IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DAMON RIPPO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 53626

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Answer to Petition for Rehearing in obedience to this Court's Order filed on August 27, 2018. This answer is based on the following points and authorities and all papers and pleadings on file herein.

Dated this 11th day of September, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
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POINTS AND AUTHORITIES

On August 2, 2018, in a published Opinion, this Court affirmed in part, reversed in part, and remanded the denial of an untimely and successive postconviction petition for writ of habeas corpus in a death penalty case. Rippo v. State, 134 Nev.Adv.Op. 53 (Aug 2, 2018) (hereinafter referred to as "Opinion"). This Opinion followed the United States Supreme Court's summary grant of certiorari which vacated and remanded this Court's prior disposition of the case. Rippo v. State (Rippo III), 132 Nev. 95, 368 P.3d 729 (2016), cert. granted, judgment vacated by Rippo v. Baker (Rippo IV), 580 U.S. ___, 137 S.Ct. 905 (2017). On August 27, 2018, Rippo petitioned this Court for rehearing of its latest Opinion. On the same date, this Court filed an Order directing the State to answer the petition within 15 days.

The court may consider rehearings in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2). Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. NRAP 40(c)(1).

In his petition, Rippo argues that this Court's Opinion violates the United States Supreme Court's mandate and overlooks or misapprehends the facts and law in its discussion of the judicial bias claim. Having prevailed both on the certiorari petition and on this Court's recent Opinion reversing and remanding for an evidentiary hearing, Rippo is still not satisfied with the favorable outcome and seeks rehearing to further enhance his position and arguments on remand to the trial court below. Rippo requests this Court amend its Opinion by deleting everything the majority said regarding the judicial bias claim and simply remand the case to the district court for further proceedings without further guidance on the judicial bias claim.

At issue here is the preservation of Nevada's procedural bars as an adequate and independent state law ground for barring consideration of untimely and successive habeas petitions on the merits. Time and again this Court's loose language has undermined application of those bars and needlessly exposed itself to federal review and criticism. Despite this Court's repeated insistence that it uniformly and consistently applies Nevada's procedural default rules, see e.g., Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), federal courts have found otherwise. See e.g., McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995); Petrocelli v. Angelone, 248 F.3d 877, 886 (9th Cir. 2001); Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002)

(finding NRS 34.810 to be inadequate to support a procedural default defense in federal court). The granting of certiorari in the present case is but the latest example of this Court's unfortunate and unnecessary opining upon the merits of federal constitutional claims which it then deems are procedurally defaulted under state law. But this Court cannot have it both ways. Procedural default and a ruling on the merits are mutually exclusive outcomes. When this Court purports to reach the merits of constitutional claims or invoke law-of-the-case as part of the procedural default analysis, then federal courts will treat it as a decision on the merits and will bypass state bars. The state procedural default rules are then rendered a nullity because they are reduced down to nothing more than a ruling on the merits of the federal constitutional claim. That is what happened here in the Rippo case:

> *The [Nevada Supreme] court further relied on its bias holding to determine that Rippo had not established cause and prejudice to overcome various state procedural bars. 132 Nev., at , 368 P. 3d, at 745. Because the court below did not invoke any state-law grounds "independent of the merits of [Rippo's] federal constitutional challenge," we have jurisdiction to review its resolution of federal law. Foster v. Chatman, 578 U.S. ___ (2016) (slip op., at 8).

Rippo v. Baker, *supra*. The only reason the United States Supreme Court was able to reverse and remand this Court's Opinion in Rippo III is because this Court held the judicial bias claim was procedurally barred, but then incongruously reached the merits of the judicial bias claim. By definition, a procedurally barred claim is one that is ***not*** entertained on the merits. Application of a state procedural default rule

which includes an analysis of the merits of the defaulted claim is as good as having no state procedural bar at all. "[W]ithout such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The issue is further illustrated by this Court's flawed analysis of procedurally defaulted Brady claims in other cases, where this Court arguably has reduced cause and prejudice to nothing more than the merits of the federal Brady claim itself:

> Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. [T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material. To raise a claim in an untimely and/or successive post-conviction habeas petition, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars. Good cause and prejudice parallel the second and third Brady components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.

State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) [internal quotes removed]. The effect of equating cause and prejudice of the procedural bars with the merits of federal claims has been to utterly nullify our procedural bars in federal court:

> In this case, the Nevada Supreme Court explicitly relied on its federal Brady analysis as controlling the outcome of its state procedural default analysis . . . . As the Nevada Supreme Court explained, in the context of Brady claims, the merits of the claim dovetail exactly with the cause-and-prejudice analysis. Thus, its decision did not rest on an independent and adequate state ground and does not bar federal habeas review.

