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<p>ZANE MICHAEL FLOYD,</p> <p style="padding-left: 100px;">Appellant,</p> <p style="padding-left: 40px;">vs.</p> <p>E.K. McDANIEL, Warden of the NEVADA STATE PRISON at ELY, NEVADA; and CATHERINE CORTEZ MASTO, Attorney General of Nevada,</p> <p style="padding-left: 100px;">Respondents.</p>	}	<p style="text-align: right;">Electronically Filed Dec 06 2010 10:51 a.m. Tracie K. Lindeman</p> <p style="text-align: right; padding-top: 100px;">Case No. 51409</p>
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Appellant, Zane Michael Floyd, hereby petitions for rehearing of this Court's decision filed on November 17, 2010, affirming the denial of post-conviction habeas relief. Mr. Floyd timely petitions this Court for rehearing on the ground that it misapplied and failed to consider the statutory rules directly controlling a dispositive issue in this cause. See NRAP 40(a)(1), 40(c)(2)(B).

This Court should grant rehearing because its ruling that Mr. Floyd’s “claims of ineffective assistance of appellate counsel were untimely and could have been raised previously,” erroneously conflates Mr. Floyd’s claim against prior post-conviction counsel with his claim against direct appeal counsel. While Mr. Floyd’s claim against direct appeal counsel requires a showing of cause and prejudice to overcome procedural bars, Mr. Floyd’s claim against prior post-conviction counsel was timely raised. See NRS 34.726; NRS 34.810.

1. Mr. Floyd's claim that prior post-conviction counsel was ineffective was timely raised.

Mr. Floyd was entitled to receive the effective assistance of his prior post-conviction counsel since his initial capital habeas petition was filed after January 1,

1 1993. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). Mr. Floyd
2 timely alleged his claim against prior post-conviction counsel within eight months of
3 learning that counsel failed to investigate and plead several meritorious claims.¹

4 a. Mr. Floyd's claim that prior post-conviction counsel was
5 constitutionally ineffective is timely under NRS 34.726.

6 This Court ruled that NRS 34.726 "is not a statute of limitations." Glauner v.
7 State, 107 Nev. 482, 485 n.3, 813 P.2d 1001, 1003 n.3. This Court has consistently
8 and uniformly held that the tolling of a limitations period is appropriate until the
9 "plaintiff discovers or should have discovered all of the necessary facts" giving rise
10 to the claim. Siragusa v. Brown, 114 Nev. 1384, 1393, 971 P.2d 801, 807.² Mr.

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12 ¹ This Court issued Mr. Floyd's Remittitur on March 15, 2006, after denying
13 his initial petition. Mr. Floyd initiated federal proceedings on April 14, 2006. Mr.
14 Floyd's claim against prior post-conviction counsel was revealed in and about
15 October, 2006, as a result of current counsels' investigation. Mr. Floyd filed a
16 federal amended petition on October 23, 2006. Once Mr. Floyd's federal amended
17 petition was filed, the state's delay in responding significantly contributed to the
18 failure of the federal court to order a return to state court until April 25, 2007.
19 See, e.g., King v. Bell, 378 F.3d 550 (6th Cir. 2004) (refusing to hold defendant
20 accountable for delay caused by government). Mr. Floyd's successive state court
21 petition was filed on June 8, 2007, within fourteen days of the federal court's
22 order. The instant petition, therefore, was filed less than fifteen months after the
23 remittitur was issued, and within eight months of learning of Mr. Floyd's
24 meritorious claim that prior post-conviction counsel was ineffective.

