPHANIE GETLER, 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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JAN 29 2020

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On August 7, 2007, the State filed an Amended Information charging Petitioner Mark
4 Zana with 21 counts: Counts 1-9 – Lewdness with a Child Under the Age of 14 and Counts
5 10-21 – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the
6 Age of Sixteen.

7 On August 13, 2007, a jury found Petitioner guilty of Count 1 – Open or Gross
8 Lewdness, Counts 2, 6, 7 – Lewdness with a Child Under the Age of 14, and Counts 11, 13-
9 17 – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the Age
10 of Sixteen.

11 On December 20, 2007, Petitioner was sentenced as follows: Count 1 – 12 months in
12 Clark County Detention Center; Count 2 – life with a minimum parole eligibility of 10 years
13 in Nevada Department of Corrections (“NDC”), to run concurrent with Count 1; Count 6 – life
14 with a minimum parole eligibility of 10 years in NDC, to run consecutive to Count 2; Count 7
15 – life with a minimum parole eligibility of 10 years in NDC, to run concurrent with Count 6;
16 Count 11 – 12 to 36 months in NDC, to run consecutive to Count 6; Count 13 – 12 to 36
17 months in NDC, to run consecutive to Count 11; Count 14 – 12 to 36 months in NDC, to run
18 concurrent with Count 13; Count 15 – 12 to 36 months in NDC, to run concurrent with Count
19 14; Count 16 – 12 to 36 months in NDC, to run concurrent with Count 15; and Count 17 – 12
20 to 36 months in NDC, to run concurrent with Count 16; with 107 days credit for time served.
21 The court further sentenced Petitioner to lifetime supervision and ordered him to register as a
22 sex offender within 48 hours of sentencing or release from custody. Judgment of Conviction
23 was filed on January 2, 2008.

24 Petitioner filed a direct appeal. On September 24, 2009, the Nevada Supreme Court
25 affirmed Petitioner’s conviction. Remittitur issued on October 20, 2009.

26 On December 14, 2009, Petitioner filed a pro per Petition for Writ of Habeas Corpus.
27 The State filed a Response on January 21, 2010. On February 4, 2010, the district court denied
28 Petitioner’s Petition without prejudice and ordered that Petitioner may re-file with more

1 specificity. An Order to that effect was filed on February 26, 2010.

2 Petitioner appealed the district court's denial of his Petition. On September 29, 2010,
3 the Supreme Court ruled that the district court erred in denying Petitioner's Petition without
4 holding an evidentiary hearing or appointing counsel and reversed and remanded on that basis.
5 Remittitur issued on October 25, 2010.

6 On November 3, 2010, Petitioner filed a Motion to Waive Appointment of Counsel.
7 On November 9, 2010, the district court appointed Patricia Palm as counsel. On December 7,
8 2010, a hearing was held on Petitioner's Motion to Waive Appointment of Counsel. Petitioner
9 stated he did not wish to have counsel or stand-by counsel appointed. At this time, the court
10 ordered Ms. Palm excused from representation.

11 On January 11, 2011, the district court held a modified Faretta canvass, Petitioner
12 formally waived his right to counsel on the record, the court granted Petitioner's request to
13 represent himself, appointed James Oronoz as standby counsel, and set a briefing schedule.

14 On February 7, 2011, Petitioner filed a Supplemental Petition. The State filed a
15 Response on April 8, 2011.

16 On July 21, 2011, the district court denied Petitioner's Petition for Writ of Habeas
17 Corpus.

18 Petitioner appealed and the Nevada Supreme Court affirmed the decision on May 9,
19 2012. Remittitur issued on June 11, 2012.

20 Petitioner filed the instant Petition for Writ of Habeas Corpus on October 22, 2019. The
21 State filed a response on December 17, 2019. A hearing on Petitioner's Petition was held on
22 January 2, 2020 and the matter was taken under advisement. On January 6, Petitioner filed a
23 reply. On January 17, 2020, the court issued a decision.

24 ANALYSIS

25 **I. PETITIONER'S PETITION IS PROCEDURALLY BARRED**

26 A petitioner must raise all grounds for relief in a timely filed first post-conviction
27 Petition for Writ of Habeas Corpus, otherwise the claims are waived and procedurally barred.
28 Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). "A court must dismiss a habeas

1 petition if it presents claims that either were or could have been presented in an earlier
2 proceeding, unless the court finds both cause for failing to present the claims earlier or for
3 raising them again and actual prejudice to the petitioner.” Id. Where a petitioner does not show
4 good cause for failure to raise claims of error upon direct appeal, the district court is not obliged
5 to consider their merits in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d
6 1025 (1975). Further, substantive claims—even those disguised as ineffective assistance of
7 counsel claims—are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117
8 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner’s
9 Second Petition is procedurally barred, without a showing of good cause and prejudice, and is
10 dismissed.

11 **A. This petition is time-barred pursuant to NRS 34.726.**

12 A petitioner must challenge the validity of their judgment or sentence within one year
13 from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant
14 to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and begins to
15 run from the date the judgment of conviction is filed or remittitur issues from a timely filed
16 direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson
17 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). “Application of the statutory
18 procedural default rules to post-conviction habeas petitions is mandatory,” and “cannot be
19 ignored [by the district court] when properly raised by the State.” State v. Eighth Judicial Dist.
20 Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in
21 Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late
22 despite evidence presented by the defendant that he purchased postage through the prison and
23 mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002).
24 Absent a showing of good cause and prejudice, courts have no discretion regarding whether to
25 apply the statutory procedural bars.

