IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

ORIGINAL

Case No. 42593

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RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Post-Conviction Relief
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that Defendant failed to show "cause" to overcome the procedural bars of NRS 34.726 and 34.810.
2. Whether Defendant's constitutional rights were violated by the District Court dismissing his untimely successive post-conviction petition based on the procedural bars of NRS 34.726, 34.810 and laches.

STATEMENT OF THE CASE

On May 6, 1983, Samuel Howard (hereafter "Defendant") was convicted of Murder and two counts of Robbery with a Deadly Weapon, and Sentenced to Death by a jury. (Appellant's Appendix, hereafter "App.", p. 1). The Judgment of Conviction was filed on September 20, 1983. Id. Defendant Appealed directly to the Nevada Supreme Court and his conviction was Affirmed on December 15, 1986. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986). His subsequent Petition for Rehearing was Denied. Defendant's Petition for Writ of Certiorari to the United State

Supreme Court was Denied on October 12, 1987. Howard v. Nevada, 484 U.S. 872, 108 S.Ct. 203 (1987). The first Petition for post-conviction relief was filed on October 29, 1987. App., p. 3. There was an evidentiary hearing and the petition was Denied. Id. Defendant filed an Appeal and on November 7, 1990, the Nevada Supreme Court Affirmed the District Court's Denial of Defendant's Petition. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). Again, a subsequent Petition for Rehearing was Denied.

Defendant filed his second Petition for post-conviction relief on May 24, 1992, which was Dismissed on procedural grounds. App., p. 4. An Appeal was filed and on March 19, 1993, the Nevada Supreme Court dismissed it. App., p. 594. The Order Dismissing Appeal found that the petition was so lacking in merit that briefing and oral argument was not even warranted. Id. His Petition for Writ of Certiorari to the United States Supreme Court was Denied on October 5, 1993. Howard v. Nevada, 510 U.S. 840, 114 S.Ct. 122 (1993).

A Petition for Writ of Habeas Corpus was filed by Defendant on May 24, 1988 in the United States District Court and was Dismissed without prejudice on June 23, 1988. Defendant's second Petition for Writ of Habeas Corpus in the United States District Court has been stayed pending exhaustion of remedies in Nevada state court. Id.

The Instant Petition for Writ of Habeas Corpus was improperly filed on December 20, 2002, but properly verified and filed on April 2, 2003. Id. The District Court's Dismissal of Defendant's petition was filed on October 23, 2003. Id. at 593.

The District Court found that Defendant's petition failed to allege new or different grounds that have not already been addressed on direct appeal or should have been addressed on direct appeal as required under NRS 34.810. Id. at 594. The District Court also found that Defendant was time barred from bringing the petition under NRS 34.726(1) since the latest remittitur from the Nevada Supreme Court was filed on October 23, 1993, and Defendant failed to meet his burden of showing good

cause for the delay. Id. at 595. Additionally, Defendant was barred by statutory laches of NRS 34.800 and equitable laches. Id. Defendant filed the instant Appeal on November 25, 2003. App., p. 617-18.

STATEMENT OF FACTS

On March 26, 1980, Defendant was detained by a Sears Roebuck security guard for attempting to defraud the store. Howard, 102 Nev. at 573, 729 P.2d at 1342. Defendant pulled out a .357 magnum, took the security guard's badge and portable radio, and escaped. Id. Defendant then called a Mrs. Monahan, telling her that he wanted to purchase a van she and her husband, Dr. Monahan, had advertised. Id.

The Monahans and Defendant met at a casino parking lot where Defendant displayed the badge and radio, and claimed to be a security guard with the hotel. Id. He stated that he was interested in purchasing the van and arrangements were made for the victim to meet Defendant the next day at Dr. Monahan's dentistry office to test-drive the vehicle. Id. at 574, 729 P.2d at 1342. On March 27, Dr. Monahan's body was found in the van. Id. He had been robbed and murdered. Id.