25 ² See, e.g., Rickard v. Montgomery Ward & Co., 120 Nev. 493, 96 P.3d 743
26 (2004) (bankruptcy stay tolled five year limitations period for prosecuting cause of
27 action); Siragusa v. Brown, 114 Nev. 1384, 971 P.2d 801 (1999) (remanding for
28 evidentiary hearing to determine whether plaintiff "failed to exercise reasonable
diligence in discovering" defendant's role in civil conspiracy); Grayson v. State
Farm Mutual Auto. Ins., 114 Nev. 1379, 1381-83, 971 P.2d 798, 799-800 (1999)
(providing for tolling of limitations period until plaintiff learned that insurance
coverage was insufficient); Kopicko v. Young, 114 Nev. 1333, 1336-38, 971 P.2d
789, 791-92 (1998) (providing for tolling of limitations period until plaintiff

1 Floyd clearly could not have raised his claim that prior post-conviction counsel was
2 constitutionally ineffective prior to or during the time that prior post-conviction
3 counsel represented him. Prior post-conviction counsel's mere presence prevented
4 Mr. Floyd from filing such a claim. E.g., Manning v. Foster, 224 F.3d 1129, 1135
5 (9th Cir. 2000). Furthermore, Mr. Floyd did not have a factual basis for claiming that
6 prior post-conviction counsel was ineffective prior to the conclusion of that
7 representation. Cf., e.g., Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145
8 (2004) (claim of ineffective assistance of counsel premature if raised before the
9 conclusion of the direct appeal).

10 Mr. Floyd complied with NRS 34.726 by filing his claim that prior post-
11 conviction counsel was ineffective after the conclusion of counsel's representation
12 and within eight months of learning of the existence of the claim. After the
13 conclusion of prior post-conviction proceedings on March 15, 2006, current counsel
14 conducted a substantial investigation of constitutional issues both within and outside
15 of the direct appeal record. In October 2006, current counsel's investigation revealed
16 that prior post-conviction counsel was ineffective for failing to plead numerous
17 meritorious claims. The fruits of Mr. Floyd's investigation are found throughout his
18 instant petition. See 11 APP 2178 - 12 APP 2392. Mr. Floyd was extremely diligent
19 in investigating and presenting to the state district court, within eight months of
20 discovery, his claim that prior post-conviction counsel was ineffective. The doctrine
21 of statutory tolling, therefore, requires this Court to rule that Mr. Floyd's claim that
22 prior post-conviction counsel was ineffective was timely as a matter of state and

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26 sustained legal damages); Allen v. Webb, 87 Nev. 261, 485 P.2d 677 (1971)
27 (failure to record trust deed tolled limitations period until plaintiff "discovered or
28 should have discovered their damage").

1 federal³ constitutional law. Contrary to this Court's ruling, the district court,
2 therefore, did not err in granting Mr. Floyd an evidentiary hearing on the issue of
3 whether prior post-conviction counsel was ineffective.

4 b. Mr. Floyd's claim that prior post-conviction counsel was
5 ineffective is also timely under the doctrine of equitable tolling.

6 Separate from the *statutory* tolling requirements of NRS 34.726, controlling
7 state law independently dictates that Mr. Floyd's Petition should be *equitably* tolled.
8 The appropriateness of equitable tolling is dictated by "the diligence of the claimant;
9 the claimant's knowledge of the relevant facts; . . . the prejudice to [the opposing
10 party] that would actually result from delay during the time that the limitations period
11 is tolled; and any other equitable considerations appropriate in the particular case."
12 Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). As
13 previously noted, Mr. Floyd was extremely diligent in investigating and raising
14 within eight months the allegation that he was prejudiced by prior post-conviction
15 counsel's constitutional ineffectiveness. All other equitable tolling considerations

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17 ³ Mr. Floyd's petition would also be considered timely under the more
18 stringent federal timeliness standard of 28 U.S.C. § 2244(d)(1)(D) which assesses
19 the "date on which the factual predicate of the claim or claims presented could
20 have been discovered through the exercise of reasonable diligence." See, e.g.,
21 Hasan v. Galaza, 254 F.3d 1150, 1154, 1155 (9th Cir. 2001) (holding that claim
22 was timely raised when petitioner "did not discover the factual predicate of his
23 ineffective assistance of counsel claim, so that the clock did not start to tick, until
24 he learned" of the grounds for the claim) ("The reasoning is analogous to holding
25 that a tort claim accrued when the plaintiff had knowledge of her injury but before
26 she had discovered the cause (or could have done so in the exercise of reasonable
27 diligence."); Moore v. Knight, 368 F.3d 936, 939-40 (7th Cir. 2004) (petitioner's
28 claim held timely when he did not have prior information about ex parte contacts
between the trial court and the jury); Williams v. Knowles, 2006 WL 845734, at
*5 (E. D. Cal.) (noting that "the clock starts when a petitioner understands the
facts themselves").