26 Here, the Judgment of Conviction was filed on January 2, 2008 and the Nevada
27 Supreme Court affirmed that judgment on October 20, 2009. Accordingly, Petitioner had until
28 October 20, 2010 to file a Petition for Writ of Habeas Corpus and this Petition is over nine

1 years late.

2 **B. This petition is successive pursuant to NRS 34.810.**

3 Courts must dismiss successive post-conviction petitions if a prior petition was decided
4 on the merits and a defendant fails to raise new grounds for relief, or if a defendant does raise
5 new grounds for relief but failure to assert those grounds in any prior petition was an abuse of
6 the writ. NRS 34.810(2); See Riker, 121 Nev. at 231, 112 P.3d at 1074. In other words, if the
7 claim or allegation was previously available through reasonable diligence, it is an abuse of the
8 writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct.
9 1454, 1472 (1991). “Successive petitions may be dismissed based solely on the face of the
10 petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions
11 will only be decided on the merits if the defendant can show good cause and prejudice for
12 failing to raise the new grounds in their first petition. NRS 34.810(3); Lozada v. State, 110
13 Nev. 349, 358, 871 P.2d 944, 950 (1994).

14 Here, Petitioner filed a timely first petition on December 14, 2009. The district court
15 denied that petition on July 21, 2011. The Nevada Supreme Court affirmed that decision on
16 June 11, 2012. Therefore, the filing of this second petition, containing new claims, is an abuse
17 of the writ

18 **C. Petitioner’s grounds 2, 3 and 7 are waived.**

19 Claims other than challenges to the validity of a guilty plea and ineffective assistance
20 of trial and appellate counsel p raised on direct appeal “or they will be considered waived in
21 subsequent proceedings.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994)
22 (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d
23 222 (1999)).

24 Here, Petitioner’s grounds 2, 3 and 7 are waived because they are not alleging
25 ineffective assistance of counsel. Specifically, grounds 2 and 3 challenge the validity of
26 charging Petitioner with 12 counts of Possession of Visual Presentation Depicting Sexual
27 Conduct of a Person Under the Age of 16 under NRS 200.730 was illegal pursuant to
28 Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (20016). Ground 7 raises a claim of

1 prosecutorial misconduct. None of these claims were raised on direct appeal or in Petitioner's
2 first timely Petition for Writ of Habeas Corpus. Moreover, none of them allege ineffective
3 assistance of counsel. Therefore, they are waived.

4 **D. Petitioner's ground 4 is barred by the doctrine of res judicata**

5 *Res judicata* precludes a party from re-litigating an issue which has been finally
6 determined by a court of competent jurisdiction. Exec. Mgmt. v. Ticor Titles Ins. Co., 114
7 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581,
8 598, 879 P.2d 1180, 1191 (1994)); Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237,
9 239 (1948) (recognizing the doctrine's availability in criminal proceedings). "The law of a
10 first appeal is law of the case on all subsequent appeals in which the facts are substantially the
11 same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85
12 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided
13 by a more detailed and precisely focused argument subsequently made after reflection upon
14 the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine,
15 issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini
16 v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396,
17 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada
18 Supreme Court. NEV. CONST. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark.
19 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State,
20 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file
21 motions with the same arguments, his motion is barred by the doctrines of the law of the case
22 and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

23 Petitioner claims he is entitled to a new trial because of juror misconduct. Specifically,
24 Petitioner argues that a juror conducted outside internet research in an effort to determine the
25 ages of the victims in the pictures and told their fellow jurors about their efforts. Petition at 8-
26 13. The Nevada Supreme Court considered and rejected this claim on direct appeal.
27 Specifically, the Court held that while the juror's behavior was inappropriate, "the misconduct
28 did not prejudice the jury's decision" because "the information obtained through the juror's

1 independent research was vague, ambiguous, and only discussed for a brief time.” Order of
2 Affirmance at 7-8. Petitioner now takes issue with the Nevada Supreme Court’s interpretation
3 of those facts, alleging that the court misunderstood the situation. Petition at 8. However, as
4 the court has already decided the issue, it will not be relitigated a decade later.

5 **E. Application of the procedural bars is mandatory.**

6 The Nevada Supreme Court has specifically found that the district court has a duty to
7 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
8 disregard them. In Riker, the Court held that “[a]pplication of the statutory procedural default
9 rules to post-conviction habeas petitions is mandatory,” and “cannot be ignored when properly
10 raised by the State.” 121 Nev. at 231–33, 112 P.3d at 1074–75. Ignoring these procedural bars
11 is considered an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076.
12 Riker justified this holding by noting that “[t]he necessity for a workable system dictates that
13 there must exist a time when a criminal conviction is final.” Id. at 231, 112 P.3d 1074 (citation
14 omitted); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003)
15 (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural
16 default rules nor can they empower a court to disregard them).

17 In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the
18 procedural default rules are mandatory when it reversed the district court’s grant of a
19 postconviction petition for writ of habeas corpus. 129 Nev. 559, 566, 307 P.3d 322, 326
20 (2013). There, the Court ruled that the defendant’s petition was untimely and successive, and
21 that the defendant failed to show good cause and actual prejudice. Id. Accordingly, the Court
22 reversed the district court and ordered the defendant’s petition dismissed pursuant to the
23 procedural bars. Id. at 567, 307 P.3d at 327.