Cooper v. Neven, 641 F.3d 322, 332-33 (9th Cir. 2011); see also Nitschke v. Belleque, 680 F.3d 1105, 1110-11 (9th Cir. 2012) cert. denied, 133 S. Ct. 450, 184 L. Ed. 2d 276 (U.S. 2012). If this Court persists in equating cause and prejudice with the merits of the federal claim, then the state procedural bars become meaningless. That is why we now find ourselves litigating the merits of a federal constitutional claim some 22 years after the trial, which is something the legislature wanted to avoid by enacting procedural default rules.

In answer to the certiorari petition in the present case[1], the State's prosecutor argued that this Court in Rippo III had denied the judicial bias claim as procedurally defaulted without good cause and prejudice which should have been an adequate and independent state law basis to preclude certiorari review of the merits of the federal constitutional claim. See Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546 (1991); Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877 (2002). The State's prosecutor also argued that to the extent this Court's discussion of the judicial bias claim in any way could be construed as a ruling on the merits, such was at most an

[1] The State has no objection to Rippo's motion to take judicial notice of the certiorari petition and brief in opposition.

alternative and unnecessary ruling in light of the primary holding of the case that Rippo had failed to establish ineffective assistance of first postconviction counsel as good cause to overcome the state procedural default. See Sochor v. Florida, 504 U.S. 527, 534 n.*, 112 S.Ct. 2114, 2120, n.* (1992) (state supreme court made requisite "plain statement that petitioner's claim was procedurally barred" by stating that "claim was not preserved for appeal" and by citing case requiring preservation of claims, even though state court went on to reject merits "in the alternative"); Bailey v. Nagle, 172 F.3d 1299, 1304 (11th Cir. 1999) (although state court opinion "could have been more explicit" about its reasoning, ruling rested on procedural ground and analysis of merits was merely alternative ground for decision).

Unfortunately, this Court's loose language discussing the merits of the judicial bias claim could not be overcome and it opened the door to once again have a federal court disregard our state procedural rules and reach the merits of a claim that this Court intended to be procedurally barred under state law. Rippo relied upon Foster v. Chatman where the Supreme Court found it had jurisdiction to grant certiorari on a claim of a Batson violation occurring at trial that had been renewed in state habeas and denied based on res judicata. Foster v. Chatman, ___ U.S. ___, 136 S. Ct. 1737 (2016). When a state court declines to review the merits of a petitioner's claim solely on the ground that it has done so already, it creates no bar to federal habeas review.

Cone v. Bell, 556 U.S. 449, 466-67, 129 S.Ct. 1769, 1781 (2009); see also Wellons v. Hall, 558 U.S. 220, 130 S. Ct. 727 (2010).

Because this Court clearly intended to procedurally bar the judicial bias claim, then on remand from the Supreme Court the only thing this Court needed to do was remove from Rippo III any discussion of the merits of the judicial bias claim and re-publish an amended Opinion consistent with its original intent of applying state procedural bars. Any discussion of prejudice (ie., the merits) of the judicial bias claim was surplussage and unnecessary to the determination that there was no good cause as explained in the State's Brief in Opposition filed with the U.S. Supreme Court. Opining upon the merits served only to "renew" the judicial bias claim as if there was no procedural bar at all. If this Court had simply affirmed the denial of the judicial bias claim as procedurally barred as intended, then there would have been no federal question presented and no jurisdiction for certiorari.

Other courts in Virginia, California, and Florida, among others, have reaffirmed their prior holdings on remand from the United States Supreme Court, after reconsideration of their prior decisions. Jones v. Commonwealth (Jones II), 795 S.E.2d 705 (Va. 2017); People v. Barba (Barba IV), 155 Cal. Rptr. 707, 711 (Cal. Dist. Ct. App. 2013); Powell v. State (Powell II), 66 So.3d 905, 909 (Fla. 2011); see also, e.g., People v. Bacigalupo, 862 P.2d 808, 819 (Cal. 1993) (re-affirming on remand its prior decision in People v. Bacigalupo, 820 P.2d 559 (Cal. 1991) after

reconsideration in light of Stringer v. Black, 503 U.S. 222 (1992); In re Linehan, 594 N.W.2d 867 (Mi. 1999) (re-affirming Linehan III, 557 N.W.2d 171 (Mi. 1996) in light of Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997)).

The United States Supreme Court, in Jones v. Virginia, __ U.S. __, 136 S. Ct. 1358 (2016), vacated and remanded Jones v. Commonwealth (Jones I), 763 S.E.2d 823 (Va. 2014), for reconsideration in light of Montgomery v. Louisiana, 577 U.S. __, 136 S. Ct. 718 (2016). In Jones II, the Virginia Supreme Court reinstated its holding in Jones I, again affirming the denial of Jones' motion to vacate after consideration of the factors set out in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012).

Likewise, the United States Supreme Court's decision in Florida v. Powell, __ U.S. __, 130 S. Ct. 1195 (2010), vacating and remanding Powell v. State (Powell I), 969 So. 2d 1060, 1063 (Fla. 2007), found that Powell I had not set forth independent and adequate state grounds for its decision, and ruled on the merits of Powell's federal Miranda claim. However, the High Court also noted, in vacating and remanding, that "nothing in our decision today, we emphasize, trenches on the Florida Supreme Court's authority to impose, based on the State's Constitution, any additional protections against coerced confessions it deems appropriate." 130 S. Ct. at 1203 (emphasis added). In Powell II, although it opted to follow the High Court's decision, the Florida Supreme Court recognized that, "pursuant to basic federalist

principles," it retained the authority to re-affirm its holding in Powell I under the Florida Constitution's Fifth Amendment protections, if it so chose. 66 So.3d at 909.

The California Court of Appeal for the Second District affirmed a case on remand from the United States Supreme Court *three times*, after reconsideration in light of Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009), Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705 (2011), and Williams v. Illinois 567 U.S. 50, 132 S. Ct. 2221 (2012), respectively. In affirming for the third time, the California Court of Appeal noted that, in Barba II, "because [its] entire decision in Barba I had been vacated, [it] restated [its] discussion as to the other issues that had been before [it]." Barba IV, 155 Cal. Rptr. at 711. Likewise, as the United States Supreme Court had vacated the California court's analysis and holding from Barba III, the court restated its analysis and holding from Barba I, Barba II, and Barba III as to the issues not implicated by Williams. 155 Cal. Rptr. at 711.

As in Barba IV and Powell II, this Court may indeed restate, re-affirm, and reconsider its prior opinion from Rippo III as to the issues not decided by the United States Supreme Court – namely, application of state procedural bars. When a case has been decided by the Supreme Court of the United States on appeal, and remanded, whatever was before the High Court and disposed of is considered law of the case. E.g., Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 428, 98 S. Ct. 702, 703-04 (1978); In re Sanford & Tool Co., 160 U.S. 247, 255-56, 16 S. Ct. 291, 293

(1895). However, any matters left open by the mandate of the Supreme Court may be considered and decided by the lower court on remand. Id. In the present case, the Supreme Court's remand Order serves only to vacate the prior judgment and remands the case "for further proceedings not inconsistent with this opinion." Because the U.S. Supreme Court did not decide the merits of any federal claim, this Court is not bound by any law of the case and has simply been instructed to reconsider the issue in light of the correct standard of law.

Also, this Court's recent Opinion which remands for an evidentiary hearing is not itself a final order subject to further certiorari review at this time. It is only an interim and non-final decision which may be rendered moot or may be further clarified following the evidentiary hearing. Supreme Court review of state court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. §1257(a). Rippo's claim that the remedy for misconstruing the United States Supreme Court's mandate is a renewed petition for writ for certiorari (Petition at 16-17), appears premature as there is no jurisdiction for further certiorari review until there has been a final determination by this Court. Remand for an evidentiary hearing is not a final decision.

In answer to the grant of certiorari this Court should have eliminated the federal question altogether by striking language pertaining to the merits of the

judicial bias claim and barring the claim under independent and adequate state law procedural grounds. But that did not happen. Instead, on remand this Court has now published Rippo v. State, 134 Nev.Adv.Op. 53 (Aug 2, 2018), which perpetuates the problem by still intertwining application of our state procedural bars with the merits of the federal judicial bias claim and remanding for an evidentiary hearing. The State's interest here is not so much the outcome of this particular case. If this Court wants to remand for an evidentiary hearing then by all means do so, but do so in a way that does not further undermine our state procedural bars and destroy our ability to defend the integrity of our criminal convictions in federal court. Either procedurally bar a claim or review it on the merits, but do not attempt to do both at the same time.

WHEREFORE, for reasons altogether different than those advanced by Rippo, the State agrees that rehearing is warranted in order to amend some of the language in the Opinion which purports to comingle procedural default rules with the merits of the federal claim.

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Dated this 11th day of September, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ Steven S. Owens*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points, contains 2,869 words and 229 lines of text.

Dated this 11th day of September, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 11, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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SSO//ed