IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 53626

FILED

DEC 07 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING AND AMENDING OPINION

This is an appeal from a district court order denying appellant Michael Damon Rippo's second postconviction petition for a writ of habeas corpus. After we affirmed the district court order, *Rippo v. State (Rippo III)*, 132 Nev. 95, 368 P.3d 729 (2016), the United States Supreme Court granted Rippo's petition for a writ of certiorari, vacated our decision in *Rippo III*, and remanded the case to us "for further proceedings not inconsistent with [the Court's] opinion," *Rippo v. Baker (Rippo IV)*, 137 S. Ct. 905 (2017). On remand, we affirmed in part and reversed in part, remanding the case to the district court for an evidentiary hearing as to whether Rippo could prove ineffective assistance of postconviction counsel with respect to his judicial-bias claim and thereby establish cause and prejudice to excuse the procedural defaults that otherwise applied to his untimely and successive petition. *Rippo v. State (Rippo V)*, 134 Nev., Adv. Op. 53, 423 P.3d 1084 (2018). Rippo now seeks rehearing of our decision in *Rippo V*. Having reviewed the petition for rehearing and the State's response, we conclude that rehearing is not warranted. NRAP 40(c). Although we have considered

and reject all of the arguments in the rehearing petition, a few of them warrant some discussion and minor amendments to our opinion in *Rippo V*.[1]

Rippo's primary argument for rehearing is that this court violated the Supreme Court's mandate in *Rippo IV*. We disagree. The Supreme Court held in *Rippo IV* that we asked the wrong question with respect to the merits of Rippo's judicial-bias claim, directing us to the correct inquiry: "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." 137 S. Ct. at 906-07. We made that inquiry on remand in *Rippo V*. 134 Nev., Adv. Op. 53, 423 P.3d at 1101-02. Rippo seems to take issue with the context in which we made that inquiry—the applicable procedural defaults and whether Rippo had demonstrated good cause and prejudice. But that is exactly the context in which we considered the merits of the judicial-bias claim in *Rippo III*—as we explained in *Rippo III*, we addressed the merits of the judicial-bias claim only to the extent they were relevant to Rippo's reliance on ineffective assistance of postconviction counsel as good cause and prejudice to excuse the procedural defaults. 132 Nev. at 104-119, 368 P.3d at 735-45 (discussing procedural defaults in general and ineffective assistance of postconviction counsel as cause and prejudice to excuse procedural defaults, and applying that discussion to procedurally defaulted judicial-bias claim). That is the same context in which the judicial-bias claim is addressed in *Rippo V*.

Rippo suggests that our adherence to the procedural-default context in *Rippo V* is contrary to the Supreme Court's conclusion that it had

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[1]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

jurisdiction to review our decision in *Rippo III* with respect to the merits of the judicial-bias claim. We are not convinced that the two positions are inconsistent. The Supreme Court concluded it had jurisdiction because we had not invoked any state-law grounds that were *independent* of the merits of the federal constitutional challenge at issue (judicial bias). *Rippo IV*, 137 S. Ct. at 907 n*. That conclusion is consistent with the relationship between the merits of the federal constitutional challenge at issue (judicial bias) and the relevant exception to the law-of-the-case doctrine and the alleged cause and prejudice to excuse the procedural default under NRS 34.810(2), as explained in both *Rippo III* and *V*. Our application of the state law bars depended on a federal constitutional ruling. Not surprisingly, "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the [State] court's holding is not independent of federal law." *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)), *cited in Rippo IV*, 137 S. Ct. at 907 n*. That the Supreme Court thus has jurisdiction to review a State court's resolution of federal law in that circumstance does not mean that the state law bar cannot be applied.[2] We therefore are not convinced that *Rippo IV*

[2]The State suggests in its response to the rehearing petition that our recognition that in some instances the application of a state law bar depends on a federal constitutional ruling renders the state procedural bars a "nullity." While the State may be frustrated that this relationship means the Supreme Court can review our resolution of federal law, we fail to see how this renders the state procedural bars a nullity. Faithfully applying state procedural bars does not mean that we can just ignore the fact that sometimes their application, particularly the good cause and prejudice to excuse them, may depend on federal constitutional law. This is nothing

required us to ignore the context in which the federal constitutional ruling arose in *Rippo III*—the application of state law bars. Instead, all that *Rippo IV* required was that we ask the correct question when evaluating the merits of the judicial-bias claim (a federal constitutional ruling) on which the state law bars depended. We did that in *Rippo V*.

Rippo also argues that we overlooked or misapprehended the facts when we determined that first postconviction counsel could not have asserted that trial or appellate counsel were ineffective with respect to the judicial-bias claim and therefore an evidentiary hearing was not required as to postconviction counsel's omission of those ineffective-assistance claims. As to trial counsel, Rippo points to no specific factual allegations—meaning potential witness testimony or other evidence—to support a conclusion that trial counsel's performance was deficient—e.g., that trial counsel knew about the sting operation or that competent counsel would have investigated further and uncovered information about the district attorney's involvement in the sting operation. Absent such factual allegations, he would not be entitled to an evidentiary hearing as to whether postconviction counsel could have asserted that trial counsel provided ineffective assistance as to the judicial-bias claim. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (explaining that specific

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new. In fact, the example that the State particularly laments in its response—the relationship between the cause and prejudice to excuse a state procedural bar and two of the elements of a defaulted claim under *Brady v. Maryland*, 373 U.S. 83 (1963)—has been part of our jurisprudence for almost two decades. *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (relying on *Strickler v. Greene*, 527 U.S. 263 (1999)). Regardless, the State has offered no alternative analysis.

factual allegations required for a defendant to be entitled to an evidentiary hearing include a factual background such as the names of witnesses and descriptions of their testimony or other sources of evidence showing entitlement to relief). Nor is it clear that the district court made a contrary factual finding that "trial counsel was remiss in failing to adequately raise a judicial bias claim disproving the false statements of the State and the trial judge," as asserted in the rehearing petition. Instead, the district court's order states that "trial counsel knew and alleged" that the State was involved in the sting operation.[3] As to the omitted appellate counsel claim, Rippo argues that we overlooked the fact that appellate counsel could have filed a motion for a limited remand under former SCR 250(IV)(H) to develop the facts about the sting operation. But appellate counsel *did* request a remand in the reply brief on direct appeal. This court rejected the request, *Rippo v. State (Rippo I)*, 113 Nev. 1239, 1250 n.3, 946 P.2d 1017, 1024 n.3 (1997), and we see no reason that a citation to former SCR 250(IV)(H) would have changed that decision.

Rippo also argues that we overlooked his allegation that he could show cause and prejudice to excuse the procedural default as to the judicial-bias claim based solely on the trial judge's and the prosecutor's failure to disclose the state actors' involvement in the federal investigation. To the extent that allegation was asserted as cause and prejudice

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[3]The basis for the district court's statement in this respect is unclear. The portions of the trial record available to this court do not indicate that trial counsel knew about the district attorney office's involvement in the sting operation. And Rippo's reply brief on direct appeal indicates that the information had not been available to trial counsel.

independent of the postconviction-counsel claim, Rippo could have raised this omission on rehearing from the decision in *Rippo III*. He did not. Regardless, the above allegation would be sufficient to establish cause to excuse the procedural default under NRS 34.810(2) independent of the postconviction-counsel claim only if the trial judge's and the prosecutor's failure to disclose the information *prevented* Rippo from raising the more robust judicial-bias claim in his first habeas petition. *See Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (explaining that cause to excuse a procedural default must be an impediment external to the defense that prevented the petitioner from presenting the claims previously). If the state actors' involvement in the sting operation was publicly reported to such a degree that the factual basis for this claim was reasonably available when the first petition was filed or supplemented, then these allegations could not provide good cause. *Cf. Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007) (concluding that factual basis for a judicial-bias claim was not "reasonably available" to a petitioner's prior counsel based on "scattered news items and court filings," which included a newspaper article that suggested the trial judge was corrupt, a grand jury subpoena for the trial judge's records, and a statement made in a television report linking the trial judge to a federal investigation of judicial corruption in Cook County, Illinois). And even if the public reporting on the matter was not extensive enough to make the claim reasonably available to prior postconviction counsel, there is some evidence that prior postconviction counsel nonetheless knew about or at least had reason to further investigate the state actors' involvement, particularly as to the sting operation—e.g, statements in the reply brief on direct appeal that was filed by the same attorney who filed the first

postconviction petition. But if Rippo has evidence to show that the trial judge's and the prosecutor's failure to disclose the state actors' involvement in the sting operation prevented him from relying on that involvement and the judge's knowledge of it as the basis for reasserting the judicial-bias claim in the first postconviction petition, he may present that evidence to the district court on remand.

Although we are not convinced that rehearing is warranted, the rehearing petition has drawn our attention to language in *Rippo V* that could be misinterpreted in two respects—as requiring that Rippo (1) prove that the trial judge *lied* about his knowledge of the State's involvement in the sting operation when it does not appear the judge was affirmatively asked about it when the federal investigation came up during the trial and (2) prove both that the trial judge knew about the State's involvement in the sting operation *and* affirmatively misrepresented his connection to Denny Mason in order to obtain relief. The opinion in *Rippo V* therefore is amended as follows:

On page 34, 423 P.3d at 1102, the fourth sentence in the paragraph that begins with "Turning to the prejudice prong" and reads as follows is deleted:

> The answer to the question may be yes, if Rippo's allegations that the trial judge knew about the State's involvement in the federal sting operation but lied about it and falsely denied that he had any connection to Mason or his business partner to avoid implicating himself in the federal bribery investigation are true.

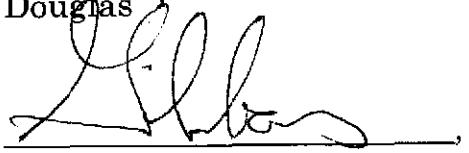
That sentence is replaced with the following:

> The answer to the question may be yes, if Rippo's allegations that the trial judge knew about the State's involvement in the federal sting operation but failed to disclose it or falsely denied that he had any connection to Mason or his business partner to avoid implicating himself in the federal bribery investigation are true.

With this change to the opinion, we deny rehearing.

It is so ORDERED.

_____, C.J.
Douglas



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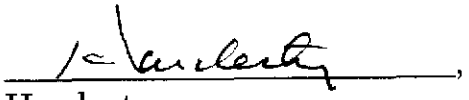
Gibbons



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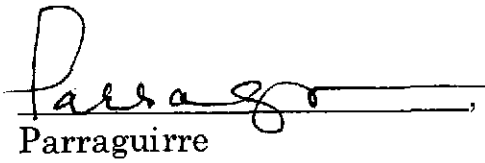

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 20
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

PICKERING, J., with whom Cherry, J. joins, dissenting:

The papers filed in connection with the petition for rehearing support the concern expressed in my dissent to this court's August 2, 2018 reissued opinion, to wit: that our reissued opinion does not comport with the Supreme Court's mandate in *Rippo v. Baker*, 137 S. Ct. 905 (2017). I would grant rehearing, not deny it, and therefore respectfully dissent.

Pickering, J.

Pickering

I concur:

Cherry, J.

Cherry