1 militate in favor of tolling.

- 2 c. Mr. Floyd's claim that prior post-conviction counsel was
3 constitutionally ineffective is properly raised pursuant to NRS
34.810(1)(b)(2).

4 The instant successive petition was the only vehicle for Mr. Floyd to raise his
5 allegation that prior post-conviction counsel was ineffective.⁴ State law cannot create
6 a right to the effective assistance of post-conviction counsel without providing a
7 forum for a capital petitioner to vindicate that right. The only forum to vindicate that
8 right is in a successive post-conviction petition. This Court clearly erred in ruling
9 that Mr. Floyd's claim that prior post-conviction counsel was ineffective was barred
10 under NRS 34.810(1)(b)(2) because it was raised in a successive petition.

- 11 2. Mr. Floyd's claim that prior post-conviction counsel was ineffective is
12 meritorious, and provides the cause and prejudice necessary to excuse
13 applicable procedural default rules in connection with his remaining
claims.

14 Mr. Floyd's allegation that prior post-conviction counsel was ineffective
15 supplies the "good cause" and "prejudice" necessary under controlling state and
16 federal constitutional law for a merits review of his entire petition. E.g., Crump, 113
17 Nev. at 304-05, 934 P.2d at 254. Although Mr. Floyd's instant petition, filed more
18 than one year after the conclusion of his direct appeal, contains new claims which
19 could have been previously raised, NRS 34.726 provides that:

20 For the purposes of this subsection, good cause for delay
exists if the petitioner demonstrates to the satisfaction of
21 the court:

- 22 (a) That the delay is not the fault of the petitioner; and
23 (b) That dismissal of the petition as untimely will
unduly prejudice the petitioner.

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25 ⁴ Although Mr. Floyd's ability to allege the ineffective assistance of counsel
26 is not limitless, see State v. Eighth Judicial District Court (Riker), 121 Nev. 225,
27 234-37, 112 P.3d 1070, 1077 (2005), the instant proceedings is his first
opportunity to challenge the ineffectiveness of prior post-conviction counsel.

1 NRS 34.726(1). The statute’s plain meaning requires that this Court consider whether
2 the delay in filing Mr. Floyd’s new claims was his “fault.” The failure of prior post-
3 conviction counsel to present the new claims contained in the instant petition clearly
4 was not Mr. Floyd’s “fault.” See e.g., Bennet v. State, 111 Nev. 1099, 1103, 901 P.2d
5 676, 679 (1995). The use of the term “the fault of the petitioner” shows that the
6 legislative intent of NRS 34.726(1)(a) was that petitioners, as opposed to prior
7 counsel, must act or fail to act to cause the delay.⁵ To be at fault, a party must have
8 acted in a manner that goes beyond negligence because “[f]ault contemplates more
9 than mere negligence, and includes intentional acts.” Slaked v. Farmers Ins.
10 Exchange, 5 P.3d 280, 285 (Colo. 2000).⁶ In Pellegrini v. State, 117 Nev. 860, 36
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12 ⁵ The legislature’s explicit adoption of a definition of “cause” in NRS
13 34.726(1), which is different from the judicially-adopted definition of “cause” in
14 NRS 34.810, indicates the legislative intent to adopt the different, explicit
15 definition prescribed by this section. E.g., Utter v. Casey, 81 Nev. 268, 274, 401
16 P.2d 684, 687-88 (1965).