24 **II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME THE**
25 **PROCEDURAL BARS**

26 To show good cause for delay under NRS 34.726(1), a defendant must demonstrate the
27 following: (1) “[t]hat the delay is not the fault of the petitioner,” and (2) that the petitioner will
28 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726(1)(a)-(b); NRS

1 34.810(3). Good cause is a “substantial reason; one that affords a legal excuse.” Hathaway v.
2 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235,
3 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a defendant must demonstrate that
4 “an impediment external to the defense prevented their compliance with the applicable
5 procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause
6 exists if a defendant can establish that the factual or legal basis of a claim was not available to
7 him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at
8 506-07. Once the factual or legal basis becomes known to a defendant, they must bring the
9 additional claims within a reasonable amount of time after the basis for the good cause arises.
10 See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726
11 applies to successive petitions). A claim that is itself procedurally barred cannot constitute
12 good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077. See also Edwards v. Carpenter, 529 U.S.
13 446, 453 120 S. Ct. 1587, 1592 (2000).

14 Here, Petitioner has failed to show good cause as to why the court should consider any
15 of his procedurally barred claims. All of the facts and circumstances needed to raise these
16 claims were available well before now, particularly considering that the majority of his claims
17 occurred before Petitioner was ever convicted. Regarding grounds 2 and 3, while Petitioner
18 claims that he has good cause for why he waited to bring them because of a 2016 Nevada
19 Supreme Court decision, he still cannot establish what impediment external to him necessitated
20 him waiting three years after that decision to raise the claims. As such, Petitioner has failed to
21 show good cause.

22 **III. PETITIONER HAS NOT SHOW PREJUDICE TO OVERCOME THE** 23 **PROCEDURAL BARS**

24 To establish prejudice, petitioners must show “not merely that the errors of [the
25 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
26 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
27 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
28 Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). “Bare” and “naked” allegations are

1 not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record.
2 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it
3 is contradicted or proven to be false by the record as it existed at the time the claim was made.”
4 Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A proper petition for post-
5 conviction relief must set forth specific factual allegations supporting the claims made and
6 cannot rely on conclusory claims for relief. N.R.S. 34.735(6). Failure to do so will result in a
7 dismissal of the petition. Id. “The petitioner is not entitled to an evidentiary hearing if the
8 record belies or repels the allegations.” Colwell v. State, 18 Nev. 807, 812, 59 P.3d 463, 467
9 (2002) (citing Evans, 117 Nev. at 621, 28 P.3d at 507).

10 **A. Petitioner’s Grounds 1, 2 and 3 fail.**

11 In Grounds 1, 2, and 3, Petitioner alleges that because the Nevada Supreme Court in
12 Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (2016) altered how many counts a defendant
13 could be charged with for possession of visual presentation depicting sexual conduct of child
14 pursuant to NRS 200.730, he is entitled to relief. Specifically, in Ground 1 he alleges that he
15 is actually innocent on this basis; in Ground 2 that he was illegally charged with 12 instead of
16 1 count of possession of visual presentation depicting sexual conduct of child; and in Ground
17 3, that double jeopardy was violated because he was charged multiple times for a single crime.
18 All claims are meritless because the Castaneda decision is inapplicable to Petitioner’s case.

19 First, Petitioner’s Ground 1 of actual innocence fails because he is claiming legal, not
20 factual innocence. Actual innocence means factual innocence not mere legal insufficiency.
21 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley,
22 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a
23 crime, a petitioner “must show that it is more likely than not that no reasonable juror would
24 have convicted him absent a constitutional violation.” Calderon v. Thompson, 523 U.S. 538,
25 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup, 513 U.S. at 316, 115 S.
26 Ct. at 861). Petitioner is claiming legal innocence of all except one count of possession of
27 visual presentation depicting sexual conduct of child. Further, Petitioner cannot show that even
28 if the rule set out in Castaneda applied to his case, that he would not have been convicted.

1 Petitioner was convicted of six counts of possession of visual presentation depicting sexual
2 conduct of child, showing that the jury concluded that he did possess child pornography. There
3 was never a question that Petitioner did in fact possess images. In fact, the only issue the jury
4 appears to have had was how old the females in the images were. As such, Petitioner's claim
5 made in Ground One is meritless and denied.

6 Petitioner's claim in grounds 2 and 3 that he was illegally charged and sentenced for
7 multiple counts for one crime is also meritless. In 2016, the Nevada Supreme Court in
8 Castaneda held that simultaneous possession of multiple images constitutes a single violation
9 of NRS 200.730 unless there is proof of individual distinct crimes of possession. Id. at 444,
10 373 P.3d 115. This case is inapplicable to Petitioner because it was decided eight years after
11 he was convicted, and Petitioner has failed to make any claim that this case should be applied
12 retroactively.

13 The Nevada Supreme Court has adopted a general retroactivity framework based upon
14 the United States Supreme Court's holding in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060
15 (1989). Clem v. State, 119 Nev. 615, 626–30, 81 P.3d 521, 529–32 (2008); Colwell v. State,
16 118 Nev. 807, 59 P.3d 463 (2002). The Teague Court held that with narrow exception, “new
17 constitutional rules of criminal procedure will not be applicable to those cases which have
18 become final before the new rules are announced.” 489 U.S. at 310, 109 S. Ct. at 1075
19 (emphasis added). A court's interpretation of a statute is not a matter of constitutional law and
20 should not be applied retroactively. See, Branham v. Baca, 134 Nev. 814, 817, 434 P.3d 313,
21 316 (2018); See also, Nika v. State, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008). As
22 Castaneda altered how many charged of possession of visual presentation depicting sexual
23 conduct of child could be filed against a defendant, it did not announce a new rule of criminal
24 procedure and is therefore not retroactive.