The jury found Defendant guilty of murder and robbery. Id. The jury determined at the sentencing hearing that Defendant should receive the death penalty. Id.

ARGUMENT

I

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS WAS PROPERLY DISMISSED BASED ON THE PROCEDURAL BARS OF NRS 34.726 AND 34.810

Defendant's third petition for post-conviction relief was properly dismissed without an evidentiary hearing by the District Court because Defendant has failed to show cause and prejudice to overcome the procedural bars of NRS 34.726 and 34.810. NRS 34.726 provides for the dismissal of a habeas petition based on delay in filing, stating in pertinent part:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

NRS 34.810 provides for dismissal based on waiver and abusive filing of successive petitions, stating in pertinent part:

> 1. The court shall dismiss a petition if the court determines that:
> ...
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
> (3) Raised in any other proceeding that the petition has taken to secure relief from his conviction and sentence,
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petition to assert those grounds in a prior petition constituted an abuse of the writ.
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner.

A. The Burden Of Showing "Good Cause" To Overcome The Procedural Bars Has Not Been Met

In an attempt to circumvent the procedural bars to his petition, Defendant first tries to impermissibly relieve himself of the burden to show cause. Defendant first claims the one-year rule of NRS 34.726 does not apply "because the state has made no showing that any part of the delay in filing the petition was petitioner's own 'fault.'" Appellant's Brief, p. 3. He later goes on to claim that the District Court's decision was legally erroneous and "factually unsupported because the record is barren of any evidence from which the court could conclude that any delay was [Defendant's] fault." Id. at 6. Both NRS 34.726 and 34.810 explicitly state that it is the petitioner's burden

to demonstrate good cause and actual prejudice. The Nevada Supreme Court also explicitly stated in Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001) that to overcome the procedural bars of NRS 34.726 and NRS 34.810, the defendant has "the burden of demonstrating good cause for delay and bringing his new claims or for presenting the same claims again and actual prejudice." See also, Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997); Hood v. State, 111 Nev. 335, 337-38, 890 P.2d 797, 798 (1995). It was, therefore, Defendant's burden to show cause (not the State's or the District Court's responsibility to show there was not good cause). His failure to do so warranted dismissal.

This Court has said that to establish good cause, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural bar that has been violated. Lozado v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994). The Court reaffirmed this holding in Crump, 113 Nev. 293, 934 P.2d 247 (1997). The Court went on to say that once the State has raised procedural grounds for dismissal, the burden then falls on the defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Id. at 302, 934 P.2d at 253, citing Phelps v. Director of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). The lack of assistance of counsel when preparing a petition, and even the failure of trial counsel to forward a copy of the file to a petitioner, have been found to *not* constitute good cause. See, Phelps, at 660, 764 P.2d at 1306; Hood, 111 Nev. 335, 890 P.2d 797 (1985).

Defendant contends that "good cause" under NRS 34.726(1) is different from the "impediment external to the defense" cause standard used in NRS 34.810, citing a number of civil cases, cases from Texas and Arizona and cases involving statutory construction. Appellant's Brief, p. 7-9. It must first be pointed out that Defendant's petition was also dismissed pursuant to NRS 34.810, not just NRS 34.726. App., p. 594-95. Notwithstanding this, the test under both statutes is, however, the same. For

example, in Hathaway v. State, 119 Nev. Adv. Rep. 30, 71 P.3d 503, 506 (2003), a case involving a dismissal pursuant to NRS 34.726(1), this Court stated, "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Citing Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537; Lozado, 110 Nev. at 353, 871 P.2d at 936; Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). Defendant fails to show that an impediment external to the defense caused his untimely petition, and, therefore, fails to overcome the procedural bars of NRS 34.726(1) and 34.810.