17 ⁶ See, e.g., NRS 104.1201(2)(q) (“‘Fault’ means wrongful act, omission,
18 breach or default”); NRS 104A.2103(1)(f) (“‘Fault’ means wrongful act, omission,
19 breach or default”); NRS 128.105(2) (fault of parent or parents can be established
20 by proving abandonment, neglect, parental unfitness, failure of parental
21 adjustment, risk of serious physical, mental or emotional injury to child, or token
22 efforts by the parents(s)); In re Termination of Parental Rights as to N.J., 116 Nev.
23 790, 801, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard
24 in termination of parental rights cases; best interests of child necessarily include
25 considerations of parental fault and/or conduct and both best interests of the child
26 and parental fault must be proven by clear and convincing evidence); Hill v. State,
27 955 S.W.2d 96, 100 (Tex. Crim. App. 1997) (“[t]he word “fault” implies
28 wrongdoing; “[f]ault” is defined as “a weakness in character, failing imperfection,
impairment, . . . misdemeanor . . . mistake . . . responsibility for something
wrong”) (citation omitted); State v. Jackson, 94 Ariz. 117, 122, 382 P.2d 229, 232
(Ariz. 1963) (“[f]ault implies misconduct not lack of judgment” (citation
omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the

1 P.3d 519 (2001), this Court held that counsel’s failure to act cannot be considered the
2 petitioner’s fault under NRS 34.726:

3 For example, in Bennett v. State, 111 Nev. 1099, 1103, 901
4 P.2d 676, 679 (1995), we concluded that good cause
5 excused the procedural bar at NRS 34.726(1) for untimely
6 filing of a second petition where the first petition had been
7 timely filed, but not pursued by counsel, and any delay in
8 filing the second petition was not the petitioner’s fault.

9 Pellegrini, 34 P.3d at 526 n. 10; see also Bennett, 111 Nev. at 1103, 901 P.2d at 679
10 (delay in filing supplemental petition occurred “only after counsel was appointed”).
11 This Court has never conducted any semblance of a statutory construction analysis
12 of NRS 34.726(1)(a), or considered the plain meaning of the statute referring to the
13 Petitioner’s “fault,” which is different from the judicially created “impediment
14 external to the defense” standard of good cause under NRS 34.810. Mazzan v.
15 Whitley, 112 Nev. 838, 841-42, 921 P.2d 920, 921-22 (1996) (citing Murray v.
16 Carrier, 477 U.S. 478, 488 (1986)).

17 Mr. Floyd’s timely claim that prior post-conviction counsel was ineffective in
18 failing to include meritorious claims in his initial petition establishes the requisite
19 cause and prejudice to excuse the procedural defaults otherwise applicable to his
20 remaining claims. A plethora of information was available to prior post-conviction
21 counsel supporting the contention that Mr. Floyd suffered from organic brain damage
22 caused by fetal alcohol spectrum disorder (FASD). This information included a
23 report from Dr. Maria J. Cardle, Ph.D., dated January 20, 25, 1989, indicating that
24 Mr. Floyd had been diagnosed as being neurologically impaired when he was only
25 thirteen. See 11 APP 2178 - 12 APP 2392; 37 APP 7330-39. Despite the existence

26 determination of whether a Social Security recipient is “at fault” for having
27 received an overpayment “is highly subjective, highly dependent on the interaction
28 between the intentions and state of mind of the claimant and the peculiar
circumstances of his situation”).

1 of this information, prior counsel completely failed to investigate FASD, inadequately
2 investigated Mr. Floyd's organic brain damage, and failed to plead Mr. Floyd's FASD
3 or organic brain damage in his initial post-conviction petition.

4 In fact, prior post-conviction counsel failed to set forth any extra record
5 evidence or claims. Instead, prior post-conviction counsel alleged that Mr. Floyd had
6 been deprived of the effective assistance of counsel because, among other things, trial
7 counsel failed to request a penalty phase jury instruction correctly defining the use
8 of "character" evidence and failed to strike overlapping aggravating circumstances.
9 There were no aggravating circumstances, however, that could even remotely be said
10 to be overlapping and there was no "character" evidence presented.

11 The main purpose of post-conviction litigation is to establish facts outside of
12 the record that would have a reasonable possibility or probability of changing the
13 result. See Bennett, 111 Nev. at 1108, 901 P.2d at 682; see generally Strickland v.
14 Washington, 466 U.S. 668, 693-94 (1984). There can be little doubt that Mr. Floyd's
15 first state petition did not accomplish either of these objectives. Through current
16 counsels' informal investigation, several extra-record claims were developed that
17 prior post-conviction counsel could have easily identified had he attempted an extra-
18 record investigation. Investigating extra-record evidence is always required to
19 demonstrate the prejudicial ineffectiveness of trial counsel. Strickland, 466 U.S. at
20 699-700; Bennett, 111 Nev. at 1108, 901 P.2d at 682; Wilson v. State, 105 Nev. 110,
21 114-15, 771 P.2d 583 (1989); In re Marquez, 1 Cal.4th 584, 604, 822 P.2d 435, 446
22 (1992) ("To determine whether prejudice has been established, we compare the actual
23 trial with the hypothetical trial that would have taken place had counsel competently
24 investigated and presented the . . . defense. [Citation]."); Nevada Indigent Defense
25 Standards of Performance, Standard 2-19(e)(4) (Duty of post-conviction counsel to
26 "continue an aggressive investigation of all aspects of the case") (2008); see also Ford

1 v. Warden, 111 Nev. 872, 881, 901 P.2d 123 (1995) (claim that client’s mental state
2 prevented counsel from adequately litigating habeas proceeding rejected because
3 counsel did not raise any claims “not ascertainable from records . . . reviewed”).

4 Prior post-conviction counsel also failed to meet state and federal constitutional
5 due process standards when he did not conduct tasks necessary to adequately
6 represent Mr. Floyd during his habeas proceeding. Even under the due process “farce
7 or sham” test, this Court has held that counsel’s representation can violate the federal
8 constitutional right to the effective assistance of counsel:

9 While Nevada law . . . will recognize the ineffectiveness of counsel only
10 when the proceedings have been reduced to a farce or pretense, Warden
11 v. Lischko, 90 Nev. 221, 223, 523 P.2d 6, 7 (1974), it is still recognized
12 that a primary requirement is that counsel ‘. . . conduct careful factual
13 and legal investigations and inquiries with a view to developing matters
14 of defense in order that he may make informed decisions on his client’s
15 behalf both at the pleading stage . . . and at trial . . .’ In re Saunders, 2
16 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970). If
17 counsel’s failure to undertake these careful investigations and inquiries
18 results in omitting a crucial defense from the case, the defendant has not
19 had that assistance to which he is entitled. In re Saunders, *supra*; People
20 v. Stanworth, 11 Cal.3d 588, 114 Cal.Rptr. 250, 522 P.2d 1058 (1974).

21 Jackson v. Warden, 91 Nev. 430, 432-33, 537 P.2d 473 (1975) (remanding for
22 hearing where petition alleged counsel advised guilty plea without conducting any
23 investigation); accord Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409, 413 (1984)
24 (counsel’s representation fell below “farce or sham” standard, where counsel did not
25 obtain or present any mitigating evidence but berated jury for guilty verdict); Bean
26 v. State, 86 Nev. 80, 92-93, 465 P.2d 133, 141 (1970) (pre-Strickland “farce or sham”
27 test of counsel’s effectiveness based on due process). Even under the lenient
28 standard, prior post-conviction counsel’s failure to inquire into extra-record issues
violated Mr. Floyd’s basic right to due process of law under the state and federal
constitutions, as well as his right to effective assistance of counsel pursuant to Crump.

The newly discovered mitigation evidence was not presented at trial, and
therefore was not cumulative. This evidence would have weighed against the

1 imposition of the death penalty, and its omission was prejudicial. See 11 APP 2178 -
2 12 APP 2392. The other new claims presented throughout the instant petition are
3 meritorious. There was no strategic legal reason for prior post-conviction counsel's
4 failure to investigate, develop and plead the claims in the instant petition. See 37 APP
5 7330-39.

6 For the foregoing reasons, Mr. Floyd respectfully requests that this Court grant
7 his petition for rehearing and issue a writ of habeas corpus vacating his conviction
8 and death sentence.

9 Dated this 6th day of December, 2010.

10 Respectfully submitted,
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