IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 12 2020 03:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MARK R. ZANA,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-19-804193-W

Docket No: 80571

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
MARK ZANA #1013790,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

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

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

I N D E X

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

I N D E X

Case No. C318103

Dept. No. XVII (17)

FILED
OCT 22 2019
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

* * * * *

Mark Zana,

Petitioner,

-vs-

Warden Baker,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

A-19-804193-W
Dept. XVII

INSTRUCTIONS:

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

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

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

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

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

LCC FORM 26.082

RECEIVED
OCT 22 2019
CLERK OF THE COURT

3. Appointment of Counsel

Petitioner requests the appointment of counsel as he is indigent, has no training in the legal profession, lacks the expertise or access to adequately research appropriate case law, statutory law, or the rules of criminal procedure, and has no training in the rules of evidence. Petitioner only has access to a paging system and no access to any persons trained in the law. The court has ruled that this limited access fails to provide adequate access to the courts or adequate legal assistance. (See Koerschner v. Warden, 508 F. Supp. 2d 849; 2007 U.S. Dist. LEXIS 65237)

NRS 34.750 provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues presented, whether the petitioner is able to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The determination of whether counsel should be appointed is not necessarily dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief.

When previously appointing petitioner counsel, the Nevada Supreme Court stated:

"Appellant's petition arose out of a lengthy trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and

claimed he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." (Nevada Supreme Court order of reversal, remand, and appointment of counsel; case #55688, September 29, 2010).

future petitions challenging your conviction and sentence.

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

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court

3. Date of judgment of conviction: January 2, 2008

4. Case number: C218103

5. (a) Length of sentence: 22 years to life.

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

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ___ No X

If "yes," list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: Open and gross lewdness and possession of visual presentation depicting sexual conduct under the age of 16.

8. What was your plea? (check one)

(a) Not guilty X
(b) Guilty ___
(c) Guilty but mentally ill ___
(d) Nolo contendere ___

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury ___

11. Did you testify at the trial? Yes X No ___

12. Did you appeal from the judgment of conviction?

Yes X No ___

13. If you did appeal, answer the following:
(a) Name of court: Nevada Supreme Court
(b) Case number or citation: 50786
(c) Result: Appeal Denied
(d) Date of result: October 20, 2009
(Attach copy of order or decision, if available.)

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

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

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Post-conviction

(3) Grounds raised: Ineffective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No X

(5) Result: Denial of petition

(6) Date of result: February 24, 2010

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Post-conviction

(3) Grounds raised: Ineffective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No X

(5) Result: Denial of petition.

(6) Date of result: August 3, 2011

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

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

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?
Yes X No ___

Citation or date of decision: 9/29/2010

(2) Second petition, application or motion?
Yes X No ___

Citation or date of decision: 6/4/2012

(3) Third or subsequent petitions, applications or motions? Yes ___ No ___

Citation or date of decision: ___

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

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

(a) Which of the grounds is the same: Grounds 4, 5, 6.

(b) The proceedings in which these grounds were raised: See page 5A.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

See page 5A.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) See page 5A.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

See pages 5B and 5C.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

17.(b) Ground 4 was raised on direct appeal, in the Federal District Court, and in the Ninth Circuit Court of Appeals. Grounds 5 and 6 were raised in the State District Court.

17.(c) Ground 4, jury misconduct, is being raised here due to petitioner's counsel and the State misrepresenting the facts of this claim and the Nevada Supreme Court's misapprehension of the facts of this claim. Grounds 5 and 6 are being raised here due to the conflict of interest created by petitioner's appellate counsel when he drafted and filed petitioner's previous writs of habeas corpus for ineffective assistance of counsel in an effort to conceal his ineffective assistance of counsel. Petitioner demonstrates cause for the procedural default of these claims because the impediments stated were external to petitioner's defense and prevented him from complying with procedural rules.

18. Grounds 1, 2, 3, and 6 (gateway claim of actual innocence, unit of prosecution challenge, double jeopardy, and prosecutorial misconduct) were not previously presented in any other court due to petitioner only recently becoming aware of the Nevada Supreme Court's clarification of NRS 200.730 in Castaneda v. Nevada and the ineffective assistance of counsel petitioner received. Petitioner demonstrates cause for the procedural default because these impediments were external to his defense and prevented him from complying with procedural rules.

19. This petition is being filed more than one year following the filing of the judgement of conviction and the filing of a decision on direct appeal due to several impediments that were beyond petitioner's control.

One such impediment was the Nevada Supreme Court's ruling in Castaneda v. Nevada, 373 P.3d 108; 2016 Nev. LEXIS 524; 132 Nev. Adv. Rep. 44, 64515. The Nevada Supreme Court's clarification of NRS 200.730 for the first time in Castaneda applies to cases such as petitioner's, which were final when it was decided.

Petitioner only recently became aware of Castaneda due to having no training in the legal profession and lacking the expertise or access to adequately ~~da~~research. Petitioner only has access to a paging system and no access to any persons trained in the law. The court has ruled that this fails to provide adequate access to the courts or adequate legal assistance. (See Koerschner v. Warden, 508 F. Supp. 2d 849; 2007 U.S. Dist. LEXIS 65237)

Other impediments relating to the jury misconduct claim were the Nevada Supreme Court's misapprehension of material facts of the record, the State's misrepresentation of facts in the record, and petitioner's counsel facilitating the Court's misapprehension of the facts and working against petitioner's interests. In addition, counsel failed to file a motion for reconsideration with the Court in order to bring the Court's misapprehension of the facts to their attention.

Another impediment was the conflict of interest created by petitioner's counsel when he drafted and filed petitioner's previous writs of habeas corpus for ineffective assistance of counsel and appeals in an effort to conceal his ineffective assistance.

-5B-

These impediments prevented petitioner from complying with procedural rules and were beyond petitioner's control.

-5C-

Yes ___ No X

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:
At trial, Thomas F. Ahern.
On direct appeal, Christopher R. Cram.

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

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

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

(a) Ground one: Actual Innocence

Supporting FACTS (Tell your story briefly without citing cases or law.): As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(b) Ground two: Unit of Prosecution Challenge

Supporting FACTS (Tell your story briefly without citing cases or law.): As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(c) Ground three: Double Jeopardy

Supporting FACTS (Tell your story briefly without citing cases or law.): As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(d) Ground four: Jury Misconduct

Supporting FACTS (Tell your story briefly without citing cases or law.): As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

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

EXECUTED at Lovelock Correctional Center on the _____ day of the month of _____ of the year 2019.

Mark Zona
Mark Zona #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

*More grounds listed on page 7A of this petition.

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(e) Ground Five: Ineffective Assistance of Counsel before, during, and after trial.

As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(f) Ground Six: Ineffective Assistance of Counsel on Direct Appeal.

As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(g) Ground Seven: Prosecutorial Misconduct.

As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

(h) Ground Eight: Cumulative Error.

As per instruction #2, the specific facts supporting this claim are included in the attached Memorandum of Law.

VERIFICATION

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

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

Petitioner In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I, Mark Zana, hereby certify, pursuant to N.R.C.P. 5(b), that on this ____ day of the month of _____ of the year 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden Baker
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

~~Adam Paul Laxal~~ Aaron Jones
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada 89155-2212

(District Attorney of County of Conviction)

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

Petitioner In Pro Se

Case No. A-19-804193-W
Dept. No. Dept. XVII

FILED
OCT 2 2 2019
CLERK OF COURT

In the 8th Judicial District Court of the State of Nevada
in and for the County of Clark

Mark Zana
petitioner,

-vs-

State of Nevada,
Warden Baker,
respondent.

Memorandum of
Law

Memorandum of Law

23.(a) Ground One: Actual Innocence

The gateway doctrine of Schlup v. Delo, 513 U.S. 298, 299, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) applies as petitioner's due process rights are violated because he stands actually innocent of counts 1, 2, 6, 7, 11, 13, 14, 15, 16, and 17 amounting to 22 years to life in prison in violation of United States Constitutional Amendments 5, 6, and 14 along with Articles 1 and 8 of the Nevada Constitution.

Petitioner is actually innocent and therefore overcomes the procedural and time bars to a successive petition. Petitioner has set forth sufficient allegations to entitle him to an evidentiary hearing as he has not asserted naked allegations. All claims made herein are substantiated by the record and failure to consider this petition on its merits would amount to a fundamental miscarriage of justice.

Nevada Revised Statute 200.730 penalizes possession and the State proved only a singular act of digital possession of items seized the day police took the computers into police custody. In Castaneda v. Nevada, 373 P.3d 108; 2016 Nev. Lexis 524; 132 Nev. Adv. Rep. 44, 64575; the Nevada Supreme Court clarified NRS 200.730 for the first time. Therefore, it applies to cases such as petitioner's that were final when it was decided.

At trial petitioner was tried of 12 counts of possession of visual presentation depicting sexual conduct of a person under the age of 16 and convicted of 6 of those counts. According to NRS 200.730 and the Nevada Supreme Court's clarification of

said NRS in Castaneda, petitioner's simultaneous possession of images at one time and place constitutes a single violation of NRS 200.730. Thus, petitioner should have been charged with a single count of possession, not 12. The State would have then been required to prove that all 12 images were, in fact, child pornography in order to secure a conviction for the single count. As the record confirms, the State clearly failed to do this. As such, petitioner is actually innocent of counts 11, 13, 14, 15, 16, and 17. These counts should be vacated and a new trial ordered for petitioner.

In petitioner's case as with Castaneda, "The State prosecuted the images as a group and did not attempt to show, other than that there were 15 different images, individual crimes of possession."

In Pickett it was held that evidence of possessing multiple images of child pornography on a computer constituted one crime because the "State did not otherwise attempt to distinguish the offenses by showing the crimes were separated by time or location or by otherwise demonstrating that Pickett formed a new intent as to each image." State v. Pickett, 211 S.W.3d 696, 706 (2007).

In Castaneda 14 of his 15 convictions for possessing child pornography were vacated because he committed one felony when he simultaneously possessed 15 images of child pornography, consistent with the rule of lenity. His simultaneous possession at one time and place of images constituted a single violation of NRS 200.730.

Unlike Castaneda, who was convicted of all 15 counts he was charged with, petitioner was only convicted of 6 of the 12 counts brought against him. Therefore, had petitioner been correctly

charged with the single count of possession, he would have been acquitted of that single count. Therefore petitioner has proven that he is actually innocent of counts 11, 13, 14, 15, 16, and 19.

Furthermore, there was a failure by the State to prove State of mind required for the lewdness charge when they failed to prove the possession counts. The State argued against severing the unrelated possession counts from the lewdness charge because the State needed the possession counts to prove the mental state required for the lewdness charge." The State charged Mr. Zana with lewdness with a minor under the age of 14. To prove that charge the State had to show state of mind of the Defendant ..." (State's Answering Brief page 41, lines 1-2; 7/29/08). In its ruling, the Nevada Supreme Court stated "... evidence of the pornography was admissible to prove the mental state required for the lewdness charge." (Nevada Supreme Court ruling page 11, lines 15-16; 9/24/09).

Since petitioner has proven he is actually innocent of the possession counts and the State used those counts to prove the mental state required for the lewdness charge, petitioner has shown that the State failed to prove the required element, state of mind. Therefore, petitioner is actually innocent of the lewdness charge as the State failed to prove the mental state required for the lewdness charge. As such, counts 1, 2, 6, and 7 should be vacated.

"A habeas petitioner may overcome the procedural bars and secure review of the merits of defaulted claims by showing that the failure to consider a petition on its merits would amount to a fundamental miscarriage of justice. This standard is met when the petitioner makes a colorable showing he is

actually innocent of the crime." Berry v. Nevada, 363 P.3d 1148; 2015 Nev. LEXIS 117; 131 Nev. Adv. Rep. 96, 66474.

The Court "has long recognized a petitioner's right to a post-conviction evidentiary hearing when petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

"Where ... something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." Vaillancourt v. Warden, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974).

23. (b) Ground Two: Unit of Prosecution Challenge

Petitioner's due process rights and right to a fair trial were violated when the State illegally charged and tried him with 12 counts of possession of child pornography for simultaneously possessing 12 images at one time and place. This was done in clear violation of Nevada Revised Statute 200.730 as the 12 images constituted a single violation of NRS 200.730.

NRS 200.730 penalizes possession and the State proved only a singular act of digital possession of items seized the day police took petitioner's computers into custody.

"The State prosecuted the images as a group and did not attempt to show, other than that there were 15 different images, individual distinct crimes of possession." Castaneda v. Nevada, 373 P.3d 108; 2016 Nev. LEXIS 524; 132 Nev. Adv. Rep. 44, 64515. The same holds true in petitioner's case.

The police seized petitioner's two computers at one time and place exactly like in Castaneda. 12 images were found on those computers that the State alleged were child pornography. The State charged petitioner with 12 counts of possession. The Nevada Supreme Court's clarification of NRS 200.730 in Castaneda confirms that petitioner should have only been charged with a single count of possession for simultaneously possessing 12 images at one time and place.

In Pickett it was held that evidence of possessing multiple images of child pornography on a computer constituted one crime because the "State did not otherwise attempt to distinguish the offenses by showing that the crimes were separated by time or location or by otherwise demonstrating that Pickett formed a new intent as to each image." State v. Pickett, 211 S.W. 3d 696, 706 (2007).

In Castaneda "Fourteen of defendant's 15 convictions for possessing child pornography were vacated because he committed one felony when he simultaneously possessed 15 images of children engaged in sexual conduct, consistent with rule of lenity, his simultaneous possession at one time and place of images constituted single violation of NRS 200.730." Castaneda v. Nevada, 373 P.3d 108; 2016 Nev. LEXIS 524; 132 Nev. Adv. Rep. 44, 64515.