Defendant's effort to bypass the procedural bars by attributing them to counsel and therefore contending that they are not the Defendant's "fault," is unpersuasive and inefficient. This is especially true in light of this Court's adoption in Crump, 113 Nev. at 304, 934 P.2d at 253 (1997) of the standard enunciated by the United States Supreme Court in Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2545 (1991) where the Court stated, "mere attorney error, not rising to the level of ineffective assistance of counsel, such as attorney ignorance or inadvertence, is not 'cause' because the attorney is petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Defendant bears the risk of attorney error. A defendant cannot sit idly by while his agent acts, then attempt to recuse himself of responsibility by claiming ignorance of the law. See, App., p. 237-38.

Defendant repeatedly cites Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) for the inaccurate proposition that alleged attorney error is sufficient to show cause. Bennett is not on point with this proposition, and its unique facts are distinctively different from Defendant's situation. In Bennett, the defendant filed a timely post-conviction writ which subsequently fell through the cracks once post-conviction counsel was appointed. Id. at 1103, 901 P.2d at 679. Consequently, he never got even a single evidentiary hearing. Id. In this case, the Defendant has

already had his hearing and has filed a second petition. Both the District Court and the Nevada Supreme Court have denied Defendant's prior petitions and found that Defendant's claims lacked merit. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) and Howard v. State, 106 Nev. 713, 800 P.2d 175 (1991).

B. Defendant Fails To Show How He Would Be Prejudiced" By His Petition Not Being Heard On The Merits

Defendant also fails to show that he has been prejudiced by the dismissal of his petition. In order to establish prejudice, the defendant must show "not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Crump, 113 Nev. at 302, 934 P.2d at 253, citing Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). Defendant merely makes the conclusory statement that the "substantive claims alleged establish that, on the merits, a refusal to entertain the petition would result in undue prejudice." There has been no attempt to show that there is a reasonable probability that, but for the alleged errors, the result of the trial would have been different. See, Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1997) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 1865 (1984).

C. The District Court Properly Dismissed Defendant's Petition Without An Evidentiary Hearing Because He Failed To Show That He Was Entitled To One

Defendant was not entitled to an evidentiary hearing because he has failed to show that there was a valid basis to excuse the procedural bars. In order to be entitled to an evidentiary hearing, both NRS 34.726(1) and 34.810(3) require a petitioner to demonstrate a valid basis exists to excuse the procedural bars. Otherwise, the district court must dismiss the petition without an evidentiary hearing. See, NRS 34.745(4) (providing for summary dismissal of successive petitions); NRS 34.770(1)-(2) (providing that where a judge determines upon review of the pleadings and supporting documents "that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing"); Dickerson v. State, 114

Nev. 1084, 1088, 967 P.2d 1132, 1134 (1998) (discussing dismissal for failure to allege sufficient basis to overcome time bar at NRS 34.726); Bejarano v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925-26 (1996) (discussing dismissal for failure to allege sufficient basis to overcome procedural bars at NRS 34.810).

Defendant claims that the district court "was required to liberally construe [Defendant's] petition and accept all the factual allegations of the petition as true." Appellant's Brief, p. 3-4. First, Defendant appears to misapprehend what factual allegations are even relevant. The only relevant facts before the district court were those related to cause to overcome the procedural bars. The facts alleged concerning the merits of Defendant's claims are simply not relevant for a "cause" determination. Second, Defendant's authorities for his proposition are not on point and irrelevant. He first cites Vacation Village v. Hitachi American, 110 Nev. 481, 874 P.2d 744 (1994). This case is inapposite since it specifically deals with standard of review for dismissal under Nevada Rules of *Civil* Procedure 12(b)(5). That was not the basis for the State's motion to dismiss. Doleman v. Meiji Mutual Life, 727 F.2d 1480 (9th Cir. 1984) deals with a motion to dismiss a *civil* conspiracy *in Hawaii* under the Federal Rules of *Civil* Procedure Rule 12 and is equally irrelevant. As discussed above, Defendant's alleged reasons for failing to comply with the procedural bars are insufficient to show cause. For this reason he was not, and is not, entitled to an evidentiary hearing.

