

IN THE SUPREME COURT OF THE STATE OF NEVADA

LATISHA MARIE BABB,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 49929

FILED

JAN 04 2008

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RESPONDENT'S ANSWERING BRIEF

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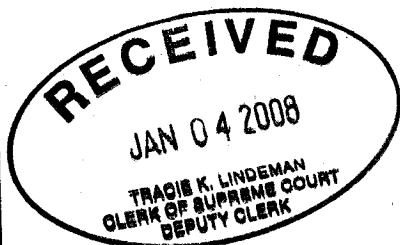
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08-00306

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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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4 LATISHA BABB,

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8 Respondent.
9 _____/

10 RESPONDENT'S ANSWERING BRIEF

11 I. STATEMENT OF THE CASE

12 Although one might never know it from the Opening Brief, this is an appeal from an order
13 dismissing a second petition for writ of habeas corpus (post-conviction) as being untimely, abusive
14 and successive.¹

15 Latisha Babb stood trial with co-defendants Harte and Sirex. Babb was convicted of
16 murder. The jury imposed a sentence of life without parole for Sirex and Babb. Harte was
17 sentenced to death. Babb appealed but the judgment was affirmed. Babb and Sirex v. State,
18 Docket No. 34195, Order of Affirmance (July 10, 2001)(found at Appellant's Appendix, Volume
19 12, p. 2206.). She then filed her first petition for writ of habeas corpus. Appellant's Appendix,
20 (AA) Volume 12, pp, 2223 *et seq.* That was denied and she again appealed but the judgment was
21 affirmed. Babb v. State, No. 42886 (Order of Affirmance, November 4, 2004)(found at AA, Vol.
22 14 at 2490). She then filed a second petition. AA, Vol. 1, pp. 1-37. The State answered and
23 moved to dismiss. AA Vol. 14, p. 2638-2640. After arguments on the motion the district court
24 _____

25 ¹It is the nature of the order that makes about 14 of the 15 volumes of appendix
26 irrelevant to this appeal. Nevertheless, because the petition and the exhibits were some 2600
pages long, it appears to be properly included in the appendix. Much of the Opening Brief is,
also irrelevant as it does not address the order from which this appeal arises.

1 entered an interim order, ruling that all of the claims in the second petition would be dismissed
2 as being untimely, abusive and successive. AA Vol. 15, p. 2697-99. The court, however, allowed
3 the opportunity to present new claims, not previously available, based on some recent
4 developments in the law. Specifically, based on the holding in *Bejarano v. State*, 122 Nev. ____ ,
5 146 P.3d 265 (2006). The Court in that case held that a prior decision, *McConnell v. State*, 120
6 Nev. 1043, 102 P.3d 606 (2004) would be applied retroactively. *McConnell*, in turn, held that
7 where a murder conviction is based upon a felony murder theory, then the aggravating
8 circumstance based on that same felony murder is not available in the sentencing phase.

9 Babb filed a second supplement to the second petition, claiming that she is entitled to relief
10 due to those decisions. AA Vol. 15, p. 2688-91. The State moved to dismiss that second
11 supplement, contending that her arguments are incorrect as matter of law. AA Vol. 15 p. 2693-95.

12 On April 5, 2007, this Court heard oral arguments on that motion. AA Vol. 15, p. 2700 *et seq.*
13 Subsequently, the Court entered an order dismissing that claim as well. AA Vol. 15, p. 2272-74.
14 Each claim was dismissed on procedural grounds except the newest claim based on *McConnell*.
15 That was dismissed because Babb was not sentenced to death and thus was prejudiced.

16 II. STATEMENT OF THE FACTS

17 The facts relevant to this appeal are primarily presented above in the statement of the case.
18 The underlying facts involve the robbery and murder of taxi driver John Castro. The facts are
19 described in the decision from the appeal by the co-defendant, *Harte v. State*, 116 Nev. 1054, 13
20 P.3d 420 (2000).

21 III. ARGUMENT

22 The district court did not err in dismissing the second petition as it was untimely, abusive
23 and successive.

24 Each claim raised by Babb was untimely, by virtue of NRS 34.726. In addition, each claim
25 either was raised or could have been raised in an earlier proceeding. Thus they were barred by
26 NRS 34.810. Such bars can sometimes be overcome. The petitioner must show good cause and

1 prejudice. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001). Good cause requires a
2 demonstration that some impediment external to the defense prevented the petitioner from
3 complying with the pertinent procedural rules. 117 Nev. at 887, 34 P.3d at 537.

4 In the district court Babb attempted to overcome the bars by claiming that her first post-
5 conviction counsel had rendered ineffective assistance of counsel. However, as noted by the
6 district court, Babb was not sentenced to death and in a non-capital case there is no right to
7 counsel and thus no right to the effective assistance of post-conviction counsel. 117 Nev. at 887-
8 888, 34 P.3d at 537-38. Thus this claim, even if true, would not overcome the bars.

9 Babb also asserts that she has some sort of due process right to present whatever claims she
10 wishes, any time she wishes. That is incorrect. The post-conviction action described in chapter
11 34 is a creature of statute, existing only by the grace of the legislature.² Consequently, the
12 legislature is empowered to also create the procedural rules governing the action. *See Passanisi*
13 *v. Director, Prisons*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). Our legislature has not provided for
14 the rules espoused by Babb. On the contrary, this Court has consistently rejected the notion that
15 failure to raise a claim through ignorance of counsel, or ignorance of the petitioner, somehow
16 allows it to be raised later. *See Ford v. Warden*, 111 Nev. 872, 879-80, 901 P.2d 123, 127 (1995).
17 Claims are lost by failure to assert them in a timely manner, not just by explicit and purposeful
18 abandonment of the claims. *Id.*

19 The two justifications to excuse the procedural bars were insufficient as a matter of law.
20 Accordingly, this Court should affirm the order dismissing the second petition for writ of habeas
21 corpus.

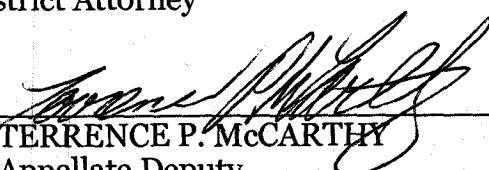
23 ²The traditional habeas corpus writ is much narrower than our statutory creature. In
24 such a case, the respondent may justify the imprisonment merely by showing a judgment of
25 conviction from a court of competent jurisdiction. *See Ex Parte Watkins*, 28 U.S. 193 (1830).
26 In Nevada's statutory post-conviction action, a judgment of conviction is not a defense to the
writ, but instead is a pre-requisite to review. *See NRS 34.724*. Thus our procedural device is
about as far removed from a traditional habeas corpus action as one can get.

1 IV. CONCLUSION

2 Because each claim was untimely, and each claim had been or could have been raised in an
3 earlier proceeding, and the petitioner did not plead any good cause to excuse the bar, the petition
4 was properly dismissed.

5 DATED: January 3, 2008.

6 RICHARD A. GAMMICK
7 District Attorney

8 By 
9 TERRENCE P. MCCARTHY
10 Appellate Deputy
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DATED this 3 day of January, 2008.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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DATED: January 3, 2008.

DRosse