

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 42593

FILED

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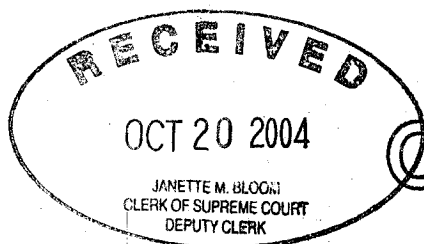
APPELLANT'S REPLY BRIEF

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1 **ARGUMENT**

2 Application of the Alleged Bars Under Nev. Rev. Stat. §§ 34.726 or
3 34.810 Violates Petitioner's Right to Due Process of Law and Equal
4 Protection of the Laws Under the State and Federal Constitutions

5 A. Appellant Howard Was Not Given Adequate Notice That N.r.s. §§
6 34.726 Was Applicable to His Case Thus Application by the District
7 Court Violated His Fifth and Fourteenth Amendment Rights

8 It is HOWARD's contention that N.R.S. 34.726 cannot be constitutionally
9 applied to his case based upon the fact that there was no authority before this
10 Court's decision in Pellegrini that made him aware that N.R.S. 34.726 would be
11 applied to his **successive** post conviction habeas litigation. The states' response
12 to this issue is flawed in two respects.

13 Initially, while it is recognized that this Honorable Court stated in Pellegrini
14 that it had previously applied the time bar of N.R.S. 34.726 to successive petitions
15 in published and unpublished opinions and this Court cited to Bennett 111 Nev.
16 1099, 1103 and Moran v. State, case no. 28188 - order dismissing appeal - as
17 evidence of this application, it must be recognized by this Court that the
18 unpublished Moran order dismissing appeal was not available to HOWARD or his
19 counsel until many years after the issuance of that order.¹ As this Court is well
20 aware unpublished orders dismissing appeals are sent only to the parties involved
21 in the particular litigation and such orders are not precedent as to other cases
22 pending before this Honorable Court.

23 Moreover, while this Court stated that Bennett was an example of a published
24 opinion by this Court applying N.R.S. 34.726, HOWARD must respectfully disagree
25 with this analysis based upon an in-depth review of the Bennett opinion.

26 ¹ As counsel for Appellant HOWARD was also appellate counsel for David
27 Pellegrini, counsel for Appellant HOWARD obtained access to the unpublished Moran
28 order when she initially began the district court litigation which ended in this Court's
decision entitled Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

1 While Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) is a post conviction
2 capital litigation, it does not establish that this Court previously and clearly applied
3 N.R.S. 34.726 to a successive post conviction litigation. The facts establish that
4 Edward Bennett was convicted of murder with use of a deadly weapon and other
5 crimes. The jury returned a sentence of death as to the murder with use of a
6 deadly weapon conviction. This Court affirmed Bennett's convictions and sentences
7 on direct appeal. Bennett v. State, 106 Nev. 135 (1990). Thereafter, on November
8 1, 1990 Bennett filed a timely post conviction challenge to his convictions and
9 death sentence in the trial court. After Bennett filed his initial "Petition For Post
10 Conviction Relief", the trial court appointed counsel however no further proceedings
11 were calendared with the trial court with respect to Bennett's petition for post
12 conviction relief. Bennett, 111 Nev. 1099, 901 P.2d 676, 678 (1995). Three years
13 and one month later, Bennett through his appointed counsel filed a second
14 document entitled "Petition for Post Conviction Relief" Id. The trial court ultimately
15 dismissed the post conviction litigation.

16 On appeal, "the state distinguished the petition filed in 1993 from the
17 petition filed in 1990, insisting that the dismissal of the 1993 petition was
18 appropriate on procedural grounds for lack of timeliness" but conceding that
19 Bennett could seek relief pursuant to his 1990 petition. The only reference by this
20 Court to the application of N.R.S. 34.726 came when it was noted that:

21 Although Bennett waited over three years to proceed to hearing on his
22 post-conviction remedy, he filed his initial petition in a timely manner,
23 and it was only after counsel was appointed that the three-year delay
transpired. In fairness to Bennett, we decline to penalize him on the
24 basis of a delay that apparently was not his fault. See NRS
34.726(1)(a).