Unlike Castaneda, who was convicted of all 15 counts, petitioner was only convicted of 6 of 12 counts of possession and sentenced to 2 counts consecutively. Had petitioner been correctly charged with a single count as NRS 200.730 intended, the State would have been required to prove that all 12 images

were, in fact, child pornography in order to convict petitioner of the single count of possession. The State clearly failed to prove all 12 counts of possession and as such counts 11, 13, 14, 15, 16, and 17 should be vacated and a new trial ordered for petitioner due to cross-contamination of the issues at trial and the State's failure to prove state of mind in the lewdness charge. (See Ground One for state of mind argument)

Petitioner suffered prejudice when he was illegally charged with and tried for 12 counts of possession, wrongfully convicted of 6 counts, and illegally sentenced to 2 counts consecutively.

"...due process requires availability of habeas relief when a states highest court interprets for the first time and clarifies the provisions of a state criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's conviction became final." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003).

In Castaneda the Nevada Supreme Court clarified NRS 200.730 for the first time and it therefore applies to cases, like petitioner's, that were final when it was decided.

23. (c) Ground Three: Double Jeopardy

Petitioner's due process rights and right to a fair trial were violated and he was subjected to double jeopardy when the State illegally prosecuted and punished petitioner multiple times for a single offense. Petitioner was charged and prosecuted for 12

counts of possession of child pornography. Petitioner was then wrongfully convicted of 6 of the 12 counts and illegally sentenced to 2 counts consecutively. NRS 200.730 only intended a single charge for possessing the 12 images at one time and place. (See Castaneda v. Nevada in Grounds One and Two).

Petitioner casts his argument in constitutional terms, citing protection against multiple punishments for the same offense afforded by the double jeopardy clause of the 5th Amendment of the United States Constitution and Articles 1 and 8 of the Nevada Constitution.

"The purpose of the Double Jeopardy Clause is to ensure that a criminal defendant is not subjected to prosecution and punishment more than a single time for any single offense." Breed v. Jones, 421 U.S. 519, 530, 95 S. Ct. 1779, 44 L. Ed 2d 346 (1975).

"When a defendant receives multiple convictions based on a single act, this court will reverse redundant convictions that do not comport with legislative intent." State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997).

Petitioner's due process rights and right to a fair trial were violated and he suffered prejudice and double jeopardy when the State illegally prosecuted and sentenced him for multiple counts though he committed a single offense. As such, counts 11, 13, 14, 15, 16, and 17 should be vacated and a new trial ordered for petitioner.

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23. (d) Ground Four: Jury Misconduct

Petitioner's 5th, 6th, and 14th Amendment rights were violated when a juror successfully conducted internet research about a material issue at trial and shared his findings with the jury panel prior to them rendering their verdict. This research was done in direct conflict with the Court's admonishment and is a clear violation of the Confrontation Clause.

Petitioner's counsel and the State misrepresented the facts of this claim on direct appeal. The Nevada Supreme Court misapprehended the facts of this claim and erroneously based their ruling on incorrect and incomplete information. This ultimately resulted in this claim failing on direct appeal.

"A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is a reasonable possibility that the extrinsic material could have affected the verdict." "The State bears the burden of proving that constitutional errors are harmless beyond a reasonable doubt." Dickson v. Sullivan, 849 P.2d 403; 1988 U.S. App. LEXIS 7950.

Jury Misconduct occurred in petitioner's trial as several courts have conceded. But, due to counsel's ineffective assistance, the courts have mistakenly ruled the jury misconduct not to be prejudicial. This is belied by the record. Petitioner's counsel and the State misrepresented the facts of this issue by arguing a single failed internet search by juror Thurman. The record confirms juror Thurman made numerous successful internet searches about a material issue of the case, shared his findings with the entire jury where it was discussed

and even argued over. It ultimately caused the jury to re-examine trial evidence. This was done shortly before the jury rendered their verdict. The record substantiates these claims. If not for petitioner's counsel and the State mis-representing the facts of this claim and the Court's mis-apprehension of the facts of the record, petitioner would have prevailed on appeal.

Several weeks after trial juror Marques reported jury misconduct to the Court. This fact makes clear the degree to which this misconduct affected juror Marques as it is rare for jury misconduct to be reported. The Court held an evidentiary hearing whereby each juror testified under oath. Before trial the Court ruled that an expert would be required by the State to testify to the differences between a 16 year old and a 17 year old or else the State wouldn't have proven their case. At trial the State's medical expert offered no proof as to the ages of the people in the images. At that point the Court changed its ruling and informed the jury that they could ignore the expert testimony and determine the ages of the people in the images themselves. Juror Thurmon took it upon himself to conduct internet research in an attempt to help him determine the ages of the people in the images. At the evidentiary hearing the jurors stated a combined 21 times that juror Thurmon successfully accessed numerous legal pornographic websites, compared the girls from those websites to the images introduced at trial, and shared his findings with the jury prior to them rendering their verdict. Juror Thurmon's internet research was not confined to a single

failed internet search for one website as petitioner's counsel and the State misrepresented and the Court misapprehended.

The Nevada Supreme Court ordered and received all trial transcripts including the jury misconduct hearing transcripts, yet the Court misapprehended the facts of this claim. The Court's ruling was based solely and erroneously on the belief of a single failed internet search. This is belied by the record. The following quotes are from the Court's ruling.

"... one juror engaged in an Internet search for a particular pornographic website that was mentioned at trial. Despite the juror's efforts, he was unable to locate the website. Upon returning on Monday to deliberate, he advised his fellow jurors of his fruitless search ..." (Nevada Supreme Court ruling, Sept. 24, 2009; pages 7-8).

"We conclude that the juror's independent search of the Internet did amount to the use of extrinsic evidence in violation of the Confrontation Clause. However, we conclude that one juror's inability to locate a website mentioned at trial **is** not so prejudicial as to necessitate a new trial." (NV S. Ct. ruling, Sept. 24, 2009; page 9).

"... it is clear that the jury only briefly discussed the fruitless search..." (NV S. Ct. ruling, Sept. 24, 2009; page 9).

"Moreover, the fruitless search..." (NV S. Ct. page 9).

"... the fruitless search ..." (NV S. Ct. page 10).

In its ruling the Nevada Supreme Court clearly mis-apprehended the facts of the record as they referred to

juror Thurmon's internet research as fruitless, unsuccessful, and singular no less than five times. This was their entire basis for denying petitioner a new trial for this claim. The record substantiates that juror Thurmon made numerous successful internet searches for pornography websites and that he compared models from those websites to the pictures introduced at trial in an effort to aid him in deciding how to determine the outcome of petitioner's trial. Juror Thurmon then shared this information with the entire jury in direct conflict with the Confrontation Clause. Even the State admitted "... had the juror been successful in accessing the internet website, this case would be vastly different." (answering brief, page 24).

The following juror statements are from the jury misconduct evidentiary hearing transcripts.

Juror Thurmon: "I was strongly in favor that I couldn't determine it so I felt not guilty at that time, that's why I said I couldn't -- I couldn't determine whether they were absolutely over the age of 16, and that's what -- that's all I said. That was Monday when we first came in. We went to the internet charges, and at that time I was one of I think two jurors that were in favor of not guilty." (page 33)

"-- I looked at some pornography sites but nothing with child porn..." (page 22)

"I was looking for some websites with younger girls..." (page 24)

"I looked at pornography websites..." (page 23)

Q. "Right, and then you looked and you found other websites?"
A. "Other normal websites, yes." (page 31)
Juror Koehler: "A juror came back on that Monday and said he went home, looked on the internet, compared young girls' faces that they said they were over the age of 18, and he said they looked younger than the ones that are in the computer disk..." (page 50)
Juror Marques: "... that they had gone on the internet to search it to see if they could tell the ages, and they couldn't come up with a conclusion of the ages of the person or persons were..." (page 4)
Juror Sheets: "He went and he looked at pictures of young girls." (page 36)
Juror Becker: "I do remember one gentleman who looked at in-- pictures, or tried to research pornography pictures to determine ages." "... when he returned he said that he looked at pictures on the internet and based on him looking at pictures on the internet..." (pages 43-44)
Juror Yango: "Just -- I guess, if I can recall, is research on determining age I believe." "The internet." (page 47)
Juror Davis: "He basically stated that he was kind of just playing online on some sites just to see if he could determine whether or not females were underage..." (page 55)
Juror Bensing: "I know that one juror said he watched pornography over the weekend because he wanted to see how young the girls actually looked." (page 59)

Juror Michael: "... and that he looked on some sites..." (page 63)
Juror Ruelas: "He said he looked at pictures of girls to determine the ages." (page 66)
Juror Paracuelle: "... the real estate guy said that he went on the computer over the weekend and went on to porno sites just to make comparisons of -- in models." (page 72)
Juror Becker: "I just believe the jury was having a hard time -- " "It made us go back and reexamine the pictures ourselves in greater detail." (page 44)

The record substantiates that juror Thurman was successful in his internet search, he shared his findings with the jury where it was discussed prior to rendering their verdict. The jury was influenced by the extrinsic evidence to such a degree that it made them re-examine trial evidence. This extrinsic evidence was directly related to a material issue at trial. The timing of the internet research and discussion of it relative to the verdict, the specificity of it, and the materiality of it all weigh in favor of concluding that the extrinsic evidence did influence the jurors. Clearly juror Thurman lost credibility as he testified that, before he shared his research with the jury, he was in favor of acquittal. Shortly after being berated by fellow jurors for doing the internet research juror Thurman returned numerous guilty verdicts.

In Dickson the jury had not discussed the extrinsic information during deliberations. Yet that court found a new trial was warranted because just 2 jurors were exposed to extrinsic evidence. In petitioner's case the

entire jury was exposed to extrinsic evidence directly related to a material issue at trial, they discussed the information, it caused the jury to re-examine trial evidence, and ultimately led to one juror to report it several weeks after trial because it "buggethes." That every juror remembered juror Thurman's research weeks after trial had concluded speaks to the impact it had on them.

"When a jury is exposed to facts that have not been introduced into evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to the extraneous information." Mazzan, 912 F.2d at 505; Gibson, 633 F.2d at 854.

"[a] new trial must be granted unless it appears beyond a reasonable doubt that no prejudice has resulted." Canada v. Nevada, 113 Nev. 938; 944 P.2d 781 (1997) (citing to Lane v. State, 110 Nev. 938; 944 P.2d 1358 at 1364).

The Nevada Supreme Court has held that the misconduct of a single juror may result in a new trial. "... a single juror's exposure to extrinsic material may still influence the verdict because that juror may interject opinions during deliberations while under the influence of the extrinsic material." Bowman v. Nevada, 373 P.3d 57; 2016 Nev. LEXIS 361; 132 Nev. Adv. Rep. 30.

This is precisely what occurred in petitioner's case when juror Thurman shared the results of his internet searches with the entire jury.

"Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Meyer v. Nevada, 119 Nev. at 564, 80 P.3d at 455.

Petitioner suffered prejudice due to the inability to confront the extrinsic evidence juror Thurman introduced into the jury deliberations. Juror Thurman's internet research exposed himself and the entire jury to extrinsic evidence about a material issue at trial in clear violation of the Confrontation Clause and warrants the order of a new trial for petitioner. Failure to consider this claim on its merits would amount to a fundamental miscarriage of justice.

23. (e) Ground Five: Ineffective Assistance of Counsel before, during, and after trial.

The two prong test of Strickland applies as trial counsel's representation fell below an objective standard of reasonableness and the deficient performance prejudiced petitioner such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Counsel's deficient representation deprived petitioner of his 6th and 14th Amendment rights. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

I. Prior to trial, counsel failed to make a unit of prosecution challenge regarding the 12 counts of possession of child pornography brought against petitioner in violation of NRS 200.730. (See Ground 2 of this petition)

The similiarities between Warner and petitioner's case are numerous and are as follows:

"There was no physical evidence of the alleged incidents."

"... it would have been important to investigate the

background of the complaining witnesses but failed to do so."

"...trial counsel did not request the district court order Dee to undergo a psychological examination to determine whether Dee was being truthful."

"Trial counsel did not present any witnesses in support of appellant's character, although appellant's credibility and the credibility of the alleged victim were central issues of the case."

"Nor did trial counsel interview appellant's employer and co-workers." Warner v. Nevada, 102 Nev. 635; 729 P.2d 1359; 1986 Nev. LEXIS 1605.

II. In Warner as with petitioner's case, trial counsel failed to investigate the backgrounds of witnesses nor did he request they undergo a psychological examination to assess their truthfulness. Two of petitioner's acusers made two and three differing statements to police. Two other acusers recorded statements to police differed from their preliminary hearing testimony. The truthfulness of these four people was in question yet petitioner's counsel failed to ask to have them evaluated before trial. Counsel failed to present any witnesses in support of petitioner's character and failed to interview or call to testify petitioner's principal, fellow co-workers, teachers, or the Henderson Police Department's D.A.R.E. officers who all worked with petitioner and his students each year. Counsel failed to contact anyone or present any witnesses at sentencing in support of a more lenient sentence.

Since there was no physical evidence or witnesses to any of the alleged incidents, the outcome at trial depended primarily upon whether the jury believed the alleged victims or petitioner. Counsel neglected this crucial area of concern which left

petitioner with no defense at trial.

III. Counsel failed to properly cross-examine Melissa Marcovecchio and Amber Newcomb at trial. Their recorded statements to police differed from their preliminary hearing and trial testimony. Counsel failed to expose their differing statements of pertinent facts to the jury and thereby expose their untruthfulness. Petitioner was convicted of these two people's accusations.