II

DEFENDANT'S CLAIM THAT THE NEVADA SUPREME COURT'S PELLEGRINI DECISION VIOLATES DUE PROCESS AND EQUAL PROTECTION BECAUSE IT IGNORED PRINCIPLES OF STATUTORY CONSTRUCTION IS WITHOUT MERIT

Defendant's claim that this Court's holding in Pellegrini violated due process and equal protection by ignoring principles of statutory construction is without merit. In Pellegrini, this Court, en banc, exhaustively explained and applied the principles of statutory construction as applied to NRS 34.726 and successive petitions. This court held that the plain meaning rule applies. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

This Court went on to say that the legislative intent also showed that the legislature intended for the time bar of NRS 34.726 to apply to successive petitions. See, Id. at 876-78, 34 P.3d at 530-31.

As to the plain meaning rule, this Court stated:

> However, words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute's language to consider legislative intent. Speer v. State, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000); Carson City District Attorney v. Ryder, 116 Nev. 502, 505, 998 P.2d 1186, 1188 (2000). Thus, we are not at liberty to "'go fishing in...the legislative mind'" where a statute is clear and unambiguous. Ex Parte Smith, 33 Nev. 466, 479-80, 111 P. 930, 935 (1910), quoting V. & T.R.R. Co. v. Lyon County, 6 Nev. 68, 73 (1870). Further, when reviewing a legislative change in a statute, "'we ware bound to presume that it was done ex industria, for the purpose of effecting the change which is effected in the law.'" Camino Et. Al. v. Lewis, 52 Nev. 202, 210, 284 P. 766, 768 (1930) (Coleman, J., concurring), quoting Crane & Co. v. Gloster, 13 Nev. 279, 281 (1878). Still, we must construe statutory language to avoid absurd or unreasonable results, and, if possible, we will avoid any interpretation that renders nugatory part of a statute. Speer, 116 Nev. at 679, 5 P.3d at 1064.

Id. at 873-74, 34 P.3d at 528-29. Following the rules of interpretation just enunciated, this Court found that NRS 34.726 provides no exception for successive petitions, concluding that the plain language of the statute indicates that it applies to all petitions filed after the effective date of January 1, 1993. Id. After a thorough analysis, it was held that the "plain language of the one-year provision requires its application to all petitions; this reading is consistent with the spirit of AB 227, is not absurd, and does not render nugatory other habeas procedural bars. Accordingly, we do not look beyond the statutory scheme itself to interpret NRS 34.726." Id. at 876, 34 P.3d at 530.

This Court went on, however, to consider argumendo whether the legislative history supported the defendant's theory that the Legislature did not intend for the time bar of NRS 34.726 to apply to successive petitions. It was found that the relevant legislative history did not support the defendant's arguments, stating:

> Nowhere in the legislative history is the intended effect of NRS 34.726

> on successive petitions expressly addressed. Moreover, the legislative history of the habeas statutes shows that Nevada's lawmakers never intended for petitioners to have multiple opportunities to obtain post-conviction relief absent extraordinary circumstances. From our Marshall decision, which identified the constitutional flaw in the Legislature's initial effort to create only one remedy in habeas, and through the eventual elimination of the Chapter 177 remedy, the Legislature made every effort to limit the ability to bring repetitive, meritless and delayed petitions. By the time Chapter 177's post-conviction relief provisions were repealed, we had already interpreted its one-year time limit at NRS 77.315 to apply to successive Chapter 177 petitions. See, Deutscher v. Warden, 102 Nev. 388, 724 P.2d 213 (1986). The statutory scheme permitted petitioners to resort to a Chapter 34 petition only in exceptional circumstances, where the prerequisite of a prior timely Chapter 177 petition was met or excused and where petitioners could overcome the statutory laches, waiver, and successive petition bars. Still, it is clear that these limitation had proven inefficient, and therefore AB 227, along with its procedural bars, was intended to ensure that petitioners would be limited to one time through the post-conviction system. The first argument made in voters' sample ballots in 1992 in favor of the constitutional amendment proposed by SJR 13 evidences this "one time through the system" intent:
>
> 'Under the existing system, a prisoner had two chances at habeas corpus relief, one in the court of his conviction and one in the court in the district in which he is incarcerated. This amendment would allow the Legislature to specify only one comprehensive process, giving more finality to criminal convictions. By reducing costly paperwork the amendment would also result in significant savings to the state. 1992 General Election Sample Ballot, Arguments for Passage of Ballot Question No. 2, at 15.'
>
> Additionally, the bill sponsor's testimony made clear that the effect of repealing the Chapter 177 remedy would be that "only one course of action would exist for a prisoner to challenge the constitutionality of his/her conviction or sentence." Minutes of the Senate Committee on Judiciary, at 3, 66th Leg. (Nev., March 20, 1991 (testimony by Assemblywoman Dawn Gibbons)).

Id. at 876-77, 34 P.3d at 530.

Defendant also cites the same testimony before the legislative committees that Pellegrini cited. See, Appellant's Brief, p. 14-15. Instead of offering this testimony under an equitable estoppel theory as was done in Pellegrini, Defendant attempts to offer it in an attempt to bolster his legislative intent theory. This Court's response in Pellegrini is, however, equally applicable, concluding "that the testimony did not constitute representations that successive petitions were exempt from the time limit later codified at NRS 34.726, and cannot reasonably be construed to have misled [the] Legislature...." Pellegrini, 117 Nev. at 878, 34 P.3d at 531. Defendant's argument

also fails because, as noted above, the plain meaning rule applies to NRS 34.726. This Court properly followed the rules of statutory construction in interpreting NRS 34.726, and Defendant's assertions to the contrary are without merit.

III

DEFENDANT HAS BEEN PROVIDED ADEQUATE NOTICE THAT NRS 34.726 APPLIES TO SUCCESSIVE PETITIONS FOR DUE PROCESS PURPOSES

Defendant's rights have not been violated under the Notice requirement of Due Process. The legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action. Pellegrini, 117 Nev. at 874, 34 P.3d at 529, citing Brown v. Angelone, 150 F.3d 370, 373 (4th Cir. 1998), citing Block v. North Dakota, 461 U.S. 273, 286 n. 23, 103 S.Ct. 1811 (1983). Consequently, petitioners whose convictions were final before the effective date of NRS 34.726 and who had filed a timely first petition, were entitled to a reasonable period of one year after the effective date of the new limitation period in which to file any successive petitions. Pellegrini, 117 Nev. at 874, 34 P.3d at 529.

Defendant's first argument that the time bar of NRS 34.726 cannot be applied to him because it was not in effect at the time the supposed events in petitioner's case occurred has no basis. Defendant also argues that the time bar of NRS 34.726 cannot apply to him because there was no authority before Pellegrini suggesting that NRS 34.726 would apply to successive petitions. Defendant's argument fails for two obvious reasons.

First, as already stated above, NRS 34.726 is clear and unambiguous. An argument that a clear and unambiguous statute does not put a defendant on notice is severely attenuated. Second, as noted in Pellegrini, this Court has previously applied the time bar at NRS 34.726 to successive petitions in published and unpublished dispositions. Id. at 869, 34 P.3d at 526 (citing Bennett, 111 Nev. 1099, 1103, 901

P.2d 676, 679 and Moran v. State, 112 Nev. 1733, 999 P.2d 391, 1996 Nev. LEXIS 763 (Order Dismissing Appeal, 1996) as examples). An argument that there was no authority prior to Pellegrini suggesting that NRS 34.726 would apply to successive petitions is also attenuated and without basis.

The State would also like to point out that Defendant's petition was not even properly filed within one year of the Pellegrini decision. Pellegrini was decided on November 15, 2001. Defendant's petition was improperly filed on December 20, 2002, and not properly filed in District Court until April 2, 2003. App. p. 594. Even if Defendant's attenuated analysis that he was not on notice until the Pellegrini decision came down was true, he *still* did not properly file the instant petition within a reasonable time of it. Consequently, for all the reasons stated above, Defendant's right to Notice under Due Process was not violated.

IV

DEFENDANT HAS NOT BEEN DENIED DUE PROCESS AND EQUAL PROTECTION BECAUSE HIS ALLEGATIONS THAT NEVADA'S PROCEDURAL BARS ARE APPLIED INCONSISTENTLY IS INCORRECT AND IRRELEVANT

Applying the time bars of NRS 34.726 and 34.810 to Defendant's petition does not violate his rights to due process and equal protection. Defendant rehashes the same argument as that presented in Pellegrini, stating that this Court applies procedural bars inconsistently. Defendant cites no authority holding that a court in conducting habeas review may ignore valid statutory procedural rules on the basis that these may have been inconsistently applied in the past. See, Pellegrini, 117 Nev. at 879-80, 34 P.3d at 532. Defendant, like Pellegrini, relies on authority stating that federal courts are normally prohibited from reviewing constitutional claims where a state court has explicitly invoked a state procedural bar as a separate basis for decision. Id. Under this federal rule, a state court's decision that a habeas claim is procedurally barred under state law is not adequate to bar federal review unless the procedural bar is applied regularly in the vast majority of cases and its application is

not discretionary. Id.

As this Court has already stated, "this rule has no legitimate application to our review in habeas." Id. at 880, 34 P.3d at 532. In addition, this Court has explicitly rejected the assertion that this Court inconsistently applies procedural default rules. Id.; see also, Valerio v. State, 112 Nev. 383, 389-90, 915 P.2d 874, 878 (1996). In an attempt to bypass this Court's precedent, Defendant grasps for authority, citing a California case from 1959, In re Tarter, 339 P.2d 553 (1959) as support for the contention that cases are not authority for the propositions not considered, then applies tortured logic to presume that, since Pellegrini did not consider arguments raised in selected unpublished cases, it cannot stand for the position taken by the Nevada Supreme Court that procedural bars are consistently applied. Defendant simply presumes that this Court did not consider the cases, but of course has no way of knowing what cases this Court actually considered. Furthermore, by "cherry picking" only those cases that allegedly support Defendant's contention, it conveniently ignores the thousands of unpublished cases not cited where procedural bars were obviously consistently applied.

V

IN ADDITION TO THE PROCEDURAL BARS OF NRS 34.726 AND 34.810, DEFENDANT'S PETITION WAS PROPERLY DISMISSED BASED ON LACHES

Defendant's petition is also barred by the doctrine of laches. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "a period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision of direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The statute also requires that the State plead laches in its motion to dismiss the petition, which the State did. The judgment of conviction was filed September 20, 1983 and the direct appeal was affirmed on December 15, 1986. Since over seventeen years have elapsed between the decision of the direct appeal of the judgment and the filing of Defendant's

petition, NRS 34.800 directly applies.

In addition to the statutory bar of NRS 34.800, Defendant's petition is also barred by the doctrine of equitable laches. Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). As the Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984) "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." That time has long since passed in this case.

Defendant has not challenged on this appeal the dismissal of his petition based on laches. Below, Defendant took the position that the State could not invoke laches because it required a showing of prejudice. Defendant's argument completely lacked merit because NRS 34.800(2) creates a rebuttable presumption of prejudice to the State. Defendant did not below, and has not on this appeal, offered any evidence to overcome this presumption. His petition is, therefore, also barred under the doctrine of laches.

CONCLUSION

For the reasons stated above, Defendant has failed to make the required showing to overcome the procedural bars to his Petition for Writ of Habeas Corpus, and his constitutional rights have not been violated. Accordingly, the State respectfully asks this Court to Affirm the District Court's Dismissal of Defendant's Petition.

Dated this 23rd day of July, 2004.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
JAMES TUFTELAND
Chief Deputy District Attorney
Nevada Bar #000439

CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of July, 2004.

Respectfully submitted,

DAVID ROGER
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BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 23rd day of July, 2004.

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