25 Bennett, supra at 679.

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27 ///

1 Thereafter, this Court specified that:

2 Without expressly addressing the remaining procedural bases for the
3 dismissal of Bennett's petition, we therefore choose to reach the
4 merits of Bennett's contentions which are clearly lacking for the most
part and, in terms of those allegations of arguable merit, do not
otherwise warrant a new penalty hearing.

5 Id. It is submitted that these quotes and the procedural history of the Bennett
6 case clearly demonstrate that this Court had **not**, prior to the Pellegrini decision,
7 applied N.R.S. 34.726 to a **successive** post conviction capital litigations. Bennett
8 was not a **successive** case. Alternatively, it is submitted that the procedural
9 history, the above quotes and the analysis engaged in by this Court in Bennett did
10 not make it apparent to any convicted individual nor any appellate counsel that this
11 Court intended by the above noted quotes to inform or give clear notice to
12 appellants that from 1995 forward N.R.S. 34.726 would apply to successive post
13 conviction litigations. As such it is respectfully submitted that prior to the
14 Pellegrini decision there was no authority to suggest that N.R.S. 34.726 would
15 apply to **successive** post conviction/habeas petitions. Thus, application of this
16 statute to Mr. HOWARD violates his Fifth and Fourteenth Amendment right to due
17 process of law.

18 B. This Honorable Court Does Not Regularly or Consistently Apply N.R.S.
19 §§ 34.726 or 34.810 Thus Application by the District Court and this
Court Violates Howard's Fifth and Fourteenth Amendment Rights

20 While it is recognized that this Honorable Court has stated that the adequate
21 and consistent application analysis with regard to procedural bars "has no
22 legitimate application to our review in habeas", it is submitted that this issue must
23 be brought to the attention of both the district court and this Honorable Court so
24 that the state may have "the opportunity to pass upon and correct alleged
25 violations of its prisoners' federal rights" before intervention by the federal courts.
26 Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)(*per*
27 *curiam*).

1 In order to adequately present the State of Nevada with the opportunity to correct
2 the alleged violation of HOWARD's federal rights, Mr. HOWARD "must present both
3 the operative facts and the federal legal theory on which his claim is based to the
4 state court." Koerner v. Grigas, 328 F.3d 1039, 1046 (9th Cir. 2003) citing Kelly
5 v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003). Thus, Mr. HOWARD cites the
6 following facts and cases as establishing that this Court has not regularly or
7 consistently applied N.R.S. 34.726 on post conviction review after the statute's
8 effective date of January 1993.

9 In Nevius v. Warden, Nevada State Prison, case numbers 29027 and 29028,
10 appellant filed a **third**, if not a fourth,² post conviction pleading ie. an original
11 petition for writ of habeas corpus with this Court.³ On October 9, 1996, over three
12 years after the effective date of N.R.S. 34.726, this Court chose to Nevius' original
13 writ solely on the basis of N.R.S. 34.810. (App. 401) In this case, this Court failed
14 to apply N.R.S. 34.726 even though the statute was applicable to the case given
15 the filing date of the third, or fourth, petition.

16 ///

18 ² See App. 392 which states "initially we note that this is at least
19 appellant's third post conviction petition challenging the validity of his judgment and
20 sentence." Also see App. 392 fn. 4 which states "under the circumstances of this case,
21 appellant's first two petition in the Eighth Judicial District Court might fairly be
characterized as one petition for purposes of applying applicable procedural bars."

22 ³ Nevius filed his first post conviction petition with the Eighth Judicial
23 District Court on February 11, 1986 which was summarily denied on the merits on
24 February 13, 1986. On February 14, 1986, Nevius filed a second post conviction
25 petition with the Eighth Judicial District Court which was summarily denied on the
26 merits by the district court on November 18, 1996. Nevius appealed the denial of
27 these two post conviction petitions to the Nevada Supreme Court. This appeal was
28 dismissed on February 19, 1986. Thereafter, on June 7, 1989, Nevius filed a third
post conviction pleading with the First Judicial District Court. On July 18, 1996, the
district court denied this petition. (See App. 391-392) Thus, the original petition for
writ of habeas corpus filed with this Court was the fourth post conviction pleading
submitted by Nevius to the state courts of Nevada.

1 Additionally, in Farmer v. State of Nevada, case no. 29120, appellant filed
2 a **third** petition for post conviction relief with the trial court on August 28, 1995.
3 (App. 442-446). On appeal from the denial of the third petition for post conviction
4 relief, on November 20, 1997 - more than four years after the effective date of
5 N.R.S. 34.726, this Court chose to affirm the trial court's denial of the petition
6 solely upon the basis of N.R.S. 34.810(2) and (3). (App. 443) As in Nevius, this
7 Court failed to apply N.R.S. 34.726 even though the statute was applicable to the
8 case given the filing date of the third petition.

9 Moreover, in Sechrest v. State of Nevada, case no. 29170, appellant filed a
10 **second** post conviction pleading entitled a petition for writ of habeas corpus with
11 the trial court on August 29, 1996. (App. 437-440). On appeal from the denial of
12 the second post conviction pleading, on November 20, 1997 again over four years
13 after the effective date of N.R.S. 34.726, this Court affirmed the trial court's
14 dismissal solely on the basis of N.R.S. 34.810. (App. 439-440). As in Nevius and
15 Farmer, this Court failed to apply N.R.S. 34.726 even though this statute was
16 clearly applicable to the case given the filing date of the second post conviction
17 pleading.

18 Again, in Wilson v. State of Nevada, case no. 29802, appellant filed a **second**
19 post conviction petition for Writ of Habeas Corpus with the trial court on March 5,
20 1993. On appeal from the dismissal of the second post conviction petition, on April
21 9, 1998 over five years after the effective date of N.R.S. 34.726, this Court again
22 chose to affirm the trial court's dismissal solely on the basis of N.R.S. 34.810.
23 (App. 462). As in Nevius, Farmer, and Sechrest, this Court failed to apply N.R.S.
24 34.726 even though this statute was clearly applicable given the filing date of the
25 second post conviction pleading.

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1 Once again, in Ybarra v. State of Nevada, case no. 32762, appellant filed a
2 **third** post conviction petition for writ of habeas corpus⁴ with the trial court on April
3 22, 1993. (See Reply App. 1-42). On appeal from the dismissal of the third post
4 conviction petition, on July 6, 1999 over six years after the effective date of N.R.S.
5 34.726, this Court again chose to affirm the trial court's dismissal solely on the
6 basis of N.R.S. 34.810 and N.R.S. 34.800. (Reply App.45). Indeed, as established
7 by a footnote in the Order Dismissing Appeal in case number 32762, this Court was
8 aware of N.R.S. 34.726 and chose not to apply the statute to the Ybarra case and
9 stated that "in light of our disposition, we need not address Ybarra's contention
10 that the district court erroneously concluded that NRS 34.726, providing a one-year
11 time limit to file a post-conviction petition, also procedurally barred this petition."
12 (See Reply App. 47 fn.3).

13 Finally, in Riley v. State of Nevada, Nevada Supreme Court case no. 33750,
14 appellant filed a **second** petition for post conviction relief with the trial court on
15 August 26, 1998. (Reply App. 48-51). On appeal from the denial of the second
16 post conviction petition, on November 18, 1999 over six years after the effective
17 date of N.R.S. 34.726, this Court again chose to affirm the trial court's denial of the
18 petition solely on the basis of N.R.S. 34.810. (Reply App. 49-50). As in Nevius,
19 Farmer, Sechrest, Wilson, and Ybarra, this Court failed apply N.R.S. 34.726 even
20 though this statute was clearly applicable to the case given the filing date of the
21 second petition.

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24 ⁴ Ybarra's initial petition for post conviction relief was filed on July 9, 1986
25 and its denial was upheld by this Court in 1987. (See Reply App. 5-6). Ybarra then
26 went to federal court and that court dismissed his federal petition in order to exhaust
27 state remedies. (Reply App.6) Ybarra then filed a new petition for post-conviction
28 relief in the First Judicial District Court (where he was incarcerated). (Id.). Thus, the
petition filed in 1993 was the third post conviction challenge to Ybarra's sentence and
conviction.

1 Given the forgoing, it is clear that once in 1996, twice in 1997, once in 1998,
2 and twice in 1999, this Court was presented with a successive post conviction
3 capital case in which each appellant had filed the successive post conviction
4 pleading after the effective date of amended N.R.S. 34.726. Nonetheless, it was
5 not until November 15, 2001, when this Court published its opinion, Pellegrini v.
6 State of Nevada, that this Court itself applied N.R.S. 34.726 to a successive capital
7 post conviction litigation in a published matter.⁵

8 Moreover, the fact that this Honorable Court applied N.R.S. 34.726 once in
9 1995 to a successive capital post conviction litigation (Moran App. 355-371) in an
10 unpublished opinion clearly does not render this Court's application of the statute
11 clear, consistently applied or well established at the time of Mr. HOWARD's
12 purported default. Powell v. Lambert, 357 F.3d 871 874 (9th Cir. 2004); citing
13 Poland v. Stewart, 169 F.3d 573, 577 (9th Cir. 1999)(state procedural rules must
14 be " 'firmly established and regularly followed' at the time they were applied by the
15 state court")(quoting Ford v. Georgia 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.
16 2d 935 (1991); Valerio v. Crawford, 306 F.3d 742, 773 (9th Cir. 2002)(en banc);
17 and, Wood v. Hall, 130 F.3d 373, 376 (9th Cir. 1997). It is respectfully submitted
18 that the above noted unpublished opinions clearly establish that this Court's
19 decision in Pellegrini was novel and unexpected ⁶ and thus not firmly established
20 nor regularly followed by this Honorable Court. As such, application of N.R.S.
21 34.726 to Mr. HOWARD's case in the district court and by this Court did deny and
22 will deny Mr. HOWARD's Fifth and Fourteenth Amendment rights to due process as
23 guaranteed by the federal constitution.

24
25 ⁵ As noted above Moran was an unpublished opinion that was unavailable
26 to HOWARD or his counsel until many years after its filing.

27 ⁶ See N.A.A.C.P. v. Alabama ex rel. Richmond M. Flowers, 377 U.S. 288, 84
28 S.Ct. 1302, 12 L.Ed.2d 325 (1964); Harmon v. Ryan, 959 F.2d 1457 (9th Cir. 1992)

1 Moreover, it is submitted that Respondents have failed to provide this
2 Honorable Court with any materials that establish otherwise. Respondents have
3 better access to almost every single unpublished opinion rendered by this
4 Honorable Court and should not be allowed to rely upon their unsupported
5 assessment of the documents provided by Appellant to sustain his burden of proof
6 which establishes inconsistent and irregular application of N.R.S. 34.726. Bennett
7 v. Mueller, 322 F.3d 573, 585 (9th Cir. 2002)(noting that procedural bar is an
8 affirmative defense which the state must plead and prove and that the state has the
9 records and authorities to prove whether its courts have regularly and consistently
10 applied the procedural bar); and, Powell v. Lambert, 357 F.3d 871, 875 (9th Cir.
11 2004)(recognizing that the state has the ultimate burden of proof that its
12 procedural rule is adequate).

13 Finally, N.R.S. 34.810 was inconsistently and irregularly applied by this
14 Court at the time of Mr. HOWARD's purported default and thus cannot be used to
15 support the dismissal of his successive post conviction litigation. See Valerio v.
16 Crawford, 306 F.3d 742 (9th Cir. 2002)(en banc). Denial of Mr. HOWARD's
17 successive post conviction litigation on this basis would deny his Fifth and
18 Fourteenth Amendment rights to due process of the law.

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1 **CONCLUSION**

2 Based on the forgoing argument, and the arguments presented in Appellant's
3 Opening Brief, it is respectfully requested that this Honorable Court reverse the
4 district court's order denying Mr. HOWARD's successive post conviction petition,
5 and remand the matter back to the district court for an evidentiary hearing and a
6 merits decision on the claims challenging Mr. HOWARD's convictions and
7 sentences.

8 DATED this 17th day of October, 2004.

9 Respectfully Submitted:

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1 **CERTIFICATE OF COMPLIANCE**

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

11 DATED this 17th day of October, 2004.

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