IV. Trial counsel failed to object to several prejudicial hearsay statements illicited by the State.

"Jill Lattuca's hearsay statements were not objected to at trial, thus precluding them from appellate consideration." (State's Direct Appeal answering brief page 47, lines 25-26).

"Ann Marcovecchio's hearsay statements were not objected to at trial, thus precluding them from appellate consideration." (State's Direct Appeal answering brief page 47, lines 4-6).

V. Counsel failed to obtain a copy of the search warrant for petitioner's cell phone. There were 5 intentional material falsehoods in the search warrant for petitioner's house. Hence, the house warrant was being challenged prior to trial. Counsel's failure to obtain a copy of the cell phone warrant eliminated any chance of bolstering the challenge to the house warrant by exposing further instances of official lawlessness by Detective Peña, who applied for both warrants.

VI. Counsel failed to call to testify any of the investigators from the Sexual Assault Division of the Henderson Police Department involved in this case, including the lead Detective Rod Peña. The State intentionally neglected to call any of these investigators

to testify so as to shield them from scrutiny about their improper interviewing techniques and the inclusion of false information in the house search warrant.

"In this case, the reliability and good faith of the investigation by the Henderson Police Department is in question. The transcripts of witness interviews produced to date are replete with improper witness coaching, suggestiveness, repeated questions and even two and three repeat interviews of some witnesses. The suggestiveness of the interview techniques employed by the Sexual Assault Division of the Henderson Police Department raises the serious issue of cross-contamination of later witnesses being prompted, coerced and encouraged by the suggested testimony of earlier witnesses. In short, a basic game of 'telegraph' is created by the interview tactics in this case." (Defendant's Motion for Discovery and Continuance of Trial page 5, lines 9-17; May 16, 2006).

Counsel's failure to address this crucial area of concern, by not calling any of the investigators to testify, left petitioner with no defense at trial.

VII. Counsel failed to obtain witness statements (written or recorded) of fellow teachers and co-workers; Natalie Eustice, Sherry Hollas, Vicky Angel, Marsha Lescoe, and Linda Vinecllete from police even though all were listed by the State as witnesses.

VIII. Counsel failed to obtain a copy of petitioner's computer hard drive which contained several school videos that would have called into question the truthfulness of some of the alleged victims.

IX. Prior to trial, counsel failed to inform petitioner that, if he accepted the State's plea offer, he could still appeal the three pre-trial rulings made against him by the court. This information would have substantially impacted petitioner's decision to proceed to trial as the plea offer was for a small fraction of the time petitioner actually received at sentencing.

"an act or omission by counsel which shows ignorance or <*pg.39*> oversight may satisfy the 'cause' requirement..." Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986).

Petitioner has established factual allegations which form the basis for his claim of ineffective assistance of counsel and has provided a preponderance of evidence in support of said allegations. The evidence provided by petitioner clearly establishes that counsel's performance fell below a standard of objective reasonableness and, but for counsel's deficient performance, the outcome of the proceeding would have been different.

Petitioner is not asking for a perfect trial, but for a trial with adequate representation as is guaranteed by the 6th Amendment. The cummulative effect of counsel's numerous failures prejudiced petitioner as his 6th and 14th Amendment rights were violated. As such, a new trial should be ordered.

23. (f.) Ground Six: Ineffective Assistance of Counsel on Direct Appeal.

The two prong test of Strickland applies as appellate counsel's representation fell below an objective standard of reasonableness and the deficient performance prejudiced

petitioner such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Counsel's deficient representation resulted in petitioner's 6th and 14th Amendment rights being violated. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 8 L. Ed. 2d 674 (1984).

I. Appellate counsel failed to make a claim of actual innocence on direct appeal. (See Ground One of this petition)

II. Appellate counsel failed to make a unit of prosecution challenge on direct appeal. (See Ground Two of this petition)

III. Appellate counsel failed to make a claim of double jeopardy on direct appeal. (See Ground Three of this petition)

IV. Appellate counsel misrepresented the facts of petitioner's jury misconduct claim on direct appeal. (See Ground Four of this petition)

V. Appellate counsel failed to make a claim of prosecutorial misconduct on direct appeal. (See Ground Seven of this petition)

VI. Appellate counsel created a clear conflict of interest when he drafted and filed petitioner's previous writs of habeas corpus for ineffective assistance of counsel and appeals in an effort to conceal his ineffective assistance of counsel on direct appeal.

Petitioner received ineffective assistance of counsel due to counsel's failure to present petitioner's meritorious claims of actual innocence, double jeopardy, unit of prosecution challenge, and prosecutorial misconduct on direct appeal.

Petitioner has established factual allegations which form

the basis for his claim of ineffective assistance of counsel and has provided a preponderance of evidence in support of said allegations. The evidence provided clearly establishes that counsel's performance fell below a standard of objective reasonableness and, but for counsel's deficient performance, the outcome of the proceeding would have been different. The cummulative effect of counsel's numerous failures prejudiced petitioner as his 6th and 14th Amendment rights were violated. As such, a new trial should be ordered for petitioner.

The United States Supreme Court stated "... that appellate procedural default should not forclose habeas corpus review of a meritorious constitutional claim that may establish a prisoner's innocence." Murray v. Carrier, 477 U.S. 478, 91 L.Ed. 2d 397, 106 S. Ct. 2639 (1986).

"If the defendant could prove that his attorney committed an error which rose to the level of ineffective assistance, then the defendant would have established 'cause' and 'prejudice' under NRS 34.810 subdivision 1(b)(3) to overcome procedural defaults." Crump v. Warden, 113 Nev. 293, 934 P.2d, 113 Nev. Adv. Rep. 32, (1997).

23.(g) Ground Seven: Prosecutorial Misconduct.

The state's intentional misconduct denied petitioner his 5th and 14th Amendment rights and right to a fair trial. The State's misconduct was not harmless as it prevented petitioner from effectively preparing for trial; attacking the reliability, thoroughness, and good faith of the police investigation; impeaching the credibility of the State's

witnesses; or from bolstering the defense case against prosecutorial attack.

"Where prosecutorial misconduct violates federal constitutional rights, reversal is warranted unless the misconduct was harmless beyond a reasonable doubt." Hays v. Farwell, 482 F. Supp. 2d 1180 (2007).

"... the prejudice Defendant has suffered by the, at worst, dilatory, and at best, negligent production of discovery by the State of Nevada." (Defendant's Motion for Discovery and for Continuance of Trial, May 11, 2006; page 8, lines 18-20)

I. Prior to trial the State ignored repeated requests by the defense for a copy of the search warrant and affidavit for petitioner's cell phone, as is required by the 4th Amendment.

"The Henderson Police Department obtained a search warrant to seize and examine Defendant's cell phone. The State has never provided a copy of that warrant or the Affidavit supporting it." (Defendant's Motion for Discovery and for Continuance of Trial, May 11, 2006; page 7, lines 12-15)

The Nevada Supreme Court addressed and thoroughly discussed the State's obligation to disclose exculpatory material and, even further, the State's obligation to disclose evidence favorable or beneficial to a defendant in Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000). In Mazzan the Nevada Supreme Court stated; "Due process does not require simply the disclosure of 'exculpatory' evidence. Evidence must also be disclosed if

it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the State's witnesses, or to bolster the defense case against prosecutorial attack."

II. Prior to trial the State asked the court to take exculpatory evidence from petitioner in an effort to hinder the defense's ability to impeach the credibility of the State's witnesses or to bolster the defense case against prosecutorial attack. The court took personal notes and files from petitioner on August 7, 2007 via a written order from District Court judge Jackie Glass to petitioner's attorney, Thomas F. Pitaro. This violated petitioner's due process rights and right to a fair trial.

III. The State improperly introduced numerous photographs of unrelated events as evidence at trial from more than 10 years prior to this case. The State did not disclose this evidence to the defense prior to trial, rather, the State blind-sided the defense with them in the middle of trial. This eliminated the defenses ability to have them excluded before trial or to prepare a defense of them for trial. In doing so, the State violated petitioner's due process rights and right to a fair trial.

IV. The State intentionally withheld the search warrant and affidavit for petitioner's cellphone along with several witness statements in violation of petitioner's 4th, 5th, and 14th Amendment rights. Prior to trial petitioner was challenging the warrant and affidavit for his house as it had five intentional material falsehoods in it and a lack of probable cause. The State's refusal to comply with the defense's repeated requests and

the 4th Amendment requirement to provide the warrant and affidavit clearly reveals the lengths the State went to in order to conceal the official lawlessness of the Henderson Police Department. This severely hindered petitioner's ability to attack the reliability, thoroughness, and good faith of the police investigation and deprived petitioner his due process rights and right to a fair trial.

V. The State was required to provide the defense with a copy of their expert's report 21 days prior to trial but failed to do so. This made it impossible for the defense to prepare for the State's expert testimony at trial and violated petitioner's due process rights and right to a fair trial. Furthermore, the State's expert testified at trial that the State never asked him to prepare a report. This shows premeditation by the State to violate petitioner's constitutional rights of due process and a fair trial.

Defense Question: "--I received no report from you. Did you prepare a report?"

State's expert: "I was not asked to."

Defense Question: "You were not asked to prepare a report?"

State's expert: "No, sir."

(Trial transcript Day 4; August 10, 2007; page 21; lines 17-21)

VI. In direct conflict with NRS 200.730, the State illegally charged and prosecuted petitioner with 12 counts of possession of child pornography instead of the single count NRS 200.730 intended. This violated petitioner's double jeopardy protection, his due process rights, and right to a fair trial. Due to these facts, a new trial should be ordered for petitioner. (See Ground Two

of this petition).

VII. The State's improper pleading and notice of counts 10 through 21 violated petitioner's 5th and 14th Amendment rights.

VIII. The State intentionally elicited several instances of prejudicial hearsay evidence at trial in violation of petitioner's 5th and 14th Amendment rights.

IX. The State intentionally misrepresented the facts in petitioner's jury misconduct claim in an effort to mislead the Court into believing juror Thurmon made a single unsuccessful internet search. (See Ground Four of this petition).

These numerous and intentional acts of prosecutorial misconduct are substantiated by the record and were committed with the clear intent of depriving petitioner of his due process rights and right to a fair trial. Due to these violations of petitioner's constitutional rights, petitioner is entitled to a new trial.

23.(h.) Ground Eight: Cumulative Error

The cumulative error doctrine recognizes that the cumulative effect of several errors may prejudice a defendant to the extent that his conviction must be overturned. Petitioner has cited numerous constitutional errors that are substantiated by the record, together with the clear and convincing evidence of actual innocence demonstrate that petitioner has suffered the effects of cumulative error and is entitled to relief. Failure to

consider the meritorious claims set forth in this petition would amount to a fundamental miscarriage of justice.

AFFIDAVIT OF DAMIAN M. GONZALES

STATE OF NEVADA)
)SS:
COUNTY OF [redacted])
[redacted] Rushing

I, DAMIAN M. GONZALES, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is DAMIAN M. GONZALES,

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

IN OR ABOUT MAY OF 2019 I INTRODUCED MARK ZONA TO THE ANTHONY CASTANEDA V. STATE OF NEVADA, 373 P.3d 108; 2016 NEV. LEXIS 524; 132 NEV. ADV. REP 44, 64515 CASE LAW.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to **NRS 208.165 and/or 28 U.S.C.A § 1746** as I am a prisoner to state custody.

Dated this 4TH day of OCTOBER, 2019.

[redacted]

LCC LL FORM 34.018

Mark Zana 1003290
LCC
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center

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DEPARTMENT XVII
NOTICE OF HEARING
DATE 1/2/20 TIME 8:30a
APPROVED BY BB

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Mark Zana,

Petitioner,

vs.

Warden Baker,

Respondent,

Case No: A-19-804193-W
Department 17

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on October 22, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

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

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 2nd day of January, 20 20, at the hour of 8:30a o'clock for further proceedings.

CLERK OF THE COURT
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RECEIVED BY DEPT 17 ON
OCT 24 2019

District Court Judge

BB

A-19-804193-W
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RSPN
STEVEN B. WOLFSON
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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**

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

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in this 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.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

Petitioner filed the instant Petition for Writ of Habeas Corpus on October 22, 2019. The State's response follows.

ARGUMENT

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus, otherwise the claims are waived and procedurally barred. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for

raising them again and actual prejudice to the petitioner." Id. Where a petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider their merits in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975). Further, substantive claims—even those disguised as ineffective assistance of counsel claims—are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner's Second Petition is procedurally barred, without a showing of good cause and prejudice, and should be dismissed.

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

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

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

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B. This petition is successive pursuant to NRS 34.810.

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

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

C. Petitioner's grounds 2, 3 and 7 are waived.

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

Here, Petitioner's grounds 2, 3 and 7 are waived because they are not alleging ineffective assistance of counsel. Specifically, grounds 2 and 3 challenge the validity of charging Petitioner with 12 counts of Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the Age of 16 under NRS 200.730 was illegal pursuant to Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (20016). Ground 7 raises a claim of prosecutorial misconduct. None of these claims were raised on direct appeal or in Petitioner's

first timely Petition for Writ of Habeas Corpus. Moreover, none of them allege ineffective assistance of counsel. Therefore, they are waived.

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

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

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

Order of Affirmance at 7-8. Petitioner now takes issue with the Nevada Supreme Court's interpretation of those facts, alleging that the court misunderstood the situation. Petition at 8. However, as the court has already decided the issue, it cannot be relitigated a decade later.

E. Application of the procedural bars is mandatory.

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

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

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

To show good cause for delay under NRS 34.726(1), a defendant must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner," and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726(1)(a)-(b); NRS 34.810(3). Good cause is a "substantial reason; one that affords a legal excuse." Hathaway v.

State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a defendant must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a defendant can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a defendant, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at1077. See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

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

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

To establish prejudice, petitioners must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record.

Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A proper petition for post-conviction relief must set forth specific factual allegations supporting the claims made and cannot rely on conclusory claims for relief. N.R.S. 34.735(6). Failure to do so will result in a dismissal of the petition. Id. "The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 18 Nev. 807, 812, 59 P.3d 463, 467 (2002) (citing Evans, 117 Nev. at 621, 28 P.3d at 507).

F. Petitioner's Grounds 1, 2 and 3 fail.

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

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

conduct of child, showing that the jury concluded that he did possess child pornography. There was never a question that Petitioner did in fact possess images. In fact, the only issue the jury appears to have had was how old the females in the images were. As such, Petitioner's claim made in Ground One is meritless and should be denied.

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

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

Petitioner was charged with 12 counts of possession of visual presentation depicting sexual conduct of child in 2005, over a decade before the Nevada Supreme Court decided Castaneda. Moreover, Petitioner does not provide specific facts that the State could not prove individual instances of possession of each image. As such, his claim that had the rule announced in Castaneda applied to Petitioner, he would not have been convicted is a bare and

naked claim suitable for summary denial under Hargrove. Moreover, the pictures were saved on separate computers and there were multiple victims in the photos—perhaps as many as ten—as opposed to just one person. Therefore, it stands to reason that the photos were taken at different times, thereby possessed at different instances. Jury Trial – Day 5, 11-20 & 241-55. As such, Petitioner's claims in Grounds 2 and 3 fail.

G. Petitioner's Ground 4: Jury Misconduct fails.

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

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

> Upon review of the juror's testimony at the hearing, it is clear that the jury only briefly discussed the fruitless search and then continued with its deliberation for at least a few more hours. Moreover, the fruitless search was highly ambiguous; there are many possible interpretations 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 now way affect the jury's inquiry. Because the search's implications are ambiguous, it could not speak to a material issue in the case. Information so ostensibly irrelevant could not prejudice the average, hypothetical juror.

Order of Affirmance at 9.

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

H. Petitioner's Ground 5: Ineffective Assistance of Counsel before, during, and after trial fails.

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

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of

competence demanded of attorneys in criminal cases.'" Jackson, 91 Nev. at 432, 537 P.2d at 474 (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

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

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

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

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

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

Third, Petitioner's claim that trial counsel did not question Melissa Marcovecchio and Amber Newcomb about their inconsistent statements to the police is a bare and naked claim. Petition at17. Petitioner does not explain how their statements to the police differed or conflicted with their testimony at trial. Moreover, Petitioner's claim is belied by the record. Specifically, trial counsel did cross examine Melissa Marcovecchio about how she told the police that she did not think Petitioner was a child molester. Jury Trial – Day 3 at 185. Trial counsel cross examined Amber Newcomb on her credibility as well when he showed Ms. Newcomb her statement to the police and pointed out the inconsistencies to the jury. Jury Trial – Day 3 at 266. As such, Petitioner's claim that his attorney failed to attack the credibility of the victims is belied by the record.

Fourth, Petitioner claims that trial counsel did not object to the prejudicial hearsay statements of Jillian Lozano or Ann Marcovecchio. Petition at 17. This claim is also bare and naked because Petitioner does not identify what statements were hearsay. Moreover, Petitioner's claim fails because Petitioner does not complain that any statements were

inadmissible, he only complains that they were prejudicial which does not make a statement inadmissible absent an exception.

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

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

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

Finally, Petitioner's claim that trial counsel failed to tell him that he could appeal pre-trial rulings even if he accepted the plea deal is meritless. Petition at 19. Counsel cannot be ineffective for accurately informing Petitioner about the law. Courts must dismiss a petition if a petitioner plead guilty and the petitioner is not alleging "that the plea was involuntarily or unknowingly entered, or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). As such, if Petitioner had accepted the plea negotiation, he could not have appealed the court's pre-trial ruling and Petitioner fails to provide authority stating otherwise.

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

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I. Petitioner's Ground 6: Ineffective Assistance of Counsel on Direct Appeal fails

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

Here, Petitioner's claims of ineffective assistance of appellate counsel fails because the claims Petitioner expected appellate counsel to raise are meritless. As discussed above, Petitioner was legally charged with 12 counts of possession of a visual presentation depicting sexual conduct of child. Next, Petitioner's claim that appellate counsel misrepresented the facts surrounding the juror misconduct issue to the court fails because he does not explain how exactly appellate counsel represented the facts or how the court misinterpreted them. As discussed above, the Nevada Supreme Court concluded that any search performed by the jury was so ambiguous that it did not impact the verdict and Petitioner does not explain where in the record the juror said he actually compared the ages of the females in Petitioner's photos to the ages of other females on the internet. Next, Petitioner's claim that appellate counsel failed to raise the issue of prosecutorial misconduct fails because, as discussed below, Petitioner's claim of prosecutorial misconduct is both bare and naked, and meritless. Finally, Petitioner cannot show that appellate counsel had a conflict of interest and attempted to hide his own ineffectiveness fails because Petitioner failed to establish that appellate counsel was actually ineffective. Thus, as none of the alleged claims would have made Petitioner successful on appeal, appellate counsel cannot be deemed ineffective.

J. Petitioner's Ground 7: Prosecutorial Misconduct fails.

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

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

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

Here, the specific instances raised by Petitioner are insufficient to meet the high standard for reversal due to prosecutorial misconduct. Petitioner makes the following claims of prosecutorial misconduct, claiming that they prevented him from preparing for trial,

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

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

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

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

Fourth, Petitioner's claim that the State intentionally withheld the search warrant of Petitioner's cell phone is meritless because Petitioner cannot show that defense counsel never received the search warrant, or if that withholding prejudiced him by impacting the evidence

Petitioner could present at trial.

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

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

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

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

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

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IV. THE STATE AFFIRMATIVELY PLEADS LACHES

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

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

Here, the State affirmatively pleads laches. The Judgment of Conviction was filed in 2008 and remittitur issued in 2009—over a decade ago. This delay creates a rebuttable presumption of prejudice to the State. Petitioner is challenging the effectiveness of trial and appellate counsel. All of these claims are waived because they should have been raised in Petitioner's First Petition. That first petition was denied on July 21, 2011 and Petitioner offers no justifiable explanation for the six-year delay in raising these claims. Because the this Petition was filed over five years after the entry of the Judgment of Conviction, Petitioner's unexplained delay presents several significant prejudices to the State. The State will be prejudiced by a time-consuming and expensive trial or hearing where extensive forensic evidence and live testimony from officers and witnesses may need to be presented. The State

is further prejudiced from the delay since evidence might have been destroyed and witness' memories may suffer, should the State even be able to locate them. Accordingly, Petitioner must overcome the rebuttable presumption of prejudice to the State and because he failed to provide any arguments to overcome this presumption, this Court should deny habeas relief.

V. THERE IS NO CUMULATIVE ERROR

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

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

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Id., 101 Nev. at 3, 692 P.2d at

1289.

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

VI. PETITIONER IS NOT ENTITLED TO POST-CONVICTION COUNSEL

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

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

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

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CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's Petition for Writ of Habeas Corpus and Grant the State's Motion to Dismiss Pursuant to Laches.

DATED this 17th day of December, 2019.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 17th day of DECEMBER, 2019, to:

MARK ZANA, BAC#1013790
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

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

hjc/SVU

Case No. A-19-804193-W
Dept. No. XVII

FILED
DEC 19 2019
CLERK OF COURT

In the 8th Judicial District Court of the State of Nevada
in and for the County of Clark

Mark Zora,
petitioner,
-vs-
Warden Baker,
respondent.

Motion for Briefing Schedule

Petitioner respectfully requests he be given the opportunity to file a reply to the State's response, in accordance with the 8th Judicial Court Rule 3.20 (c), and before the Court makes any ruling(s) in petitioner's case.

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A-19-804193-W
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Motion
4883341

Certificate of Service by Mail

I, Mark Zora, hereby certify, pursuant to N.R.C.P. 5(b), that on this 16th day of December of the year 2019, I Mailed a true and correct copy of the foregoing Motion for Briefing Schedule addressed to:

8th Judicial District Court
200 S. 3rd Street
Las Vegas, NV 89155

Clark County District Attorney
200 Lewis Ave. P.O. Box 552212
Las Vegas, NV 89155-2212

Mark Zora Mark Zora 1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Mark Zana 1013790
LCC
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center

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8th Judicial District Court
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Las Vegas, NV 89155

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
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Mark Zana, Plaintiff(s) vs. Warden Baker, Defendant(s)	Case No.: A-19-804193-W Department 17

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Briefing Schedule in the above-entitled matter is set for hearing as follows:

Date: January 21, 2020

Time: 8:30 AM

Location: RJC Courtroom 11A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

Case No. A-19-804193-W
Dept. No. XVII

FILED
DEC 20 2019
CLERK OF COURT

January 21, 2020
8:30 AM

In the 8th Judicial District Court of the State of Nevada
in and for the County of Clark

Mark Zana,
petitioner,
-vs-
Warden Baker,
respondent.

Motion for Briefing Schedule

Petitioner respectfully requests he be given the opportunity to file a reply to the State's response, in accordance with the 8th Judicial Court Rule 3.20(c), and before the Court makes any ruling(s) in petitioner's case.

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DEC 20 2019
CLERK OF THE COURT

Certificat of Service by Mail

I, Mark Zana, hereby certify, pursuant to N.R.C.P. 5(b), that on this 16th day of December of the year 2019, I mailed a true and correct copy of the foregoing Motion for Briefing Schedule addressed to:

8th Judicial District Court
200 S. 3rd Street
Las Vegas, NV 89155

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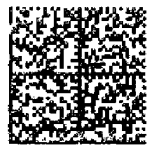
Lovelock Correctional Center



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Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

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FILED
JAN 06 2020
CLERK OF COURT

Case No. A-19-804193-W
05 CR 18103

Dept. No. XVII

9th Judicial District Court
Clark County, Nevada

Mark Zana,
Petitioner,

-vs-

State of Nevada,
Respondent

Motion for Sanctions Against the State for Misrepresenting the Facts to the Court

This motion asks for sanctions against the State for intentionally misrepresenting the facts to the Court. In the following motion, petitioner has documented 18 instances where the State, in its response, has been deliberately disingenuous with the clear intention of misleading this Court. These false statements from the State demonstrate continued instances of prosecutorial misconduct and an ongoing campaign to deny petitioner his due process rights.

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A-19-804193-W
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1. "Petitioner's grounds 2, 3, and 7 are waived because they are not alleging ineffective assistance of counsel." (State's Response page 5, lines 23-24) Page 5A question 18, lines 17-25 of the petition states that these grounds were not raised in any other court due to ineffective assistance of counsel. Petitioner also referred to these three grounds in ground 5, issue I and ground 6, issues II, III, and IV which are claims of ineffective assistance of counsel.

2. "... because of a 2016 Nevada Supreme Court decision, he still cannot establish what impediment external to him necessitated him waiting three years after that decision to raise the claims." (Response page 8, lines 18-19) Petitioner included a sworn affidavit with his petition as well as citing Koerschner v. Warden, 508 F. Supp. 2d 849; 2007 U.S. Dist. Lexis 65237. Both of which clearly detail the impediments external to petitioner that prevented him from raising these claims earlier.

3. "... because the Nevada Supreme Court in Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (2016) altered how many counts a defendant could be charged with for possession of visual presentation ..." (Response page 9, lines 10-12) The Nevada Supreme Court did not alter the number of counts a defendant could be charged with in Castaneda. The Court merely clarified what NRS 200.730 intended from its creation. Neither the wording nor the intent of NRS 200.730 have been altered since it was enacted in 1983. The Nevada Supreme Court stated "The State's explication on NRS 200.730's text is flawed." (Castaneda v State, 132 Nev. 434, 373 P.3d 108 (2016))

[4.] "Petitioner has failed to make any claim that this case should be applied retroactively." (Response page 10, lines 10-11) Petitioner's arguments in grounds 1, 2, and 3 of the petition and the citing of Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) prove this claim by the State to be clearly false.

[5.] "Petitioner does not provide specific facts that the State could not prove individual instances of possession of each image." (Response page 10, lines 26-27) This is proven false on page 4, lines 20-27 of the Memorandum of Law whereby petitioner provided specific facts that, like in Castaneda, the State prosecuted the images as a group and found the images at one time and place.

[6.] "Therefore, it stands to reason that the photos were taken at different times, thereby possessed at different instances." (Response page 11, lines 3-4) Here the State intentionally misleads the Court to believe petitioner took the photos, which he did not. Petitioner was charged with possession not production. The State conducted only one search and seizure of images at one time and place. Thus proving one instance of possession exactly like in Castaneda.

[7.] "Petitioner's claim that the court misinterpreted the evidence is meritless." (Response page 11, line 16) On that same page, lines 21-27, the State quotes the Nevada Supreme Court where they refer to juror Thurmon's search as singular and fruitless no less than 5 times. Pages 11-13 of the Memorandum of Law quotes every juror confirming that juror Thurmon's research was numerous and successful.

Thus proving the Nevada Supreme Court misinterpreted the evidence and the State's assertion patently false.

[8.] "Petitioner's claim that the jurors were able to compare the ages of females online is belied by the record." (Response page 12, lines 3-4) This statement is false in two ways. the record shows that petitioner never claimed "jurors" compared females online, only one juror. Pages 11-13 of the Memorandum of Law substantiates that juror Thomas visited numerous websites and compared numerous females to the images at trial.

[9.] "Petitioner was charged at tried for those crimes, it was appropriate for a defendant to be charged with one count per image found." (Response page 14, lines 27-28) The decision in Castaneda proves this statement to be false. The Nevada Supreme Court stated "The State's explication on NRS 200.730's text is flawed." Castaneda v. State (2016)

[10.] "... Petitioner does not identify which witnesses counsel could have called or what those witnesses would have testified to." (Response page 15, lines 9-11) Petitioner did identify which witnesses were not called and what they would testify to on page 16, lines 17-21 of the Memorandum.

[11.] "Petitioner does not explain what specific witnesses trial counsel should have called or how that would have reasonably changed the outcome at trial." (Response page 16, lines 12-13) Page 17, lines 24-27 and page 18, lines 1-16 of the Memorandum specifically name the witnesses trial

counsel failed to call and why they were needed to testify.

[12.] "Petitioner does not explain what information on that computer would have impacted the victim's truthfulness or how it would have changed the outcome at trial." (Response page 16, lines 17-18) Page 18, lines 25-27 of the Memorandum explains what information was on the computer and how it would have been used.

[13.] "... he does not explain how exactly appellate counsel represented the facts or how the court misinterpreted them." (Response page 17, lines 17-18) This is belied by ground 4 of the Memorandum whereby petitioner clearly and thoroughly explains how the State and petitioner's counsel presented a single, failed internet search for the court to consider. The Memorandum (pages 11-13) quotes from the record that numerous successful internet searches were conducted thus proving the state's assertion false.

[14.] "Petitioner provides no dates of when this request was ignored and does claim that defense never obtained a copy of the search warrant." (Response page 19, lines 13-14) This is easily proven false on page 22, lines 9-11 of the Memorandum where petitioner specifically lists May 11, 2006.

[15.] "Petitioner does not state what that evidence was..." (Response page 19, line 19) Yet another patently false statement as petitioner stated what evidence was taken, the date the seizure was ordered by the court, and how that evidence would be used at trial

on page 23, lines 5-12 in the Memorandum of Law.

16. "Petitioner does not explain what the State represented to the Nevada Supreme Court." (Response page 20, lines 21-22) Petitioner quoted the State on page 11, lines 10-12 of the Memorandum "...had the juror been successful in accessing the internet website, this case would be vastly different." This is a clear misrepresentation of the facts as the record substantiates that the juror was successful in accessing numerous internet websites as was cited by petitioner on pages 11-13 of the Memorandum of Law.

17. "The issue of Petitioner's guilt is not close." (Response page 23, line 3) Petitioner was convicted of less than half of the charges brought against him. While 6 of his convictions were redundant possession counts it is clear the jury misconduct affected the jury verdict.

18. "Petitioner's claims are not complex ---" (Response page 23, line 21) The Nevada Supreme Court stated Petitioner's issue were complex (page 11 of petition) and the State argued for 23 pages and made over 85 case law citations, thus proving the complexity of petitioner's issues.

Conclusion

Petitioner has substantiated all his claims with the record while the State made patently false statements belied by the record and thus deserve to be sanctioned.

Certificate of Service

I hereby certify that service of the above and foregoing was made this 31st day of ~~January~~ December, ~~2020~~ 2019, to:

Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

8th Judicial District Court
Clark County
200 S. 3rd Street
Las Vegas, NV 89155

Mark Zana

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

Case No. A-19-804193-W
Dept. No. ~~XVII~~

FILED
JAN 06 2020
CLERK OF COURT

In the 8th Judicial District Court of the State of Nevada
in and for the County of Clark

Mark Zang,
Petitioner
-vs-
Warden Baker,
Respondent

Petitioner's reply to State's response.

Petitioner has made a colorable showing of factual innocence. Has identified and substantiated numerous constitutional violations. Has shown good cause and prejudice. Has detailed the impediments external to him which prevented these claims from being presented earlier. Petitioner asserts that failure to consider this petition on its merits would constitute a fundamental miscarriage of justice.

Response I.

Good cause and prejudice exist because the Castaneda decision applies to petitioner's case. "...due process requires availability

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of habeas relief when a state's highest court interprets for the first time and clarifies the provisions of a state criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's conviction became final." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003).

Response B.

"Successive petitions will only be decided on the merits if the defendant can show good cause and prejudice for failing to raise the new grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

Petitioner has shown good cause and prejudice through the Castaneda decision which was unavailable to petitioner at the time of his first petition. Petitioner has also shown good cause and prejudice in ground 6, issue VI of his petition whereby petitioner's appellate counsel filed his first petition with naked allegations in an effort to conceal his ineffective assistance of counsel.

Response C.

Grounds 2 and 3 and 7 were not raised on direct appeal for reasons beyond the control of petitioner. First, the Castaneda decision had not been made and second, these grounds substantiate petitioner's claim of ineffective assistance of counsel as neither petitioner's trial nor appellate counsel raised these claims.

The State asserts that these grounds are waived because they are not alleging ineffective assistance of counsel. Question #18 (page 5A) of the petition specifically and clearly

addressed grounds 2, 3, and 7 as being raised here due to ineffective assistance of counsel. Petitioner specifically raised these three grounds in ground 5, issue I and ground 6, issues II, III, and IV. Grounds 2, 3, and 7 reveal the specific details of these claims as well as the good cause and prejudice.

Response D.

The State's assertion that ground 4 is barred is belied by their own citation. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969.) The facts provided by petitioner in ground 4 are not substantially the same, but substantially different. They are not a more detailed and precisely focused argument. Failure by petitioner's counsel to present the facts detailed in ground 4 substantiate petitioner's claim of ineffective assistance of counsel and they show good cause and prejudice. If the facts presented in ground 4 had been represented upon appeal, petitioner would have received a new trial as those facts prove each and every element of a jury misconduct claim. Petitioner included ground 4 in ground 6, issue III.

The State's assertion that petitioner is "simply continuing to file motions with the same arguments" (Response page 16, lines 11-13) is belied by the record. The facts presented in ground 4 have never been presented

by petitioner in any State action or filing.

The State's quoting of the Nevada Supreme Court's ruling in the Response (page 6, lines 27-28) further proves that the Court was unaware of the facts petitioner presented ground and thus substantiates petitioner's claims of jury misconduct and ineffective assistance of counsel. The Nevada Supreme Court was misled to believe that the juror conducted one failed internet search for one web-site. Ground 4 quotes from court transcripts extensively and proves that juror Thurmen conducted numerous, specific, and successful internet searches whereby he compared girls from those sites to the images at trial. He then used that information to help him decide a material issue of the case at trial. He shared his findings with the entire jury where it was argued over, caused the jury to reexamine trial evidence, and ultimately led one juror to report this misconduct to the Court several weeks after trial. This is a clear violation of the Confrontation clause. Petitioner does not dispute the ~~Respondent~~ Nevada Supreme Court's interpretation of the facts presented to them upon appeal. Petitioner asserts and has substantiated that the Court was never presented with the most crucial facts to that claim due entirely to ineffective assistance of counsel.

Response E.

The State's assertion that procedural bars are mandatory and that petitioner has not shown good cause to overcome those bars is belied by relevant case law and a substantial showing of

good cause and prejudice by petitioner. None of petitioner's grounds are naked allegations.

Response II.

"A habeas petitioner may overcome the procedural bars and secure review of the merits of defaulted claims by showing that the failure to consider a petition on its merits would amount to a fundamental miscarriage of justice. This standard is met when the petitioner makes a colorable showing he is actually innocent of the crime." Berry v. Nevada, 363 P.3d 1148; 2015 Nev. LEXIS 117; Nev. Adv. Rep. 96 No. 66474.

Petitioner has done precisely this and thus overcomes all procedural bars.

"Even when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or successive petition, habeas relief may [illegible] still be granted if the petitioner can demonstrate that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Mitchell v. Nevada, 122 Nev. 1269; 149 P.3d 33; 2006 Nev. LEXIS 132; 122 Nev. Adv. Rep. 107 No. 45341.

Petitioner has provided a substantial showing of good cause and prejudice. He has also made a colorable showing he is actually innocent due to numerous Constitutional Violations. Petitioner has also substantiated that numerous impediments external to him prevented his compliance with procedural rules. Specifically, the ruling by the Nevada Supreme Court in Castaneda and the ineffective assistance of counsel petitioner received. The State's assertion that petitioner established

no impediment which necessitated waiting three years to raise claims related to Castaneda is belied by the sworn affidavit petitioner included in petition as well as Koerschner v. Warden, 508 F. Supp. 2d 849; 2007 U.S. Dist. Lexis 65237, which petitioner cited in his petition. That case details the inadequate access to legal assistance and the courts petitioner is subjected to at Lovelock Correctional Center. Unlike the State, petitioner has no access to the internet or to anyone trained in the legal profession. Page 5B of the petition clearly and thoroughly explains the delay in filing and details each impediment external to petitioner.

Response III.

The State's assertion that petitioner has shown no prejudice is belied by the petition. Petitioner has established significant prejudice. None of petitioner's grounds are naked or belied by the record. All grounds presented are supported by NRS, caselaw, quotations directly from the record. The State has failed to show any instance where any of petitioner's grounds are belied by the record. The record substantiates petitioner's grounds.

Response F.

The State asserts that grounds 1, 2, and 3 fail because the Castaneda decision is inapplicable to petitioner's case. This is a naked allegation, by the State, with no case law or statutory law to support it.

"Due process requires availability of habeas relief when a State's highest court interprets for the first time and clarifies

the provisions of a State criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's conviction became final." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003).

This is precisely what the Nevada Supreme Court did in the Castaneda decision. They interpreted and clarified NRS 200.730 for the first time and so it applies to petitioner's case.

Petitioner clearly proved factual innocence whereby the record substantiates that, at no time, did the State provide any proof as to the ages of the people in the images. Without proof of age the images were simply pornographic, which is not a crime. Had the State provided any proof as to the ages of the people in the images, jurors would not have conducted internet research, compared girls from the mall or girls at church to the images. All of which was done by at least three jurors in an attempt to help them determine the ages of the girls in the images presented at trial. Why did they do all of this? Because the State failed to provide any proof as to the ages of the people in the images. Even the State admitted "... the only issue the jury appears to have had was how old the females were in the images." (Response page 10, lines 2-3) Age was the most crucial element of that charge and it's clear the State failed to prove the ages of the girls in the images. Otherwise the jurors would not have been compelled to do outside research to help them decide.

Petitioner asserts factual innocence since no juror would

have convicted him of the single count of possession. The jury convicted petitioner of 6 out of 12 possession counts. If correctly charged with one count, as NRS 200.730 intended, the jury would have had to come to a unanimous decision that all 12 images were of underage people in order to convict petitioner of the single count. The jury did not convict petitioner of all 12 possession counts, hence they would not have convicted petitioner of the single count. That along with the State providing no proof as to the ages of the people in the images shows that no reasonable juror would have convicted petitioner of the single count of possession petitioner should have been charged with.

The State's assertion that the Castaneda decision does not apply to grounds 2 and 3 is baseless. NRS 200.730 has not changed its intent since before the time of petitioner's conviction up until the Castaneda decision. The Nevada Supreme Court had to clarify NRS 200.730 because the State was violating defendants' rights by illegally charging and sentencing them to multiple counts for a single crime. Because the Court clarified NRS 200.730 for the first time in Castaneda, it clearly applies to petitioner's case as is supported by the Clem decision cited earlier. Castaneda is not a new rule as the State incorrectly asserts. That decision did not change how many charges of possession could be filed against a defendant. It clarified it to stop the State from abusing NRS 200.730 and illegally charging defendants. NRS 200.730

always intended for one charge of possession for images found at one time and place.

Petitioner provided specific facts that the State found all 12 images at one time and place despite the State's disingenuous claim to the Contrary. There was only one search warrant issued for petitioner's house, only one search conducted in one room of the house, and only one seizure made of petitioner's computers exactly like in the Castaneda case. This is clearly outlined on page 4 of petitioners Memorandum of law, lines 20-22. Furthermore, the State prosecuted the images as a group and did not attempt to show individual distinct crimes of possession exactly like in Castaneda.

Response 6.

Here the State attempts to infer what the Nevada Supreme Court was thinking when it repeatedly referred to juror Thurmon's search as fruitless and singular. The record substantiates that juror Thurmon conducted numerous successful searches of the internet. (Memorandum of law pages 11-13) Furthermore, juror Thurmon testified that he was one of two jurors strongly in favor of not guilty. (Memorandum page 11) But after being barked at and scolded by fellow jurors, they changed their vote to guilty. Lastly, petitioner never claimed "jurors" were able to compare the ages of the people in the images to other people online as the state incorrectly asserts. (Response page 12, lines 3-4) Petitioner substantiated through court

transcripts that only juror Thurmon accessed numerous pornographic websites and that he alone compared people from those sites to the people in the images in trial. (Memorandum pages 11-13) Juror Thurmon then shared his findings with the entire jury. Every juror testified to these facts under oath.

Response H.

The State's assertion that all of petitioner's grounds for ineffective assistance of counsel are bare and naked is belied by the record. The State also falsely claims that charging petitioner with one count per image was "appropriate". In Castaneda the Nevada Supreme Court stated "The State's explication on NRS 200.730's text IS flawed." The State took it upon itself to make their own interpretation of NRS 200.730 and it did so incorrectly. Thus, at the time petitioner was charged under NRS 200.730 it was not appropriate or legal to charge petitioner with 12 counts. The Castaneda decision confirms this fact and thus proves petitioner's trial and appellate counsels to be ineffective for failing to make a unit of prosecution challenge or a double jeopardy claim as Castaneda's counsel did.

Enacted in 1983, NRS 200.730 has since been amended several times. But each amendment only increased the penalties for possession. Just because the State had chosen to make an assumption as to the unit of prosecution NRS 200.730 allowed does not make it

"appropriate" as they claim in their response. It makes it reckless and ultimately illegal according to the Nevada Supreme Court. Petitioner's argument on this issue in his petition has been thorough, on point, supported by law, and anything but bare and naked as the State falsely claims.

Petitioner's claim that counsel failed to obtain a psychological evaluation of the complaining witnesses is substantiated by Warner v. Nevada, 102 Nev. 635; 729 P.2d 1359; 1986 Nev. LEXIS 1605 No. 17380. Petitioner explained that the evaluations would be used to assess the witnesses' truthfulness as most of them had ulterior motives and/or changing stories. Petitioner's case is very similar to Warner in that there was no physical evidence or witnesses to any of the alleged incidents. In Warner the Nevada Supreme Court agreed that the truthfulness of an accuser in a case like these was a "crucial concern". The Court granted Warner's petition. Petitioner's quotation and citing of Warner substantiate that his claim is not bare and naked as the State falsely alleges.

The State again asserts petitioner's claim his counsel failed to call witnesses is bare and naked. This is belied by the petition. The State also falsely claims petitioner did not identify which witnesses counsel should have called. The list of witnesses that were neither interviewed nor called to testify were named on page 16, lines 17-21 in the Memorandum. Petitioner clearly identified the

witnesses and reasons for their testimony.

Petitioner does not have a copy of the entire record and thus could not quote the exact hearsay statements referenced in his petition. This is why petitioner requires the appointment of counsel to assist him in obtaining the necessary discovery.

The State asserts that no information in the cell phone warrant was explained to be beneficial to petitioner. The State refused to provide said warrant to petitioner. Petitioner can only infer that the State intentionally violated petitioner's Constitutional right to a copy of the warrant because either it doesn't exist (another Constitutional violation) or there are more material falsehoods included in it like were in the house warrant. All of which would have aided petitioner in his challenge of the house warrant. The State could have very simply included a copy of the cell phone warrant in his response to substantiate it has no beneficial information in it for petitioner. But they didn't. What is the State hiding? Here again petitioner shows why he requires the appointment of counsel to aid him in obtaining the necessary discovery.

In all cases brought to trial, the police investigators are called to testify. Not one of investigators who interviewed witnesses were called to testify in petitioner's case. Petitioner identified the unit and lead detective [redacted] (Rod Peña; Memorandum page 17, lines 25-26) in the investigation and quoted transcripts from a pre-trial

Motion which detailed the reasons why they should have been called to testify. (Memorandum page 18, lines 1-15) This is another instance why petitioner requires the appointment of counsel in order to obtain the necessary discovery which has the specific names of the investigators the State wishes petitioner to identify.

The State's Seventh assertion that petitioner failed to explain what information on his computer would have impacted the accusors' truthfulness is baseless and disingenuous. Page 18, lines 25-27 of petitioner's memorandum clearly explain what information petitioner wished to use and the reason why.

Petitioner has shown that all of the State's assertions regarding petitioner's ineffective assistance of counsel before, during, and after trial are not only belied by the record and petition but are also disingenuous. Petitioner has substantiated all grounds with the record, statutory law, and case law.

Response I.

Here again the State falsely asserts that petitioner was legally charged with 12 counts of possession despite the clear decision in Castaneda. Furthermore, petitioner extensively quoted transcripts of juror testimony along with the Nevada Supreme Court ruling showing exactly what petitioner's counsel failed to present resulting in that Court to erroneously base ~~their~~ ruling on ~~incorrect~~ and incomplete facts. (Memorandum pages 8-15) Petitioner's claim

of prosecutorial misconduct in not bare and naked as the State falsely asserts. Petitioner has provided specific allegations supported by case law and the record. (Memorandum pages 21-25)

Response J.

In regards to ground 7, the State makes a false claim that "petitioner provides no dates of when this request was ignored..." (Response page 19, lines 13-14) The State is again being disingenuous as petitioner specifically quoted May 11, 2006 on page 22, lines 9-11 of his Memorandum.

The State is again being disingenuous when they state "Petitioner does not state what that evidence was..." (Response page 19, line 19). Page 23, lines 5-12 of the Memorandum details what the Court took from petitioner and the date the Court ordered the seizure. As to why the State made the request and why the Court agreed to the request is obvious. Those personal files and notes would have aided petitioner in preparing for trial and rebutting the State's accusors. That information was taken from petitioner in order to hinder the defense's ability to impeach the credibility of the accusors.

The pictures improperly introduced at trial were objected to by trial counsel, otherwise petitioner would have it in ground 5. Petitioner did state they were from an unrelated event 10 years prior to trial. (Memorandum page 23, lines 13-15) The fact that the State violated

petitioner's rights by failing to disclose these pictures with the other evidence to be used at trial, as is required by law, substantiated petitioner's claim of prosecutorial misconduct. Petitioner cited Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000) in his petition to support this claim.

How does one prove they haven't received something? That's the state argument for the missing cell phone warrant. The State should be able to prove they provided a copy of it. The State could have included a copy of it in their response, but again they have failed to prove that the warrant even exists.

The State knows the rule requiring them to provide the defense with a copy of any expert testimony to be used at trial 21 days prior to trial. This is why the State never argued that they weren't required to provide said report when trial counsel objected to the Court about their failure to do so. The fact the State never asked their expert to prepare a report shows their premeditation to deny petitioner his due process rights and right to a fair trial.

Petitioner has substantiated numerous times that the Castaneda decision applies to petitioner's case. (Memorandum pages 1-4)

On this issue of the State misrepresenting the facts of the jury misconduct issue, petitioner referred the Court to ground 4 where it was thoroughly substantiated. Petitioner quoted the State

as admitting "...had the juror been successful in accessing the internet website, this case would be vastly different." (Memorandum page 11, lines 10-12) This is a clear MIS-representation of the facts as pages 11-13 of the Memorandum quotes every juror testifying that juror Thurmon was successful in accessing several pornography websites.

Response IV.

The State's laches argument is bare, naked, and meritless. The State's argument is full of "mights" and "mays": "witnesses may need to be presented" (page 21, line 28), "evidence might have been destroyed" (page 22, line 1), "memories may suffer" (page 22, line 2). The State is dealing in pure speculation with no evidence of any prejudice to them.

Petitioner has made a colorable showing of actual innocence. Has identified and substantiated with the record numerous constitutional violations. Has shown good cause and prejudice. Has detailed the impediments external to him which prevented these claims from being presented earlier. Petitioner contends that failure to consider this petition on its merits would constitute a fundamental miscarriage of justice. In Berry, that petitioner submitted his 3rd petition 21 years after his conviction. His petition was ultimately granted.

The State's assertion that they will be prejudiced is meritless. The State's misconduct and abuse of NRS 200.730 are some of the reasons this petition exists.

The State's claims that evidence might have been destroyed, witness' memories may suffer, or they may not be able to be located are meritless. The accusors in this case are in their 20's currently, so memory loss is of no cocern. With the advent of social media (FaceBook, Twitter, Snapchat, etc...) and the ages of the accusors make it a near certainty that they can be found.

Response V.

The State asserts that a finding of cumulative error requires an extensive aggregation of errors. Petitioner contends he has substantiated such an aggregation of errors resulting in his due process rights and right to a fair trial being violated. Petitioner meets the relevant factors to constitute cumulative error. In petitioner's case the issue of innocence and guilt was close as he was convicted of less than half of the charges brought against him. Six of which were possession charges that should not exist according to NRS 200.730. The quantity and character are substantial as petitioner is facing multiple life sentences.

Response VI.

As the Nevada Supreme Court has determined when they previously ordered counsel to be appointed to petitioner, the issues in this petition are complex. The State's 23 page response included more than eighty-five (85)

case law citations. That is surely the sign of a complex set of grounds and issues. Discovery is indeed needed in this case. Petitioner's argument for the appointment of counsel is substantiated by the Nevada Supreme Court's previous order for the appointment of counsel and the Koerschner case cited in the petition.

Conclusion

Petitioner has met and substantiated all criteria necessary for granting of his petition. All claims made by the State for dismissal have been thoroughly rebutted by petitioner.

Certificate of Service

I hereby certify that service of the above and foregoing was made this 31st day of December, 2019 to:

Clark County District Attorney
200 Lewis Avenue P.O. Box 552212
Las Vegas, Nevada 89155-2212

8th Judicial District Court
Clark County
200 S. 3rd Street
Las Vegas, NV 89155

By Mark Zana
Mark Zana 1013790
Lovelock Correctional Ctr.
1200 Prison Road
Lovelock, NV 89419

Mark Zana #1013790
LCC
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Mark Zana, Plaintiff(s) vs. Warden Baker, Defendant(s)	Case No.: A-19-804193-W Department 17

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Sanctions Against the State for Misrepresenting the Facts to the Court in the above-entitled matter is set for hearing as follows:

Date: February 11, 2020

Time: 8:30 AM

Location: RJC Courtroom 11A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

RSPN
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**

STATE'S RESPONSE TO PETITIONER'S MOTION FOR SANCTIONS AGAINST THE STATE FOR MISREPRESENTING THE FACTS TO THE COURT

DATE OF HEARING: **FEBRUARY 11, 2020**
TIME OF HEARING: **8:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN NIMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Motion for Sanctions Against the State for Misrepresenting the Facts to the Court.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

On December 20, 2007, Petitioner was sentenced as follows: Count 1 – 12 months in Clark County Detention Center; Count 2 – 10 years to Life, to run concurrent with Count 1; Count 6 – 10 years to Life, to run consecutive to Count 2; Count 7 – 10 years to Life, to run concurrent with Count 6; Count 11 – 12 to 36 months, to run consecutive to Count 6; Count 13 – 12 to 36 months, to run consecutive to Count 11; Count 14 – 12 to 36 months in NDC, to run concurrent with Count 13; Count 15 – 12 to 36 months, to run concurrent with Count 14; Count 16 – 12 to 36 months, to run concurrent with Count 15; and Count 17 – 12 to 36 months, to run concurrent with Count 16; with 107 days credit for time served. The court further sentenced Petitioner to lifetime supervision and ordered him to register as a sex offender within 48 hours of release from custody. The Judgment of Conviction was filed on January 2, 2008.

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

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

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

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

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

On February 7, 2011, Petitioner filed a Supplemental Petition. The State filed a Response on April 8, 2011. On July 21, 2011, the district court denied Petitioner's Petition for Writ of Habeas Corpus. Petitioner appealed, and the Nevada Supreme Court affirmed the court's denial on May 9, 2012. Remittitur issued on June 11, 2012.

Petitioner filed a second Petition for Writ of Habeas Corpus on October 22, 2019. The State filed its response on December 17, 2019. On January 2, the court took the matter under advisement. On January 6, 2020, Petitioner filed a reply. The court denied the Petition on January 17, 2020.

On January 6, 2020, Petitioner filed the instant Motion for Sanctions Against the State for Misrepresenting the facts to the court. The State's response follows.

ARGUMENT

Petitioner claims the State was "deliberately disingenuous" 18 times in its December 17, 2019 Response to his Petition for Writ of Habeas Corpus. Petitioner does so without citing any applicable law or statute. All of Petitioner's claims are meritless.

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As an initial matter, all of Petitioner's claims are moot as the court has already denied his Petition for Writ of Habeas Corpus. Generally, courts do not consider issues that are moot. Martinez-Hernandez v. State, 132 Nev. 623, 380 P.3d 861 (2016). A real controversy becomes moot if the case "seeks to determine an abstract question which does not rest upon exiting facts or rights." Id. at 625, 380 P.3d at 863. This Court denied Petitioner's Petition for Writ of Habeas Corpus on January 17, 2020.

The Nevada Rules of Professional Conduct states that: "(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." NRPC 3.3. In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments prejudiced a defendant. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. "Statements by a prosecutor, in argument... made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (*quoting* Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19, 945 P.2d 438, 444–45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

I. THE ARGUMENTS MADE IN THE STATE'S RESPONSE WERE PROPER

First, Petitioner claims he did notice Grounds 2, 3, and 7 as ineffective assistance of counsel claims and that the state erred in arguing they were waived. Motion at 2. Petitioner's claim is belied by the record. In his Memorandum of Law ("Memorandum"), Petitioner listed Ground Two as "Unit of Prosecution Challenge;" Ground Three as "Double Jeopardy;" and Ground Seven as "Prosecutorial Misconduct." Memorandum at 3, 5, & 21. Even if he had listed them as ineffective assistance of counsel claims, his argument still fails because none of those grounds apply substantively to ineffective assistance of counsel. Substantive claims—even those disguised as ineffective assistance of counsel claims—are beyond the scope of habeas and waived. NRS 34.724(2)(a). Disagreement with how the State interprets his

arguments does not amount to the State engaging in misconduct.

Second, Petitioner claims he established good cause for waiting near a decade to file this petition in an affidavit included in his Petition. Motion at 2. None of the claims raised in that affidavit constitute an impediment external to him. Good cause exists if a defendant can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 507 (2003). Once the factual or legal basis becomes known to a defendant, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001). Petitioner claimed he had good cause because (1) he could not raise this claim until after 2016 because that is when the Nevada Supreme Court decided Castaneda v. State, 132 Nev. 434, 373 P.3d 108 (2016); (2) he has no training in the legal profession and lack access to research; (3) Nevada Supreme Court misinterpreted the facts of his case; and (4) his post-conviction counsel created a conflict of interest when he filed a Petition for Writ of Habeas Corpus in an attempt to cover his own ineffectiveness. Petition at 5B. Taking each in turn: (1) his first basis is not good cause because Castaneda is not retroactive and Petitioner did not provide a valid reason for waiting three years after that decision to file a Petition for Writ of Habeas Corpus; (2) Petitioner's lack of training or access to research is not an impediment external to him; (3) the Nevada Supreme Court's alleged misunderstanding of the facts is not a factual or legal basis and is not information he only recently discovered as the Court affirmed his conviction a decade ago; and (4) appellate counsel's alleged ineffectiveness was known to him well before 2019. Therefore, Petitioner failed to establish good cause.

Third, Petitioner claims the State's explanation of Castaneda v. State was incorrect. Motion at 2. Petitioner does not accuse the State of misrepresenting an essential fact at issue. This claim is a mere disagreement with the State's analysis of an inapplicable Nevada Supreme Court decision. The simple fact that Petitioner disagreed with the State's analysis of case law does not mean the State misled the court. There is no misconduct here.

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Fourth, Petitioner claims he did argue why Castanda should retroactively apply to his case in Grounds 1, 2, and 3 of his Memo. Motion at 3. In Grounds 1, 2, and 3, Petitioner analogized the facts of Castaneda to his own, claiming that because they are similar, he is innocent, was excessively charged, and his double jeopardy rights were violated. Memorandum at 1-7. He provides no law or argument for why Castaneda, a case decided over a decade after he was charged, retroactively applies to his case.

Fifth, Petitioner claims he did provide specific facts that the State could not prove individual instances of possession of the child pornography images. Motion at 3. The referenced portion of the Memorandum only claims the State proved only one specific instance of possession without specific facts provided, and a block quote of Castaneda, 132 Nev. 434, 373 P.3d 108. Memorandum at 4. Nowhere in the referenced material does he offer specific facts establishing he did not possess each image individually.

Sixth, Petitioner claims the State intentionally led the court to believe he took the pictures of child pornography. Motion at 3. The State never accused Petitioner of taking the pictures at issue. The State instead argued that because there were multiple victims, the pictures were likely taken at different times. State's Response at 11. As explained in the State's Response, the pictures were saved on separate computers and there were multiple victims in the photos—perhaps as many as ten—as opposed to just one person. Jury Trial – Day 5, 11-20 & 241-55.

Seventh, Petitioner claims the State misled the court in arguing that the Nevada Supreme Court did not misinterpret the evidence when it directly quoted the Court's Order of Affirmance. Motion at 3. Again, Petitioner is disagreeing with the State's and Supreme Court's argument, not a specific fact at issue. The State does not engage in misconduct when it rebuts Petitioner's claim. Further, the State cannot be held to error for directly quoting the Nevada Supreme Court decision.

Eighth, Petitioner claims he did state that only one juror, specifically Juror Thurman, compared the ages of the victims with pictures of females online and that the State erred in claiming "jurors" compared the images of the victims to images of females online. Motion at

4. In Petitioner's Memo, he argued that Juror Thurman shared his findings with the other jurors, meaning multiple jurors were influenced by his comparisons. Memorandum at 11:4-9. Moreover, if Petitioner's claim in this Motion is true, he cannot show error as Juror Thurman apparently did not share his results with his fellow jurors.

Petitioner's ninth claim is that the State improperly argued that he was appropriately charged for one count per image found. Motion at 4. Again, this is a disagreement with the State's argument and not an allegation that the State misrepresented any facts. The State does not commit misconduct when it disagrees with Petitioner's claims. Moreover, as explained above, Castanda is not retroactive and does not apply and Petitioner was properly charged with 11 counts of Possession of Visual Presentation Depicting Sexual Conduct of a Person Under the Age of Sixteen a decade prior to the Castanda decision.

Petitioner's 10th claim is that Petitioner did identify which witnesses he would have called and what they would have said Memorandum at page 16, lines 17-21. Motion at 4. The referenced portion states: "Counsel failed to present any witnesses in support of Petitioner's character and failed to interview or call to testify, Petitioner's principal, fellow co-workers, teachers, of the Henderson Police Department's D.A.R.E officers who all worked with Petitioner and his students each year." Memorandum, at 16:17-21. Petitioner did not identify a single person or explain how their testimony would have reasonably changed the outcome at trial.

Petitioner's 11th claim is that he did explain what specific witnesses trial counsel should have called or how that would have reasonably changed the outcome at trial in his Memorandum at page 17, lines 27-27, and page 18, lines 1-16. Motion at 4. The only person named in the referenced section is Detective Rod Pena. Memorandum at 17:26. While Petitioner names that individual, he does not explain what he would have testified to or how that testimony would have changed the outcome at trial. While Petitioner claims the witness was needed to highlight improper witness coaching on behalf of the detectives, Petitioner does not allege that Detective Pena would have testified as much and he did not allege that that testimony would have reasonably changed the outcome at trial.

Petitioner's 12th claim is that he did "explain what information on that computer would have impacted the victim's truthfulness or how it would have changed the outcome at trial" on page 18, line 27-27 of his Memorandum. Motion at 5. While the referenced portion of the Memorandum states that the computer contained school videos of the witnesses which would have called into question their truthfulness; it does not explain the specific conduct of those videos or how that would have impacted their credibility. Memorandum at 18:26-27. Further, it very well might have been in his best interest for trial counsel to make the reasonable strategic choice not to introduce into evidence the fact that Petitioner had videos of the saved on his computer.

Petitioner's 13th claim is that he did explain how appellate counsel misrepresented the facts, and how the court misinterpreted them" in Ground 4 of his Memorandum. Motion at 5. A review of his arguments made in Ground 4 rebuts this claim. Instead, he makes bare and naked claims such as: "Petitioner's counsel and the State misrepresented the facts of this claim on direct appeal" (Memorandum at 8:8-9); "Petitioner's counsel and the State misrepresented the facts of the issue by arguing a single failed internet search by Juror Thurman" (Memorandum at 8:20-21); and "Petitioner's counsel and the State misrepresented and the Court misapprehended" (Memorandum at 10:1-3). None of these claims specifically identify what was said. Further, quoting to evidentiary hearing transcripts—which the Nevada Supreme Court reviewed in determining the merits of Petitioner's claim—without offering anything more than a conclusion that they obviously establish misinterpretation on the part of the Court, the State, and appellate counsel is insufficient to establish that all three parties did in fact incorrectly interpret the evidence.

Petitioner appears to interpret the Nevada Supreme Court's explanation of the juror's "fruitless search" as the Court concluding that the juror unsuccessfully performed only one search of one girl in an effort to determine the ages of the victims here. However, Court's characterization and reference to a "fruitless search" referenced a general search of images of girls with ages similar to the victims. Order of Affirmance at 9. This is not the same as the Court believing only a single search took place. Further, the Court's characterization of the

search as "fruitless," did not mean the Court concluded that the juror was unable to find images of girls. It simply meant he could not use those images to reach a conclusion about the ages of the girls in the images introduced at trial. Order of Affirmance at 9. As such, Petitioner misunderstands the Court's analysis.

Petitioner's 14th claim is that he did provide dates of when the State ignored his request for a copy of the cell phone search warrant on Page 22, line 13-14 of his Memorandum. Motion at 5. The cited portion is a reference to the Discovery Motion filed prior to trial and the Request to Continue the trial. Memorandum at 22:12-13.While Petitioner allegedly did not have the evidence when the motion was filed, he does not claim he did not receive said evidence before trial. As long as he received this evidence before trial, he cannot claim prejudice. Moreover, he does not claim how the outcome of trial would have changed had he received the contested evidence.

Petitioner's 15th claim is that he did specifically state what exculpatory evidence that State took from him on Page 23, lines 5-12 of his Memorandum. Motion at 5. Petitioner's Memorandum references personal notes and files taken from him via court order which allegedly contained exculpatory material. Memorandum at 23:5-12. Petitioner does not explain what was in the notes and files that was exculpatory or would have reasonably changed the outcome at trial. Moreover, the court ordered that the material at issue be taken away, as such the State cannot be held to error.

Petitioner's 16th claim is that he did explain what the State argued before the Nevada Supreme Court on appeal regarding the juror misconduct in his Memorandum at page 11, lines 11-12. Motion at 6. While that is true, the portion of the State's response Petitioner takes issue with here is the argument made in response to Ground 7, IX. Memorandum at 25:8-12. As such, what he argued in Ground 4 is irrelevant. Further, the quoted portion of the State's appeal argues that the juror's internet search was unsuccessful which, again, means he was unable to use the pictures found online to determine the ages of the victims in trial. It does not argue that the juror could not find pictures of females online. While Petitioner disagrees with that statement, disagreement with the State's interpretation of the same facts is not the same as the

State misrepresenting facts.

Petitioner's 17th claim is that the issue of his guilt was close because he was convicted of only half of the charges lodged against him. Motion at 7. Again, this is a mere disagreement with the State's argument and interpretation of the evidence. Petitioner does not reference specific facts at issue. There is no misconduct here.

Petitioner's 18th claim is that his claims were complex because the Nevada Supreme Court said his appeal was complex and the State's response to his Petition was 23 pages and included 85 case law citations. Motion at 6. The length and amount of case citations used in the State's response is not a concession that his Petition was complex because the State was addressing all eight claims raised and provided all of the legal authority Petitioner did not. As such, this is a bare and naked claim.

II. PETITIONER CANNOT ESTABLISH PREJUDICE

Regardless of the merits of Petitioner's claims, he still does not show prejudice. Petitioner's Petition for Writ of Habeas Corpus was procedurally barred. It was time-barred pursuant to NRS 34.726 because the Nevada Supreme Court affirmed that judgment on October 20, 2009. This Petition is over nine years late. The Petition was also successive pursuant to NRS 34.810 because his first was denied on July 21, 2011. Finally, laches applies because Petitioner's Judgment of Conviction was filed over a decade ago, thus creating rebuttable presumption of prejudice to the State. As such, Petitioner's Petition for Writ of Habeas Corpus was procedurally barred, and the court did not need to address the merits of his claims before dismissing it.

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CONCLUSION

Based on the foregoing, the State respectfully requests this Court DENY Petitioner's Motion for Sanctions Against the State for Misrepresenting the Facts to the Court.

DATED this 6 day of February, 2020.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 6th day of FEBRUARY, 2020, to:

MARK ZANA, BAC#1013790
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

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

hjc/SVU

FILED
FEB 06 2020
CLERK OF COURT

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

Petitioner In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Mark Zana,
Petitioner,
-vs-
THE STATE OF NEVADA,
Respondent.

A-19-804193-W

Case No. A-19-804193-W

Dept. No. XVII

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
FEB 06 2020
CLERK OF THE COURT

FORM 24.064

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 31ST day of January, 2020, by placing same in the U.S. Mail via prison law library staff:

Mark Zara #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 31ST day of January, 2020.

Mark Zara

Petitioner In Pro Se

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Lovelock, NV 89419

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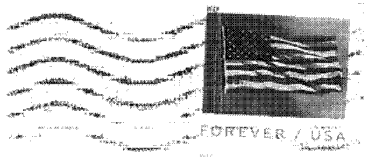

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DISTRICT COURT

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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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

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

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

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

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

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

years late.

B. This petition is successive pursuant to NRS 34.810.

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

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

C. Petitioner's grounds 2, 3 and 7 are waived.

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

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

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

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

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

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

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

E. Application of the procedural bars is mandatory.

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

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

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

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

34.810(3). Good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a defendant must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a defendant can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a defendant, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at1077. See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

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

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

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

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

A. Petitioner's Grounds 1, 2 and 3 fail.

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

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

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

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

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

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

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

B. Petitioner's Ground 4: Jury Misconduct fails.

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

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

> Upon review of the juror's testimony at the hearing, it is clear that the jury only briefly discussed the fruitless search and then continued with its deliberation for at least a few more hours. Moreover, the fruitless search was highly ambiguous; there are many possible interpretations 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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> Because the search's implications are ambiguous, it could not speak to a material issue in the case. Information so ostensibly irrelevant could not prejudice the average, hypothetical juror.

Order of Affirmance at 9.

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

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

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

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

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

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

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

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

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

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

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

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

Third, Petitioner's claim that trial counsel did not question Melissa Marcovecchio and Amber Newcomb about their inconsistent statements to the police is a bare and naked claim. Petition at17. Petitioner does not explain how their statements to the police differed or conflicted with their testimony at trial. Moreover, Petitioner's claim is belied by the record. Specifically, trial counsel did cross examine Melissa Marcovecchio about how she told the police that she did not think Petitioner was a child molester. Jury Trial – Day 3 at 185. Trial counsel cross examined Amber Newcomb on her credibility as well when he showed Ms. Newcomb her statement to the police and pointed out the inconsistencies to the jury. Jury Trial – Day 3 at 266. As such, Petitioner's claim that his attorney failed to attack the credibility of

the victims is belied by the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE STATE AFFIRMATIVELY PLEAD LACHES

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

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

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

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

V. THERE IS NO CUMULATIVE ERROR

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

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

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

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

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

VI. PETITIONER IS NOT ENTITLED TO POST-CONVICTION COUNSEL

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

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

Here, Petitioner is not entitled to counsel. First, all of his claims are procedurally barred and otherwise meritless. Moreover, Petitioner's claims are not complex and no additional 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 _____ for
STEPHANIE GEYLER
Deputy District Attorney
Nevada Bar #014203

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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

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

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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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

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

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

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

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

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

years late.

B. This petition is successive pursuant to NRS 34.810.

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

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

C. Petitioner's grounds 2, 3 and 7 are waived.

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

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

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

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

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

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

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

E. Application of the procedural bars is mandatory.

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

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

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

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

34.810(3). Good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a defendant must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a defendant can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a defendant, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at1077. See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

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

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

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

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

A. Petitioner's Grounds 1, 2 and 3 fail.

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

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

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

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

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

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

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

B. Petitioner's Ground 4: Jury Misconduct fails.

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

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

> Upon review of the juror's testimony at the hearing, it is clear that the jury only briefly discussed the fruitless search and then continued with its deliberation for at least a few more hours. Moreover, the fruitless search was highly ambiguous; there are many possible interpretations 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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> Because the search's implications are ambiguous, it could not speak to a material issue in the case. Information so ostensibly irrelevant could not prejudice the average, hypothetical juror.

Order of Affirmance at 9.

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

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

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

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

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

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

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

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

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

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

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

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

Third, Petitioner's claim that trial counsel did not question Melissa Marcovecchio and Amber Newcomb about their inconsistent statements to the police is a bare and naked claim. Petition at17. Petitioner does not explain how their statements to the police differed or conflicted with their testimony at trial. Moreover, Petitioner's claim is belied by the record. Specifically, trial counsel did cross examine Melissa Marcovecchio about how she told the police that she did not think Petitioner was a child molester. Jury Trial – Day 3 at 185. Trial counsel cross examined Amber Newcomb on her credibility as well when he showed Ms. Newcomb her statement to the police and pointed out the inconsistencies to the jury. Jury Trial – Day 3 at 266. As such, Petitioner's claim that his attorney failed to attack the credibility of

the victims is belied by the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE STATE AFFIRMATIVELY PLEAD LACHES

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

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

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

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

V. THERE IS NO CUMULATIVE ERROR

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

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

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

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

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

VI. PETITIONER IS NOT ENTITLED TO POST-CONVICTION COUNSEL

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

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

Here, Petitioner is not entitled to counsel. First, all of his claims are procedurally barred and otherwise meritless. Moreover, Petitioner's claims are not complex and no additional 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 _____ for
STEPHANIE GEYLER
Deputy District Attorney
Nevada Bar #014203

hjc/SVU

ASTA

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

MARK ZANA,

Plaintiff(s),

vs.

WARDEN BAKER,

Defendant(s),

Case No: A-19-804193-W

Dept No: XVII

CASE APPEAL STATEMENT

1. Appellant(s): Mark Zana

2. Judge: Michael Villani

3. Appellant(s): Mark Zana

Counsel:

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

4. Respondent (s): Warden Baker

Counsel:

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

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

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

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 7 day of February 2020.

Steven D. Grierson, Clerk of the Court

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

cc: Mark Zana

FILED
FEB 24 2020
CLERK OF COURT

Case No. A-19-804193-W
05C215103

Dept. No. XVII

8th Judicial District Court
Clark County, Nevada

Mark Zana,
petitioner

-vs-

State of Nevada,
respondent

Petitioner's Reply to the State's Response

Petitioner's reply to State's response of petitioner's Motion for Sanctions Against the State for Misrepresenting the Facts to the Court

Petitioner's Motion for Sanctions is not merely petitioner disagreeing with the State's interpretation of the facts as the State would like the court to believe. In his Motion, petitioner has substantiated all claims with the record, case laws, and statutory law. Moreover, the State concedes that, in at least two instances, they did provide false information to the court. (page 4, lines 24-26 and page 9, lines 5-12 of the State's response)

The State asserts that, because the Petition for

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Habeas Corpus was denied, this makes the State's intentionally deceptive statements to the Court moot and acceptable. This clearly shows the lack of respect the State has for our legal system and their oath they took to uphold the law. For the court to tolerate this behavior by the State will surely encourage and embolden the State to continue to deceive the court now and in the future.

On page 4, lines 24-26 of their response they state "Even if he had listed them as ineffective assistance of counsel claims..." Here again the State won't admit what petitioner has proven via the record. Page 15, lines 20-23; page 20, lines 6-10 and lines 15-17 of petitioner's Memorandum of Law clearly identify grounds 1, 2, 3, and 7 as ineffective assistance of counsel claims. Yet the State continues to intentionally mislead the Court.

Page 5, lines 2-22 of the response addresses the State's false claim that petitioner failed to establish an impediment external to him for filing his petition at this time. This was clearly and thoroughly addressed in Question 19, page 5B, lines 9-15 of the Petition for Habeas Corpus and again on page 2, lines 9-16 of his Motion for Sanctions whereby petitioner cited Koerschner v. Warden as the impediment along with the Castaneda case (with attached affidavit). In Koerschner that Nevada court ruled the access to the courts and to legal

assistance at Lovelock Correctional Center is inadequate. The State fails to address this ruling at any time because these facts are indisputable and substantiate petitioner's claim.

Page 5, lines 15-17 of the response states that Castaneda is not retroactive. This is false as the State fails to cite what case the Castaneda ruling replaces. Because there is none. Castaneda was a clarification of existing law and did not announce an altogether new rule of law. The statutory language of NRS 200.730 was not changed, therefore it is not a new rule but a clarification of existing law which holds no retroactivity dispute.

"If a rule is not new, then it applies even on collateral review of final cases." Colwell v. Nevada, 118 Nev. 807; 59 P.3d 463; (2002)

"Constitutional due process requires the availability of habeas relief when a state's highest court interprets for the first time and clarifies the provisions of a State criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's conviction became final." Clem v. State, 119 Nev. 615; 81 P.3d 521 (2003)

Petitioner cited Clem proving Castaneda applies. The State has failed to dispute Clem, or prove Castaneda does not apply.

Page 5, lines 17-18 of the response are proven false by Koerschner which the state has failed to rebut. It's not just petitioner who disagrees with the State on this.

issue but also the Nevada court who made that ruling disagrees with the State.

Page 5, lines 21-22 of the response is false as the record substantiates that only when petitioner become aware of Castaneda did he find substantial grounds for ineffective assistance of counsel. Petitioner's points I, II, III, V, and VI on page 20 of the Memorandum of Law all arose from the Castaneda ruling, which was unknown to petitioner before 2019.

On page 5, lines 23-27 of the response petitioner does not merely disagree with the State's analysis of case law he disproves it with Clem v. State and Colwell v. Nevada. Neither of which the State addresses. Clem was cited in the Petition and the Motion for Sanctions. The State has never offered any caselaw showing Castaneda does not apply. They have simply made that naked assertion time and time again. The State has failed to prove Castaneda was a new rule or what controlling case it replaced.

On page 6, lines 1-6 of the response the State again makes patently false statements belied by the record, caselaw, and statutory law. As cited by petitioner numerous times, Castaneda clarified NRS 200.730 for the first time and therefore applies according to Clem and Colwell. The State has repeatedly failed to provide any argument or proof to the contrary.

Page 6, lines 7-12 of the response was clearly

addressed by petitioner on page 4, lines 13-27 and page 5, lines 1-2 of the Memorandum of Law. On those pages petitioner showed, via the record, that all images were found at one time and place exactly like in Castaneda. Thus proving one instance of possession. The State has never proven more than one instance of possession or cited any case or statutory law to support its naked claim. On page 6, lines 13-19 of the response the state fails to offer any proof that the images were taken on separate days or at separate times. They further fail to prove the images were possessed at different times. Again misleading the Court with naked speculation.

On page 6 lines 20-25 of the response petitioner is not merely disagreeing with the State. Petitioner has cited the record proving the Court misinterpreted the facts. It's indisputable that, in the Court's ruling, it referred to juror Thurmon's research as singular and failed.

"... one juror engaged in an Internet search for a particular pornographic website that was mentioned at trial. Despite the juror's efforts, he was unable to locate the website." (Memorandum of Law pg. 10, lines 10-15)

The court used the term "fruitless" at least 4 times in their ruling. The State and petitioner's counsel provided this narrative to the court. Pages 11-13 of the Memorandum of Law quote every juror verifying juror Thurmon successfully accessed numerous websites, compared

girls from those sites to the 12 images, and shared his findings with the entire jury. Nowhere in the Court's ~~subsequent~~ any of these facts mentioned. The court was unaware of them. This substantiates the court misinterpreted the facts of this issue.

Page 6, lines 26-28 and page 7, lines 1-4 of the response prove the state did in fact mislead the court. Furthermore, the state didn't rebut this fact. Instead they use a separate, unrelated and (again) false statement when they said "... he cannot show error as Juror Thurmon apparently did not share his results with his fellow jurors." This is clearly false as the previously referenced pages 11-13 of the Memorandum of Law quotes every juror as stating juror Thurmon did in fact share his research with the entire jury.

On page 7, lines 5-11 of the response the State continues to ignore Castaneda. They cite no cases proving it doesn't apply, does not rebut Clay or Colwell, and incorrectly asserts petitioner was properly charged with 11 counts of possession when they charged him (illegally) with 12 counts.

Page 7, lines 12-19 addresses petitioner's character which was an essential area of trial as there were no eyewitnesses and no physical evidence. Petitioner did specifically identify his principal. Petitioner could not remember the D.A.R.E. officers' names (school records would

have those) and was unaware of any law or rule requiring such specificity as the State cited none.

Page 7, lines 20-28 of the response attempts to distract the court again. Detective Peña was named along with the investigators of the Sexual Assault Division of the Henderson Police Department. The State failed to cite anything requiring more specificity. Furthermore, petitioner quoted the specific areas they would be questioned about on page 18, lines 4-16 of the Memorandum of Law.

On page 8, lines 1-9 of the response the State fails to cite anything requiring more specificity from petitioner. Petitioner was as specific as he could be. To be any more specific would require an order of discovery and an evidentiary hearing, which were requested by petitioner.

On page 8, lines 10-22 of the response the State first claims "None of these claims specifically identify what was said." Untrue as page 20, lines 12-13 of the Memorandum of Law covers those specifics in Ground Four. As does page 25, lines 11-12 of Ground Four and pages 8-15 of the Memorandum of Law. Those transcripts are quoted extensively and go into great detail as to what was said. Second, the State then refers to those same transcripts (page 8 of response) cited by petitioner. Petitioner's conclusion was supported by more than 64 lines

of quotes from the juror to transcripts along with the Nevada Supreme Court's ruling.

On page 8, lines 23-28 and page 9, lines 1-4 of the response the State is clearly lying as substantiated by page 10, lines 10-15 of the Memorandum of Law whereby petitioner quoted the Nevada Supreme Court. The court stated "an" internet search for "a particular pornography website" and "he was unable to find the website." One search for one site and unsuccessful. At no time did that court make any reference to images, girls, or a general search as the State falsely asserts.

On page 8, lines 28 and page 9, lines 1-2 the State again lied as page 10, lines 18-20 of the Memorandum of Law proves by quoting the Nevada Supreme Court ruling.

On page 9, lines 5-12 of the response the State admits it lied when stating "Petitioner provides no dates of when this request was ignored..." The State then proceeds to distract the court further by lying that petitioner failed to claim he never received the cellphone warrant before trial. Page 17, lines 16-23 state that trial counsel never obtained a copy of the cellphone warrant. (Memorandum of Law)

On page 9, lines 13-19 of the response the state attempts to deflect when it states "...the court ordered that the material at issue be taken

away, as such the State cannot be held to error."
The State hides the fact they asked the Court to take
said evidence or to explain what grounds they had
for making that request.

On page 9, lines 20-28 of the response the State
is again lying and attempting to expand the argu-
ment it made on appeal. It has never previously
mentioned that the juror found any pictures
online. This is a new fabrication which is belied
by the record or the State would have quoted
it from their appeal response to the Nevada
Supreme Court.

On page 10, lines 2-5 of the response the State
fails to mention that 4 jurors conducted outside
investigations in order to aid them in determining
the ages of the people in the 12 images. If the
State had proven their case these jurors wouldn't
have resorted to those investigations and petitioner
would have been convicted of all 21 charges and
not just 10.

Petitioner has shown he has complicated issues and has
cited numerous instances of prejudice. His Motion for
Sanctions is substantiated by the record, case law,
and statutory law. To ignore the States actions
is to encourage it, which undermines our legal
system.

Certificate of Service

I hereby certify that service of the above and foregoing was made this 18th day of February 2020.

Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

8th Judicial District Court
Clark County
200 S. 3rd Street
Las Vegas, NV 89155

Mark Zana
Mark Zana #1013290
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Mark Zana #1013790
LCC
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center

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Clark County
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Las Vegas, NV 89155

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Electronically Filed
2/28/2020 11:23 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR
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, NV 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**

ORDER DENYING DEFENDANT'S MOTION OF FEBRUARY 11, 2020

DATE OF HEARING: **FEBRUARY 11, 2020**
TIME OF HEARING: **8:30 A.M.**

THIS MATTER having presented before the above entitled Court on the 11TH day of FEBRUARY, 2020; Defendant not present, IN PROPER PERSON; Plaintiff represented by STEVEN B. WOLFSON, District Attorney, through ROBERT TURNER, Chief Deputy District Attorney; and without argument, based on the pleadings and good cause appearing therefor,

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IT IS HEREBY ORDERED that PETITIONER'S MOTION FOR SANCTIONS AGAINST THE STATE FOR MISREPRESENTING THE FACTS TO THE COURT, shall be and is DENIED.

DATED this 24 day of February, 2020.

DISTRICT JUDGE

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

MICHAEL P. VILLANI

BY _____ for
ROBERT TURNER
Chief Deputy District Attorney
Nevada Bar #006526

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 Orde rdated 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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 11, 2020**

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

February 11, 2020 **8:30 AM** **Motion**

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

COURT CLERK: Susan Botzenhart

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES PRESENT: Turner, Robert B. Attorney

JOURNAL ENTRIES

- Plaintiff not present; incarcerated in Nevada Department of Corrections. Court noted this is a Motion for reconsideration, there is no factual or legal basis for the Court to reconsider, Court found procedural bar in the Petition, there is no good cause shown for the Court to overlook the procedural bars, and the post-conviction Petition for Writ of Habeas Corpus was denied. COURT ORDERED, Motion DENIED. State to prepare order and matter SET for status check.

NDC

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

Certification of Copy and Transmittal of Record

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

Pursuant to the Supreme Court order dated March 4, 2020, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 190.

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 12 day of March 2020.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk