IN THE SUPREME COURT OF THE STATE OF NEVADA

RODERICK STEPHEN SKINNER, No. 86846

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

Skinner pleaded guilty to Promotion of a Sexual Performance of a Minor Under Age Fourteen, a Category A violation of NRS 200.720 and NRS 200.750. Record on Appeal, hereafter "ROA," Volume 2, 37-47. He was sentenced to a term of life in prison with the possibility of parole after five years. *Id.*, 75-76. He filed a direct appeal, but his conviction was affirmed by the Nevada Supreme Court. *See Skinner v. State*, Docket No. 66666 (July 14, 2015).

In 2016, Skinner filed a timely petition for writ of habeas corpus, and a supplemental petition with the assistance of appointed counsel. ROA, Volumes 11-13, 359-890; Volumes 13-16, 891-1593. The district court held

an evidentiary hearing on the petition and supplemental petition on September 26, 2019. ROA, Volume 6, 957-1158. Following the evidentiary hearing, the district court denied relief. ROA, Volume 5, 844-874. He appealed that decision, and the Court of Appeals affirmed. *See Skinner v. Warden*, Docket No. 79981-COA (February 8, 2021).

On March 29, 2022, Skinner filed his Second Petition for Writ of Habeas Corpus; it was stricken but refiled on April 4, 2022. ROA, Volume 7, 1225-1237; 1243-1255. The State moved to dismiss the petition as untimely and procedurally barred, and Skinner opposed. *Id.*, 1270-1277; 1288-1311. The district court granted the State's motion to dismiss. ROA, Volume 9, 1646-1643. Skinner also filed a motion to correct his sentence on November 1, 2022. *Id.*, Volume 8, 1509-1517. The State opposed, and the district court denied the motion. *Id.*, 1549-1552; Volume 9, 1654-1657. Skinner also filed a Third Petition on November 15, 2022. *Id.*, Volume 8, 1556-1573. The district court dismissed the Third Petition *sua sponte*. *Id.*, Volume 9, 1661-1670.

II. ROUTING STATEMENT

Appellant Roderick Stephen Skinner ("Skinner") pled guilty and was convicted of one count of Promotion of a Sexual Performance of Minor, Age 14 or Older, a category A felony in violation of NRS 200.720 and NRS

200.750. As a result of the category A felony conviction, the case is not presumptively routed to the Court of Appeals pursuant to NRAP 17(b)(3). However, it also does not fall within the parameters for mandatory assignment to the Supreme Court under NRAP 17(a). As a result, the Supreme Court can keep this case or assign it to the Court of Appeals pursuant to NRAP 17(b).

III. STATEMENT OF FACTS

1. Facts underlying the conviction and sentence.

Skinner came to the attention of the Sparks Police Department on July 21, 2013, when a child neighbor reported that Skinner was watching pornography and masturbating in front of her while his two-year-old daughter sat on his lap. ROA, Volume 10, 1-9. Sparks Police Department detectives obtained and served a search warrant on Skinner's apartment and seized his laptop computer and external hard drives. *Id.* Detectives obtained a second search warrant to examine the contents of the laptop and hard drives, and recovered several images including visual depiction of children between the ages of four years old and 13 years old engaging in sex with adult males. *Id.* ROA, Volume 10, 1-9.

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2. Facts adduced at the 2019 evidentiary hearing.

An evidentiary hearing on Skinner's first petition for writ of habeas corpus took place on September 26, 2019. ROA, Volume 6 950 – ROA, Volume 7, 1151. At the hearing, Ms. Loehrs testified to her extensive experience as a computer forensic examiner. ROA, Volume 6, 974-976. In preparing her report for this case, Ms. Loehrs reviewed police reports, Sergeant Carry's report, and Sergeant Carry's deposition testimony. *Id.*, 976. Ms. Loehrs testified that she only reviewed the initial Digital Evidence Report Narrative completed by Sergeant Carry on November 1, 2013. *Id.*, 999. Ms. Loehrs did not review Sergeant Carry's supplemental examination report dated March 18, 2014. *Id.*, 1003.

Ms. Loehrs had no doubt that there was child pornography on Skinner's computer as a result of reviewing Sergeant Carry's reports. *Id.*, 1022. However, Ms. Loehrs was unable to confirm or rebut Sergeant Carry's findings and conclusions because she was unable to independently review the hard drives. *Id.*, 1007-1008. Ms. Loehrs acknowledged that it is possible an independent examination conducted before the hard drives were destroyed could have confirmed Sergeant Carry's findings. *Id.*, 1017.

Ms. Loehrs testified that she has found additional incriminating evidence that law enforcement missed in their own examination "all the

time." *Id.*, 996-997. Ms. Loehrs said that when she finds additional incriminating information, she "tells" the attorney and the attorney usually requests that she not generate a report. *Id.*, 997. Ms. Loehrs was unaware whether defense counsel had obtained or requested an independent forensic examination of the hard drives prior to their destruction. *Id.*, 1015. Ms. Loehrs was also unaware of any rule or statute that would govern the maintenance and disposal of Skinner's computer and hard drives, saying "I have no idea." *Id.*, 1012.

Skinner's trial counsel, Chris Frey, also testified at the evidentiary hearing. ROA, Volume 7, 1110. Mr. Frey "distinctly" remembered Skinner's case for a number of reasons including Skinner's physical characteristics, the fact that he was a foreign national, and the length of time that the case took to unfold. *Id.*, 1114-1115. Mr. Frey recalled that "the forensics from the computer clearly indicated to me, and my assessment would have been that it would have indicated to a jury, that the user of the computer was Roderick Skinner." *Id.*, 1118. Mr. Frey also recalled that Sergeant Carry had completed two reports: an initial report and a "final" report. *Id.*, 1132.

Mr. Frey did not rely on his own assessment of the computer forensics in determining that Skinner was responsible for the child pornography on his computer; he also employed the assistance of Leon

Mare of Expert Digital Forensics in Las Vegas, Nevada. *Id.*, 1118. Mr. Frey knew that Mr. Mare had been used as an expert on a number of federal child pornography cases and believed that he had the sort of experience necessary for this case. *Id.* To assist Mr. Mare in conducting his examination, Mr. Frey provided him with all of Sergeant Carry's reports and their related documents. *Id.*, 1119. Mr. Mare was asked not to formulate an opinion until after he had reviewed all the reports and conducted a two-day examination of the hard drives himself. *Id.*

After reviewing the hard drives over the course of two days, Mr. Mare verified that the findings and conclusions of the Washoe County Sheriff's Office were sound. ROA, Volume 7, 1120. Mr. Frey recalled that "when asked to assess the merits of the plea negotiations on the table [that would result in a single felony conviction], he, quite frankly, said that Mr. Skinner should -- quote/unquote -- jump on it." *Id.* Mr. Mare was unable to offer any exculpatory evidence or innocent explanation for the presence of child pornography on Skinner's machine. *Id.*, 1121. Mr. Frey did not request that Mr. Mare prepare a report in this case because his findings "were adverse" and Mr. Mare's conclusions, had the case proceeded to trial, would only have "corroborated the State's case...." *Id.*, 1125.

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Mr. Frey testified that Skinner initially had difficulty accepting the forensic findings from his computer but, as the evidence compiled and after Mr. Mare conducted the defense's examination that corroborated Sergeant Carry's findings, "his degree of acceptance of responsibility changed." *Id.*, 1122. Mr. Frey believed that Skinner's comments at sentencing, taking "responsibility" for the child pornography, were representative of his state of mind. *Id.*, 1122-1123.

Mr. Frey's goal at sentencing in this case was to put forth as much mitigation information as possible in support of a request for probation. *Id.*, 1126. In furtherance of that goal, Mr. Frey arranged to have testimony from Skinner's relatives and acquaintances from Australia and prepared a sentencing memorandum. *Id.*, 1126-1127. Between the second and third sentencing hearings, Mr. Frey learned that Skinner's two-year-old daughter (the same child who was reportedly seen on Skinner's lap while he watched pornography and masturbated) had undergone a medical examination and was "found to have a sexually-transmitted disease," specifically "genital warts," "in her anal region." *Id.*, 1128. This new evidence understandably complicated the defense's probation request. *Id.*, 1127.

At the end of the hearing, the district court took the matter under submission. *Id.*, 1150. On October 9, 2019, the district court entered its

Order Denying Petition for Writ of Habeas Corpus denying all of the claims in both the Petition and Supplemental Petition. ROA, Volume 6, 837-867.

IV. STATEMENT OF ISSUES

A. Whether the district court properly dismissed Skinner's untimely, successive petitions.

B. Whether the district erred in denying Skinner's Motion to Correct Illegal Sentence.

V. SUMMARY OF ARGUMENT

In this consolidated appeal, Skinner challenges the district court's denial of his untimely, successive petitions for writ of habeas corpus. He also challenges the district court's denial of his motion to correct illegal sentence. Skinner argues that his Second Petition should not have been dismissed upon the State's motion because he established good cause to exceed the procedural bars. He bases this argument on *Gonzales v. State*, *infra*. However, as the *Gonzales* decision recognized, petitioners who plead guilty have long been able to challenge counsel's effectiveness with regard to entry of their plea. Thus, *Gonzales* did not establish good cause to excuse the applicable procedural bars, because it did not establish new law.

Skinner's Third Petition challenged his sentence based on the Presentence Investigation Report's matrix and recommendations. He contends that the district court should have transferred this petition to the

county of his confinement. But the Third Petition did not challenge the Nevada Department of Corrections' computation of his sentence, so the First Judicial District could not have appropriately considered the Third Petition. *See* NRS 34.733 and 34.738.

Finally, Skinner concedes his motion to correct illegal sentence exceeds the scope allowed by *Edwards v. State*, *infra*, but urges this Court to expand its jurisprudence to allow for such motions any time a petitioner disagrees with the PSI's recommendation. This Court should decline that invitation.

VI. ARGUMENT

A. Skinner's Second and Third Petitions Were Properly Dismissed.

1. Standard of Review

"[A]pplication of procedural bars is mandatory… but a petitioner may overcome the bars in one of two ways: (1) by demonstrating good cause and actual prejudice…, or (2) by demonstrating actual innocence, such that a fundamental miscarriage of justice would result were the underlying claims not heard on the merits…." *Branham v. Baca*, 134 Nev. 814, 815, 434 P.3d 313, 315 (Nev. App. 2018), *citing State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev., 225, 231, 112 P.3d 1070, 1074 (2005) and *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "NRS Chapter 34

requires a petitioner to identify the applicable procedural bars for *each* claim presented and the good cause that excuses those procedural bars." *Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935, 949 (2021) (emphasis in original), *citing* NRS 34.735, 34.726(1), and 34.810(3). "A petitioner's explanation of good cause and prejudice for each procedurally barred claim must be made on the face of the petition" and "to avoid dismissal under NRS 34.726(1) or NRS 34.810, a petitioner cannot rely on conclusory claims for relief but must provide supporting specific factual allegations that if true would entitle him to relief." *Id.* (cleaned up).

2. Discussion

The Second Petition asserted that good cause existed to excuse the procedural bars based on Skinner's purported belief that he was procedurally barred from raising claims related to ineffective assistance of counsel at sentencing pursuant to NRS 34.810(1)(a) until the Nevada Supreme Court's recent decision in *Gonzales v. State*, 137 Nev. Adv. Op. 40, 492 P.3d 556 (Nev. July 29, 2021). This argument was unmeritorious, as the district court recognized.

Gonzales did not remove an otherwise applicable procedural bar. Instead, it reiterated that the purpose of NRS 34.810(1)(a) "was to preclude wasteful litigation of certain *pre-plea* violations." 492 P.3d at 561

(emphasis in original). The Nevada Supreme Court explained that "[i]n sum, we explicitly hold today what has been implicit in our caselaw for decades. The core claims prohibited by NRS 34.810(1)(a) are 'independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea' that do not allege that the guilty plea was entered involuntarily or unknowingly or without the effective assistance of counsel." 492 P.3d at 562, *quoting Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602 (1973). *Gonzales* did not create a new rule; it merely provided an explicit interpretation of law that has been applicable for decades.

"When a decision merely interprets and clarifies an existing rule[...], the court's interpretation is merely a restatement of existing law." *Buffington v. State*, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994), *citing Gier v. District Court*, 106 Nev. 208, 213, 789 P.2d 1245, 1248 (1990). New rules of law may be applied prospectively, but a restatement of existing law does not announce a new rule. As a result, there was no procedural bar precluding Skinner from raising claims of ineffective assistance of counsel at sentencing in his First Petition.

Moreover, the *Gonzales* Court explained that it was "explicitly hold[ing] today what has been implicit in our caselaw for decades." 492

P.3d at 562. Skinner is not entitled to the benefit of his failure to present an available argument in his First Petition under the mistaken belief that it was procedurally barred. As the *Gonzales* opinion made clear, claims that counsel was ineffective at the time of sentencing have been available "for decades." As NRS 34.810(1)(a) does not act as a bar, and has not acted as a bar "for decades," it could not have applied to Skinner's valid claims in his First Petition. He believes he had valid claims, he should have raised them. Nevada's post-conviction framework does not allow for multiple trips through the process, raising issues in a piecemeal fashion. *Brown v. McDaniel*, 130 Nev. 565, 572- 73, 331 P.3d 867, 872-73 (2014) ("The purpose of the single post-conviction remedy and statutory procedural bars is to ensure that petitions would be limited to one time through the post-conviction system.") (quotations and citations omitted). Finally, another district court judge's decision to grant a different petitioner's request for counsel in a different case is not binding in any way on this Court. *See*, e.g., *Camreta v. Greene*, 563 U.S. 692, 709 fn. 7, 131 S. Ct. 2020, 2033 fn. 7 (2011).

The district court correctly concluded that the *Gonzales* decision did not constitute good cause sufficient to overcome application of the

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procedural bars to the Second Petition. Moreover, Skinner did not allege facts that, if true, could establish actual innocence.

The State also specifically pled laches in its motion to dismiss. ROA, Volume 7, 1275-1276. A rebuttable presumption of prejudice exists when a period of more than 5 years passes between the filing of a judgment of conviction and the filing of a post-conviction petition challenging the validity of that judgment and the State specifically pleads laches. NRS 34.800(2). Because more than 5 years have passed since the judgment was filed on February 5, 2015, the district court properly found that laches may applied to the Second Petition.

Skinner also argues that the district court erred in dismissing his Third Petition *sua sponte* because it was an attack on the terms and conditions of his sentence. He claims that it should have been transferred to the First Judicial District because it was an attack on the terms and conditions of his sentence. But the Third Petition alleged Skinner was entitled to relief based on alleged errors in the PSI. It did not challenge the Nevada Department of Corrections' computation of his sentence, so the First Judicial District could not have appropriately considered the Third Petition. *See* NRS 34.733 and 34.738. Like the Second Petition, the Third

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Petition failed to establish good cause or prejudice sufficient to excuse the procedural bars. It was properly dismissed.

B. The District Court Correctly Denied Skinner's Motion to Correct Illegal Sentence.

1. Standard of Review

This Court reviews a district court's decision to deny a motion to correct an illegal sentence for an abuse of discretion. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); *Haney v. State*, 124 Nev. 408, 411, 185 P.3d 350, 352 (2008).

2. Discussion

A motion to correct an illegal sentence may only address the facial legality of the sentence, i.e., one at variance with the controlling statute, beyond a court's jurisdiction, or in excess of the statutory maximum. *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996). Skinner contended below that he should have been granted probation, but the Nevada Court of Appeals has previously rejected a similar argument. *See* Order of Affirmance, *Skinner v. State*, 66666-COA, July 14, 2015. Skinner attempted to argue that the district court relied on highly impalpable or suspect evidence contained in the presentence investigation report, and his motion exceeded the narrow scope of his procedural vehicle as contemplated by *Edwards, supra*. On appeal, he concedes that *Edwards*

applies to his motion, but appears to invite this Court to expand that case in order to allow a motion to correct an illegal sentence in all instances challenging the Division of Parole and Probation's matrix. This Court should decline that invitation, as such arguments may be made on direct appeal or in the context of a postconviction petition for writ of habeas corpus.

VII. CONCLUSION

Based on the foregoing, the State respectfully asserts that the decision of the district court should be affirmed.

DATED: May 10, 2024.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Jennifer P. Noble
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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DATED: May 10, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 10, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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