25 Petitioner was charged with 12 counts of possession of visual presentation depicting
26 sexual conduct of child in 2005, over a decade before the Nevada Supreme Court decided
27 Castaneda. Moreover, Petitioner does not provide specific facts that the State could not prove
28 individual instances of possession of each image. As such, his claim that had the rule

1 announced in Castaneda applied to Petitioner, he would not have been convicted is a bare and
2 naked claim suitable for summary denial under Hargrove. Moreover, the pictures were saved
3 on separate computers and there were multiple victims in the photos—perhaps as many as
4 ten—as opposed to just one person. Therefore, it stands to reason that the photos were taken
5 at different times, thereby possessed at different instances. Jury Trial – Day 5, 11-20 & 241-
6 55. As such, Petitioner’s claims in Grounds 2 and 3 fail.

7 **B. Petitioner’s Ground 4: Jury Misconduct fails.**

8 Petitioner next argues that the Nevada Supreme Court misinterpreted the facts
9 surrounding the juror misconduct. Petition at 8. Specifically, Petitioner claims that the court
10 incorrectly believed that the jury misconduct involved a single failed attempt at an internet
11 search to compare the ages of the victims in the pictures to other faces on pornography sites.
12 Petition at 8. Petitioner argues that the juror in question actually conducted several successful
13 internet searches and that the transcripts, which the Nevada Supreme Court reviewed,
14 confirmed this. Petition at 11-13.

15 As discussed above, due to the law of the case doctrine, this court cannot disturb the
16 conclusions of the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Additionally,
17 Petitioner’s claim that the court misinterpreted the evidence is meritless. The Order of
18 Affirmance explains that while there was juror misconduct, it was not prejudicial enough to
19 warrant a new trial because the juror’s search and discussion of it with other jurors was
20 ambiguous and did not affect the outcome of the case. Order of Affirmance at 9. Specifically,
21 the Court explained:

22 Upon review of the juror’s testimony at the hearing, it is clear that the
23 jury only briefly discussed the fruitless search and then continued with
24 its deliberation for at least a few more hours. Moreover, the fruitless
25 search was highly ambiguous; there are many possible interpretations
26 of the extrinsic information that the juror presented and this resulted
in little, if any, probative information being relayed to the other jurors.
Furthermore, although the issue that motivated the search—the ages
of the females depicted in the photographs on Zana’s computer—was
material, the fruitless search could in no way affect the jury’s inquiry.

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1 Because the search's implications are ambiguous, it could not speak
2 to a material issue in the case. Information so ostensibly irrelevant
could not prejudice the average, hypothetical juror.

3 Order of Affirmance at 9.

4 It is clear that the court's reference to any fruitless search was a comment to the fact
5 that the searches did not help the juror come to a conclusion about the ages of the females in
6 the pictures. Therefore, Petitioner's claim that the jurors were able to compare the ages of the
7 females in the pictures at issue to the ages of other females online is belied by the record.

8 **C. Petitioner's Ground 5: Ineffective Assistance of Counsel before, during, and**
9 **after trial fails.**

10 The United States Supreme Court has long recognized that "the right to counsel is the
11 right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104
12 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
13 (1993). To prevail on a claim of ineffective assistance of trial counsel, a petitioner must prove
14 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
15 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
16 P.2d at 323. Under the Strickland test, a petitioner must show first that his counsel's
17 representation fell below an objective standard of reasonableness, and second, that but for
18 counsel's errors, there is a reasonable probability that the result of the proceedings would have
19 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
20 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
21 part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach
22 the inquiry in the same order or even to address both components of the inquiry if the defendant
23 makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

24 "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559
25 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective
26 assistance in any given case. Even the best criminal defense attorneys would not defend a
27 particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question
28 is whether an attorney's representations amounted to incompetence under prevailing

1 professional norms, “not whether it deviated from best practices or most common custom.”
2 Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). “Effective counsel does
3 not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
4 competence demanded of attorneys in criminal cases.’” Jackson, 91 Nev. at 432, 537 P.2d at
5 474 (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

6 The court begins with the presumption of effectiveness and then must determine
7 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
8 ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). This
9 analysis does not indicate that the court should “second guess reasoned choices between trial
10 tactics, nor does it mean that defense counsel, to protect himself against allegations of
11 inadequacy, must make every conceivable motion no matter how remote the possibilities are
12 of success.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v.
13 Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). The role of a court in considering alleged
14 ineffective assistance of counsel is “not to pass upon the merits of the action not taken but to
15 determine whether, under the particular facts and circumstances of the case, trial counsel failed
16 to render reasonably effective assistance.” Id. In essence, the court must “judge the
17 reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as
18 of the time of counsel’s conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

19 Counsel cannot be deemed ineffective for failing to make futile objections, file futile
20 motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d
21 1095, 1103 (2006). “Strategic choices made by counsel after thoroughly investigating the
22 plausible options are almost unchallengeable.” Dawson v. State, 108 Nev. 112, 117, 825 P.2d
23 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial
24 counsel has the “immediate and ultimate responsibility of deciding if and when to object,
25 which witnesses, if any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8,
26 38 P.3d 163, 167 (2002).

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1 Based on the above law, the role of a court in considering allegations of ineffective
2 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
3 whether, under the particular facts and circumstances of the case, trial counsel failed to render
4 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
5 (1978). This analysis does not mean that the court should “second guess reasoned choices
6 between trial tactics nor does it mean that defense counsel, to protect himself against
7 allegations of inadequacy, must make every conceivable motion no matter how remote the
8 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
9 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
10 cannot create one and may disserve the interests of his client by attempting a useless charade.”
11 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

12 Even if a petitioner can demonstrate that his counsel's representation fell below an
13 objective standard of reasonableness, he must still demonstrate prejudice by showing a
14 reasonable probability that, but for counsel's errors, the result of the trial would have been
15 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
16 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
17 sufficient to undermine confidence in the outcome.” Id.

18 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
19 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
20 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims
21 of ineffective assistance of counsel asserted in a petition for post-conviction relief must be
22 supported with specific factual allegations, which if true, would entitle the petitioner to relief.
23 Hargrove, 100 Nev. at 502, 686 P.2d at 225. “Bare” and “naked” allegations are not sufficient,
24 nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part,
25 “[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to
26 allege specific facts rather than just conclusions may cause your petition to be dismissed.”
27 (emphasis added).

28 //

1 Here, Petitioner alleges several grounds of ineffective assistance of counsel, all of
2 which are bare and naked claims suitable only for summary denial under Hargrove. First,
3 Petitioner claims that counsel failed to challenge the number of charges for possession of
4 visual presentation depicting sexual conduct of child. Petition at 15. This claim is meritless
5 because, as discussed above, at the time Petitioner was charged at tried for those crimes, it was
6 appropriate for a defendant to be charged with one count per image found.

7 Next, Petitioner complains that trial counsel did not investigate or evaluate the
8 witnesses' character for truthfulness and that this prejudiced him because the jury's verdict
9 depended on whether they believed the victim's testimony. Petition at 16. Petitioner's claim
10 that counsel failed to obtain a psychological evaluation of the witnesses is a bare and naked
11 claim because Petitioner does not identify which witnesses should have been evaluated, cannot
12 show how an evaluation would have changed the outcome, and cannot show how that choice
13 was anything other than a reasonable strategic choice because that evaluation could have very
14 well bolstered those witnesses' credibility. Petitioner's claim that counsel did not call
15 witnesses in support of his character is likewise a bare and naked claim as Petitioner does not
16 identify which witnesses counsel could have called or what those witnesses would have
17 testified to. Moreover, Petitioner failed to show how trial counsel's decision not to call
18 character witnesses was anything other than a reasonable strategic decision because doing so
19 would have opened the door to attacks on Petitioner's character from the State.

20 Third, Petitioner's claim that trial counsel did not question Melissa Marcovecchio and
21 Amber Newcomb about their inconsistent statements to the police is a bare and naked claim.
22 Petition at 17. Petitioner does not explain how their statements to the police differed or
23 conflicted with their testimony at trial. Moreover, Petitioner's claim is belied by the record.
24 Specifically, trial counsel did cross examine Melissa Marcovecchio about how she told the
25 police that she did not think Petitioner was a child molester. Jury Trial – Day 3 at 185. Trial
26 counsel cross examined Amber Newcomb on her credibility as well when he showed Ms.
27 Newcomb her statement to the police and pointed out the inconsistencies to the jury. Jury Trial
28 – Day 3 at 266. As such, Petitioner's claim that his attorney failed to attack the credibility of

1 the victims is belied by the record.

2 Fourth, Petitioner claims that trial counsel did not object to the prejudicial hearsay
3 statements of Jillian Lozano or Ann Marcovecchio. Petition at 17. This claim is also bare and
4 naked because Petitioner does not identify what statements were hearsay. Moreover,
5 Petitioner's claim fails because Petitioner does not complain that any statements were
6 inadmissible, he only complains that they were prejudicial which does not make a statement
7 inadmissible absent an exception.

8 Fifth, Petitioner's claim that trial counsel's failure to obtain a copy of the search warrant
9 for Petitioner's cell phone to use to bolster their claim that the search warrant of Petitioner's
10 him was invalid is a bare and naked claim. Petition at 17. Petitioner does not explain what
11 information in the cell phone search warrant would have made their claim that the home search
12 warrant was in valid. Petitioner does not even claim that the search warrant for his cell phone
13 was invalid. Further, Petitioner cannot show how this alleged failure impacted the outcome at
14 trial. As such, this claim is bare and naked and suitable for summary denial under Hargrove.

15 Petitioner's sixth claim that trial counsel was ineffective because he did not call the
16 investigators from the Henderson Sexual Assault Division is a bare and naked claim. Petition
17 at 17-18. Petitioner does not explain what specific witnesses trial counsel should have called
18 or how that would have reasonably changed the outcome at trial. Accordingly, Petitioner's
19 claim is suitable for summary denial under Hargrove.

20 Seventh, Petitioner's claim that counsel did not get a copy of Petitioner's computer hard
21 drive which would have called into question the victim's truthfulness is a bare and naked
22 claim. Petition at 18. Petitioner does not explain what information on that computer would
23 have impacted the victim's truthfulness or how it would have changed the outcome at trial.

24 Finally, Petitioner's claim that trial counsel failed to tell him that he could appeal pre-
25 trial rulings even if he accepted the plea deal is meritless. Petition at 19. Counsel cannot be
26 ineffective for accurately informing Petitioner about the law. Courts must dismiss a petition if
27 a petitioner plead guilty and the petitioner is not alleging "that the plea was involuntarily or
28 unknowingly entered, or that the plea was entered without effective assistance of counsel."

1 NRS 34.810(1)(a). As such, if Petitioner had accepted the plea negotiation, he could not have
2 appealed the court's pre-trial ruling and Petitioner fails to provide authority stating otherwise.

3 Therefore, all of Petitioner's claims of ineffective assistance of trial counsel are
4 meritless or bare and naked claims that do not entitle him to relief.

5 **D. Petitioner's Ground 6: Ineffective Assistance of Counsel on Direct Appeal fails**

6 The Strickland test also applies to whether appellate counsel can be deemed ineffective.
7 Smith v. Robbins, 528 U.S. 259, 263, 120 S.Ct. 746, 752 (2016). A petitioner must show that
8 his counsel was objectively unreasonable in failing to find and argue arguable issues and that
9 there was a reasonable probability that, but for counsel's failure, the petitioner would have
10 prevailed on appeal. Id. at 286, 120 S.Ct. at 765. Appellate counsel is not ineffective for failing
11 to raise frivolous claims. Jones v. Barnes, 463 U.S. 745, 745, 103 S.Ct. 3308, 3309 (2016). In
12 fact, appellate counsel should not raise every claim, and should instead focus on their strongest
13 ones in order to maximize the possibility of success on appeal. Smith at 288, 120 S.Ct. at 766.
14 A finding of ineffective assistance of appellate counsel is generally only found when issues
15 not raised on appeal are clearly stronger than those presented. Id.

16 Here, Petitioner's claims of ineffective assistance of appellate counsel fails because the
17 claims Petitioner expected appellate counsel to raise are meritless. As discussed above,
18 Petitioner was legally charged with 12 counts of possession of a visual presentation depicting
19 sexual conduct of child. Next, Petitioner's claim that appellate counsel misrepresented the
20 facts surrounding the juror misconduct issue to the court fails because he does not explain how
21 exactly appellate counsel represented the facts or how the court misinterpreted them. As
22 discussed above, the Nevada Supreme Court concluded that any search performed by the jury
23 was so ambiguous that it did not impact the verdict and Petitioner does not explain where in
24 the record the juror said he actually compared the ages of the females in Petitioner's photos to
25 the ages of other females on the internet. Next, Petitioner's claim that appellate counsel failed
26 to raise the issue of prosecutorial misconduct fails because, as discussed below, Petitioner's
27 claim of prosecutorial misconduct is both bare and naked, and meritless. Finally, Petitioner
28 cannot show that appellate counsel had a conflict of interest and attempted to hide his own

1 ineffectiveness fails because Petitioner failed to establish that appellate counsel was actually
2 ineffective. Thus, as none of the alleged claims would have made Petitioner successful on
3 appeal, appellate counsel cannot be deemed ineffective.

4 **E. Petitioner's Ground 7: Prosecutorial Misconduct fails.**

5 The Nevada Supreme Court employs a two-step analysis when considering claims of
6 prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).
7 First, the Court determines if the conduct was improper. Id. Second, the Court determines
8 whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct
9 unless "the remarks ... were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905
10 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054
11 (1993)).

12 With respect to the second step, this Court will not reverse if the misconduct was
13 harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-
14 error review depends on whether the prosecutorial misconduct is of a constitutional dimension.
15 Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments
16 on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness
17 as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d
18 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986)). When
19 the misconduct is of constitutional dimension, this Court will reverse unless the State
20 demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d
21 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only
22 if the error substantially affects the jury's verdict." Id.

23 "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct
24 may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004)
25 (citing King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining
26 prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict
27 when considered in the context of the trial as a whole; or 2) seriously affects the integrity or
28 public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

1 Here, the specific instances raised by Petitioner are insufficient to meet the high
2 standard for reversal due to prosecutorial misconduct. Petitioner makes the following claims
3 of prosecutorial misconduct, claiming that they prevented him from preparing for trial,
4 attacking the police investigation, or impeaching State witnesses: (1) the State ignored defense
5 requests to obtain copies of the cell phone search warrant; (2) the State asked the court to take
6 exculpatory evidence away from Petitioner which prevented his ability to impeach witnesses;
7 (3) the State introduced pictures of unrelated events into evidence and failed to disclose those
8 pictures to defense prior to trial; (4) that the State intentionally withheld the search warrant of
9 Petitioner's cell phone; (5) the State did not provided defense the report made by their
10 testifying expert 21 days before trial; (6) the State illegally charged Petitioner with 12 counts
11 of possession of a visual presentation depicting sexual conduct of person under 16; (7) the
12 State improperly plead counts 10 through 21, visual presentation depicting sexual conduct of
13 person under 16; (8) the State elicited prejudicial hearsay statements; and (9) the State
14 misrepresented the facts surrounding the juror misconduct issue at appeal. Petition at 21-25.

15 First, Petitioner's claim that the State ignored defense requests to obtain copies of the
16 cell phone search warrant is bare and naked. Petitioner provides no dates of when this request
17 was ignored and does claim that defense never obtained a copy of the search warrant. Petitioner
18 does not even explain what information in the search warrant would have impacted the verdict
19 at trial. As such, Petitioner's claim is suitable for summary denial.

20 Second, Petitioner's claim that the State asked the court to take exculpatory evidence
21 away from Petitioner which prevented his ability to impeach witnesses is a bare and naked
22 claim. Petitioner does not state what that evidence was, why the State wanted to take it from
23 Petitioner, why the court agreed to the request, and how specifically it prevented Petitioner
24 from impeaching a witness.

25 Third, Petitioner's claim that the State introduced pictures of unrelated events into
26 evidence and failed to disclose those pictures to defense prior to trial is a bare and naked claim.
27 Petitioner does explain what those pictures were, whether they were inadmissible, whether
28 defense counsel objected to their admission, or how the pictures influenced the jury's verdict.

1 Fourth, Petitioner's claim that the State intentionally withheld the search warrant of
2 Petitioner's cell phone is meritless because Petitioner cannot show that defense counsel never
3 received the search warrant, or if that withholding prejudiced him by impacting the evidence
4 Petitioner could present at trial.

5 Fifth, Petitioner's claim that the State did not provided defense the report made by their
6 testifying expert 21 days before trial is meritless. Petitioner acknowledges that the expert in
7 question never prepared a report, which they are not required to do. Therefore, there was
8 nothing for the State to disclose and the State cannot be held to error for not providing a report
9 that does not exist.

10 Sixth, Petitioner's claim that the State illegally charged Petitioner with 12 counts of
11 possession of a visual presentation depicting sexual conduct of person under 16 is meritless.
12 As discussed at length, Petitioner was legally charged with 12 counts of possession of a visual
13 presentation depicting sexual conduct of person under 16, therefore the State cannot be held
14 to have erred for following the law. Petitioner's seventh claim that the State improperly plead
15 counts 10 through 21, visual presentation depicting sexual conduct of person under 16 is
16 meritless for the same reasons.

17 Eighth, Petitioner's claim that the State elicited prejudicial hearsay statements is bare
18 and naked. Petitioner does not explain what those statements were, which witnesses made the
19 hearsay statements, or whether those statements were even inadmissible. All Petitioner alleges
20 is that the statement was prejudicial, which is not grounds to exclude a statement. Moreover,
21 Petitioner cannot show that, had those statements not been admitted, the verdict would have
22 been different.

23 Ninth, Petitioner's claim that the State misrepresented the facts surrounding the juror
24 misconduct issue on appeal is bare and naked because Petitioner does not explain what the
25 State represented to the Nevada Supreme Court. Moreover, as discussed above, the court
26 correctly found that there was no prejudice for the juror misconduct.

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1 Thus, Petitioner cannot show that he would be prejudiced if the court did not consider
2 his prosecutorial misconduct claim because all of his claims are either bare and naked or
3 meritless.

4 **IV. THE STATE AFFIRMATIVELY PLEAD LACHES**

5 NRS 34.800 creates a rebuttable presumption of prejudice to the State if “[a] period
6 exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing
7 a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
8 filing of a petition challenging the validity of a judgement of conviction...”. See NRS
9 34.800(2). To invoke the presumption, the statute requires the State plead laches and move to
10 dismiss. NRS 34.800(2).

11 The U.S. Supreme Court has long recognized the societal interest in the finality of
12 criminal adjudication. Schlup v. Delo, 513 U.S. 298, 300, 115 S.Ct. 851, 854 (1995).
13 Consideration of the equitable doctrine of laches is necessary in determining whether a
14 petitioner has shown “manifest injustice” that would permit a modification of a sentence. Hart
15 v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000), overruled on other grounds by Harris
16 v. State, 130 Nev. 435, 329 P.3d 619, (2014). In Hart, the Nevada Supreme Court stated:
17 “Application of the doctrine to an individual case may require consideration of several factors,
18 including: (1) whether there was an inexcusable delay in seeking relief (2) whether an applied
19 waiver has arisen from the petitioner’s knowing acquiescence in existing conditions; and (3)
20 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.
21 631, 633, 584 P.2d 672, 673-674 (1978).

22 Here, the State affirmatively plead laches. The Judgment of Conviction was filed in
23 2008 and remittitur issued in 2009—over a decade ago. This delay creates a rebuttable
24 presumption of prejudice to the State. Petitioner is challenging the effectiveness of trial and
25 appellate counsel. All of these claims are waived because they should have been raised in
26 Petitioner’s First Petition. That first petition was denied on July 21, 2011 and Petitioner offers
27 no justifiable explanation for the six-year delay in raising these claims. Because the this
28 Petition was filed over five years after the entry of the Judgment of Conviction, Petitioner’s

1 unexplained delay presents several significant prejudices to the State. The State will be
2 prejudiced by a time-consuming and expensive trial or hearing where extensive forensic
3 evidence and live testimony from officers and witnesses may need to be presented. The State
4 is further prejudiced from the delay since evidence might have been destroyed and witness'
5 memories may suffer, should the State even be able to locate them. Accordingly, Petitioner
6 must overcome the rebuttable presumption of prejudice to the State and because he failed to
7 provide any arguments to overcome this presumption, this Court denies habeas relief.

8 **V. THERE IS NO CUMULATIVE ERROR**

9 The Nevada Supreme Court has not endorsed application of its direct appeal cumulative
10 error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243,
11 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review.
12 Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S.
13 Ct. 980 (2007) (“a habeas petitioner cannot build a showing of prejudice on series of errors,
14 none of which would by itself meet the prejudice test.”).

15 Even if applicable, a finding of cumulative error in the context of a Strickland claim is
16 extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and
17 through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that
18 there can be no cumulative error where the petitioner fails to demonstrate any single violation
19 of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) (“where individual
20 allegations of error are not of constitutional stature or are not errors, there is ‘nothing to
21 cumulate.’”) (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps,
22 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th
23 Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief, there are no
24 errors to cumulate.

25 Under the doctrine of cumulative error, “although individual errors may be harmless,
26 the cumulative effect of multiple errors may deprive a defendant of the constitutional right to
27 a fair trial.” Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v.
28 State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d

1 1288, 1289 (1985). The relevant factors to consider in determining “whether error is harmless
2 or prejudicial include whether ‘the issue of innocence or guilt is close, the quantity and
3 character of the error, and the gravity of the crime charged.’” Id., 101 Nev. at 3, 692 P.2d at
4 1289.

5 Here, because none of Petitioner’s claims have merit, no less any legal basis, there are
6 no errors to cumulate. The issue of Petitioner’s guilt is not close. Finally, the crimes Petitioner
7 was convicted of are egregious because they involved sexual conduct or exploitation of
8 children when Petitioner was in a position of authority as a teacher.

9 **VI. PETITIONER IS NOT ENTITLED TO POST-CONVICTION COUNSEL**

10 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
11 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
12 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
13 Supreme Court specifically held that with the exception of NRS 34.820(1)(a) (entitling
14 appointed counsel when petitioner is under a sentence of death), one does not have “any
15 constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164,
16 912 P.2d at 258.

17 Although NRS 34.750 gives courts the discretion to appoint post-conviction counsel,
18 that discretion should be used only to the extent “the court is satisfied that the allegation of
19 indigency is true and the petition is not dismissed summarily.” NRS 34.750. NRS 34.750
20 further requires courts to “consider whether: (a) the issues are difficult; (b) the Defendant is
21 unable to comprehend the proceedings; or (c) counsel is necessary to proceed with discovery.”
22 Id.

23 Here, Petitioner is not entitled to counsel. First, all of his claims are procedurally barred
24 and otherwise meritless. Moreover, Petitioner’s claims are not complex and no additional
25 discovery is needed. As such, Petitioner’s request for counsel is denied.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied; and the State's Motion to Dismiss Pursuant to Laches is granted.

DATED this 31 day of January, 2020.



DISTRICT JUDGE

MICHAEL P. VILLANI

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



BY


STEPHANIE GEYLER
Deputy District Attorney
Nevada Bar #014203

for

hjc/SVU

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 02, 2020

A-19-804193-W Mark Zana, Plaintiff(s)
vs.
Warden Baker, Defendant(s)

**January 02, 2020 8:30 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Shannon Reid

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Getler, Stephanie M. Attorney

JOURNAL ENTRIES

- Defendant not present. COURT ORDERED, matter UNDER ADVISEMENT.

NDC

CLERK'S NOTE: A copy of this minute order has been mailed to:

Mark Zana #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/sr 01/08/2020

CLERK'S NOTE: Minute order corrected to reflect this matter was taken Under Advisement by the Court. aw 1/15/2020

CLERK'S NOTE: The above minute order has been distributed to: Mark Zana #1013790, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419. aw 1/15/2020

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 15, 2020

A-19-804193-W Mark Zana, Plaintiff(s)
vs.
Warden Baker, Defendant(s)

January 15, 2020

2:30 PM

Minute Order

**Minute Order Re:
Deft's Post-
Conviction Petition
for Writ of Habeas
Corpus**

HEARD BY: Villani, Michael

COURTROOM: Chambers

COURT CLERK: April Watkins

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- See Minute Order dated January 17, 2020.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 17, 2020

A-19-804193-W Mark Zana, Plaintiff(s)
vs.
Warden Baker, Defendant(s)

January 17, 2020 3:46 PM Minute Order

HEARD BY: Villani, Michael

COURTROOM: Chambers

COURT CLERK: Shannon Reid

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Defendant's Post-Conviction Petition for Writ of Habeas Corpus came before this court on January 2, 2020, whereupon took the matter under further advisement. After considering all pleadings and arguments, the Court renders its decision as follows:

The Court adopts that State's procedural history.

Petitioner's Judgment of Conviction was filed January 2, 2008. The conviction was affirmed October 20, 2009. Accordingly, the filing of the Petition is untimely pursuant to NRS 34.726. Further, this is Petitioner's second Petition, and it is successive pursuant to NRS 34.810 as it fails to allege new or different grounds for relief beyond those which were already decided on the merits. Even if this Petition was timely, it fails on the merits.

Grounds 2, 3 & 7 are not claims involving ineffective of counsel and are therefore inappropriate in a post-conviction proceeding. Further, said claims should have been brought up in the first Petition. Ground 4 was addressed on appeal and therefore barred by the doctrine of res judicata.

The remaining grounds for relief, if not already addressed, deal with the applicability of *Castaneda v State*, 132 Nev. 434, 373 P.3d 108 (2016). Petitioner does not claim or set forth sufficient facts for a

claim of actual innocence or of legal innocence. Nothing in Castaneda establishes that it is to be applied retroactively. Even if it is applied retroactively, this Petition is untimely as Castaneda was decided in 2016 and the instant Petition was not filed until October 22, 2019.

Petitioner's general claims of ineffective assistance of appellate counsel are untimely and bare and naked claims. He fails to identify sufficient facts to establish ineffectiveness of counsel that would have produced a different result.

The State has alleged laches pursuant to NRS 34.800. Petitioner has not overcome the rebuttable presumption of prejudice. The Court finds that good cause does not exist to overcome the procedural bars for timeliness and the successive nature of the Petitions. Lastly, the Court does not find any errors to cumulate. Even if there were errors, their cumulative effect would not have been sufficient to warrant relief.

Therefore, Court ORDERED, Petition DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21.

Clerk's Note: The above Minute Order has been distributed to: Stephanie Getler, ESQ. and mailed to:

Mark Zana #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 21, 2020

A-19-804193-W Mark Zana, Plaintiff(s)
vs.
Warden Baker, Defendant(s)

**January 21, 2020 8:30 AM Motion Plaintiff's Motion for
Briefing Schedule**

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: April Watkins

RECORDER: Patti Slattery

REPORTER:

PARTIES

PRESENT: Turner, Robert B. Attorney

JOURNAL ENTRIES

- Court noted decision was entered on January 17, 2020, in this matter and ORDERED, matter OFF CALENDAR.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Mark Zana #1013790, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419. aw



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

MARK ZANA #1013790
1200 PRISON RD.
LOVELOCK, NV 89419

DATE: February 7, 2020
CASE: A-19-804193-W

RE CASE: MARK ZANA vs. WARDEN BAKER

NOTICE OF APPEAL FILED: February 6, 2020

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

- ☐ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☐ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☒ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

Certification of Copy

State of Nevada }
County of Clark } SS:

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

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER;
DISTRICT COURT MINUTES

MARK ZANA,

Plaintiff(s),

vs.

WARDEN BAKER,

Defendant(s),

Case No: A-19-804193-W

Dept No: XVII

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 7 day of February 2020.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk