

1 Gary L. Lewis #47615
2 In Propria Personam
3 Post Office Box 208, S.D.C.C.
4 Indian Springs, Nevada 89018

FILED

MAR 14 2011

Electronically Filed
CLERK OF COURT
Mar 18 2011 10:05 a.m.
Tracie K. Lindeman

5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 State of Nevada

9
10 Plaintiff,

11 vs.

12 Gary L. Lewis

13 Defendant.

95C129824
NOASC
Notice of Appeal (criminal)
1287248



Case No. 95C129824

Dept. No. 140 XII

Docket _____

14
15
16 **NOTICE OF APPEAL**

17 NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant,
18 Gary L. Lewis, in and through his proper person, hereby
19 appeals to the Supreme Court of Nevada from the ORDER denying and/or
20 dismissing the Petition For Writ OF Habeas Corpus, Motion
21 to Appoint Counsel, Motion For Evidentiary Hearing

22
23 ruled on the 27 day of January, 2011.

24
25 Dated this 4th day of March, 2011.

26 Respectfully Submitted,

27 x Gary Lewis
28 Gary L. Lewis

1

CLERK OF THE COURT

MAR 14 2011

RECEIVED

FILED

MAR 17 2011

Alvin L. Johnson
CLERK OF COURT

1 ASTA

2
3
4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**
6

7 STATE OF NEVADA,)

8 Plaintiff(s),)

9 vs.)

10 GARY L. LEWIS,)

11 Defendant(s),)
12

) Case No: 95C129824

) Dept No: XII
)

95C129824

ASTA

Case Appeal Statement

1298403



13
14 **CASE APPEAL STATEMENT**

15 1. Appellant(s): Gary L. Lewis

16 2. Judge: Michelle Leavitt

17 3. Appellant(s): Gary L. Lewis

18 Counsel:

19 Gary L. Lewis #47615

20 P.O. Box 208

Indian Springs, NV 89070

21 4. Respondent: THE STATE OF NEVADA

22 Counsel:

23 David Roger, District Attorney

24 200 Lewis Ave.

Las Vegas, NV 89101

25 (702) 671-2700

26 5. Respondent's Attorney Licensed in Nevada: Yes

27 6. Appellant Represented by Appointed Counsel In District Court: Yes
28

1 7. Appellant Represented by Appointed Counsel On Appeal: N/A

2 8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

3 9. Date Commenced in District Court: August 3, 1995

4 10. Brief Description of the Nature of the Action: Criminal

5 Type of Judgment or Order Being Appealed: Post-Conviction Relief

6 11. Previous Appeal: Yes

7 Supreme Court Docket Number(s): 53779

8 12. Child Custody or Visitation: N/A

9
10 Dated This 17 day of March 2011.

11 Steven D. Grierson, Clerk of the Court

12
13 By: 

14 Marie Kramer, Deputy Clerk

15 200 Lewis Ave

16 PO Box 551601

17 Las Vegas, Nevada 89155-1601

18 (702) 671-0512

DEPARTMENT 12
CASE SUMMARY
CASE No. 95C129824

The State of Nevada vs Gary L Lewis

§	Location:	Department 12
§	Judicial Officer:	Leavitt, Michelle
§	Filed on:	08/03/1995
§	Case Number History:	
§	Conversion Case Number:	C129824
§	Defendant's Scope ID #:	1302110
§	Lower Court Case Number:	95F06244

CASE INFORMATION

Offense	Deg	Date	Case Type: Felony/Gross Misdemeanor
1. SEXUAL ASSAULT	F	01/01/1900	Case Flags: Bail Set Appealed to Supreme Court

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	95C129824
Court	Department 12
Date Assigned	07/13/2007
Judicial Officer	Leavitt, Michelle





PARTY INFORMATION

Defendant	Lewis, Gary L	<i>Lead Attorneys</i> Caruso, Robert D. <i>Retained</i> 7024554211(W)
Plaintiff	State of Nevada	Bell, Stewart L. 7024554662(W)








DATE

EVENTS & ORDERS OF THE COURT





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08/16/1995	Initial Arraignment (9:00 AM) (Judicial Officer: Maupin, A. William) Events: 08/04/1995 Hearing <i>INITIAL ARRAIGNMENT Court Clerk: LORI BROWN Reporter/Recorder: PATSY SMITH Heard By: A. William Maupin</i>	
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DEPARTMENT 12
CASE SUMMARY
CASE No. 95C129824













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DEPARTMENT 12
CASE SUMMARY
CASE No. 95C129824




07/31/1996	Sentencing (9:00 AM) (Judicial Officer: Huffaker, Stephen) <i>SENTENCING Court Clerk: TINA HURD Reporter/Recorder: TOM MERCER Heard By: HUFFAKER, STEPHEN</i>	
08/02/1996	Sentencing (9:00 AM) <i>SENTENCING Court Clerk: LORI BROWN Reporter/Recorder: PATSY SMITH Heard By: A. William Maupin</i>	
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DEPARTMENT 12
CASE SUMMARY
CASE No. 95C129824

Court Clerk: April Watkins Heard By: Michelle Leavitt

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05/01/2009	Minute Order (9:00 AM) (Judicial Officer: Leavitt, Michelle) <i>MINUTE ORDER RE: DENYING FIRST AMENDMENT PETITION Court Clerk: April Watkins Heard By: Michelle Leavitt</i>	
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09/23/2010	 Petition for Writ of Habeas Corpus Filed by: Defendant Lewis, Gary L	
11/06/2010	 Order for Petition for Writ of Habeas Corpus	
12/30/2010	 Response <i>Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) and Motions for an Evidentiary Hearing and Appointment of Counsel</i>	

DEPARTMENT 12
CASE SUMMARY
CASE No. 95C129824

01/27/2011	Petition for Writ of Habeas Corpus (8:30 AM) (Judicial Officer: Leavitt, Michelle) Events: 11/06/2010 Order for Petition for Writ of Habeas Corpus
01/27/2011	Motion for Appointment of Attorney (8:30 AM) (Judicial Officer: Leavitt, Michelle) <i>Def't's Pro Per Motion to Appoint Counsel</i>
01/27/2011	Motion (8:30 AM) (Judicial Officer: Leavitt, Michelle) <i>Def't's Pro Per Motion for Evidentiary Hearing</i>
01/27/2011	 All Pending Motions (8:30 AM) (Judicial Officer: Leavitt, Michelle)
03/01/2011	 Findings of Fact, Conclusions of Law and Order Filed By: Plaintiff State of Nevada
03/14/2011	 Notice of Appeal (criminal) Party: Defendant Lewis, Gary L

ORIGINAL

25

1 **ORDR**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 JAMES R. SWEETIN
6 Chief Deputy District Attorney
7 Nevada Bar #005144
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED

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John D. Lamm
CLERK OF THE COURT

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

95C129824
FFCO
Findings of Fact, Conclusions of Law and (C)
1266303



10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 GARY L. LEWIS,
14 #1302110

15 Defendant.)

CASE NO: C129824

DEPT NO: XII

16 **FINDINGS OF FACT, CONCLUSIONS OF**

17 **LAW AND ORDER**

18 DATE OF HEARING: 01/27/2011
19 TIME OF HEARING: 8:30 A.M.

20 THIS CAUSE having come on for hearing before the Honorable MICHELLE
21 LEAVITT, District Judge, on the 27th day of January, 2011, the Petitioner not being present,
22 proceeding IN FORMA PAUPERIS, the Respondent being represented by DAVID ROGER,
23 District Attorney, by and through FRANK M. PONTICELLO, Chief Deputy District
24 Attorney, and the Court having considered the matter, including briefs, transcripts, no
25 arguments of counsel, and documents on file herein, now therefore, the Court makes the
26 following findings of fact and conclusions of law:

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DEPARTMENT 12 CLERK OF THE COURT

1 FINDINGS OF FACT

2 1. On August 15, 1995, Gary Lewis (hereinafter "Defendant") was charged by
3 way of Information with one (1) count of Sexual Assault with a Minor Under Sixteen Years
4 of Age (Felony – NRS 200.364, 200.366). Thereafter, Defendant entered into negotiations
5 with the State and on June 12, 1996, the State filed an Amended Information charging
6 Defendant with one (1) count of Sexual Assault.

7 2. Defendant entered into a Guilty Plea Agreement with the State on June 12,
8 1996, whereby he agreed to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25
9 (1970), to the charge as alleged in the Amended Information. In exchange for Defendant's
10 *Alford* plea, the State agreed to recommend concurrent time between this case and
11 Defendant's other case, C122079. The State retained the right to argue at the rendition of
12 sentence. Defendant was present in court with counsel on August 2, 1996, and sentenced to
13 LIFE with the possibility of parole to be served concurrently with C122079. Defendant
14 received no credit for time served. The Judgment of Conviction was filed on August 14,
15 1996. Defendant did not file a direct appeal.

16 3. Defendant filed a "First Amendment Petition" Writ of Habeas Corpus on
17 February 19, 2009. The district court held a hearing on Defendant's petition on February 26,
18 2009. The Court ultimately concluded that Defendant's petition was time-barred and that
19 Defendant made no attempt to demonstrate good cause. The Order denying Defendant's
20 petition was filed on May 29, 2009.¹ Defendant filed a Notice of Appeal on May 11, 2009.
21 The Nevada Supreme Court affirmed the denial of Defendant's petition on October 28, 2009.
22 Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009). Remittitur
23 issued on November 24, 2009.

24 4. Defendant filed the instant petition and motions for an evidentiary hearing and
25 appointment of counsel on September 23, 2010. The State filed its response and motion to
26 dismiss on December 30, 2010.

27
28 ¹ Defendant filed an additional petition on March 23, 2009. On May 1, 2009, the district court determined that this petition was not a proper amendment or supplement as the original petition had been denied by the court. The Nevada Supreme Court determined that the district court did not abuse its discretion in declining to permit the original petition to be amended or supplemented after it was denied. Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009).

1 5. This Court held a hearing on Defendant's petition on January 27, 2011.
2 Defendant was not present and the Court entertained no argument by the State.

3 6. Since Defendant's Judgment of Conviction was filed on August 14, 1996, and
4 Defendant did not file a direct appeal, Defendant had until Thursday, August 14, 1997, to
5 file his post-conviction habeas petition.

6 7. Defendant filed the instant petition on September 23, 2010, more than thirteen
7 (13) years after the one-year time limitation had passed.

8 8. Defendant's petition is time barred as outside the one-year time limitation.

9 9. A petition subject to procedural bars may be considered on its merits if good
10 cause is shown.

11 10. Defendant fails to demonstrate to the satisfaction of the court that good cause
12 for delay exists sufficient to overcome the one-year time bar.

13 11. Furthermore, the State specifically pled laches in its response and motion to
14 dismiss Defendant's petition.

15 12. Defendant failed to overcome the presumption that his delay of over fourteen
16 (14) years in filing the instant petition has prejudiced the State.

17 13. Since Defendant's petition is time-barred with no good cause shown, he is not
18 entitled to the appointment of an attorney or an evidentiary hearing on his claims.

19 CONCLUSIONS OF LAW

20 1. The mandatory provisions of NRS 34.726 read:

21 1. Unless there is good cause shown for delay, a petition that
22 challenges the validity of a judgment or sentence must be filed
23 *within 1 year after entry of the judgment of conviction or*, if an
24 appeal has been taken from the judgment, *within 1 year after the*
25 *supreme court issues its remittitur.* For the purposes of this
26 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.

(Emphasis added).

27 //

28 //

1 2. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
2 Supreme Court rejected a habeas petition that was filed two days late, pursuant to the “clear
3 and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the district court within the one year mandate, absent a
5 showing of “good cause” for the delay in filing. Id., at 593, 590 P.3d at 902. The one-year
6 time bar is therefore strictly construed.

7 3. The Nevada Supreme Court has found that “application of the statutory
8 procedural default rules to post-conviction habeas petitions is mandatory.” State v. Eighth
9 Judicial Dist. Court ex rel. County of Clark (Riker), 121 Nev. 225, 231, 112 P.3d 1070,
10 1074 (2005) (citing State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003)).
11 “Habeas corpus petitions that are filed many years after conviction are an unreasonable
12 burden on the criminal justice system. The necessity for a workable system dictates that
13 there must exist a time when a criminal conviction is final.” Riker, 121 Nev. at 231, 112 P.3d
14 at 1074 (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984).

15 4. “In order to demonstrate good cause, a petitioner must show that an
16 impediment external to the defense prevented him or her from complying with the state
17 procedural default rules.” Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
18 Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110
19 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72
20 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v.
21 Director, 104 Nev. 656, 764 P.2d 1303 (1988).

22 5. Such an external impediment could be “that the factual or legal basis for a
23 claim was not reasonably available to counsel, or that ‘some interference by officials’ made
24 compliance impracticable.” Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S.
25 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
26 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998). Clearly, any
27 delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

28 //

1 6. In addition, to find good cause there must be a "substantial reason; one that
2 affords a legal excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235,
3 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
4 1981). The lack of the assistance of counsel when preparing a petition, and even the failure
5 of trial counsel to forward a copy of the file to a petitioner, have been found to be non-
6 substantial, not constituting good cause. See Phelps v. Director Nevada Department of
7 Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d
8 797 (1995).

9 7. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a]
10 period exceeding five years between the filing of a judgment of conviction, an order
11 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
12 conviction and the filing of a petition challenging the validity of a judgment of
13 conviction...." The statute also requires that the State plead laches in its motion to dismiss
14 the petition. NRS 34.800.

15 8. In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme
16 Court ruled that the Sixth Amendment provides no right to counsel in post-conviction
17 proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada
18 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a
19 right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's
20 right to counsel provision as being coextensive with the Sixth Amendment to the United
21 States Constitution."

22 9. NRS 34.750 provides, in pertinent part:

23 "[a] petition may allege that the Defendant is unable to pay the
24 costs of the proceedings or employ counsel. If the court is
25 satisfied that the allegation of indigency is true and the petition *is*
26 *not dismissed summarily*, the court may appoint counsel at the
time the court orders the filing of an answer and a return. In
making its determination, the court may consider whether:

27 (a) The issues are difficult;

28 (b) The Defendant is unable to comprehend the proceedings; or

1 (c) Counsel is necessary to proceed with discovery.”
2 (emphasis added).

3 10. Under NRS 34.750, it is clear that the court has discretion in determining
4 whether to appoint counsel. McKague specifically held that with the exception of NRS
5 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one
6 does not have “[a]ny constitutional or statutory right to counsel at all” in post-conviction
7 proceedings. Id. at 164.

8 11. The Nevada Supreme Court has observed that a defendant “must show that the
9 requested review is not frivolous before he may have an attorney appointed.” Peterson v.
10 Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS
11 177.345(2)).

12 12. A defendant is entitled to an evidentiary hearing if his petition is supported by
13 specific factual allegations, which, if true, would entitle him to relief, unless the factual
14 allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603,
15 605 (1994), Hargrove, 100 Nev. at 503, 686 P.2d at 225. “The judge or justice, upon review
16 of the return, answer and all supporting documents which are filed, shall determine whether
17 an evidentiary hearing is required.” NRS 34.770(1). Defendant’s claims were all resolved
18 based on the record without the need to take further evidence so he is not entitled to an
19 evidentiary hearing.

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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 24 day of February, 2011.


DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY

 for
FRANK M. PONTICELLO
Chief Deputy District Attorney
Nevada Bar #000370

hjc/SVU

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MAR 17 2011

CLERK OF COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

GARY L. LEWIS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 95C129824
Dept No: XII

**NOTICE OF ENTRY OF
DECISION AND ORDER**

PLEASE TAKE NOTICE that on March 1, 2011, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on March 17, 2011.

STEVEN D. GRIERSON, CLERK OF THE COURT

By: Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of March 2011, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office - Appellate Division

- ☒ The United States mail addressed as follows:
Gary Lewis # 47615
P.O. Box 208
Indian Springs, NV 89070

Heather Ungermann
Heather Ungermann, Deputy Clerk

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ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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Ann D. Lamm
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

96C129824
FFCO
Findings of Fact, Conclusions of Law and C
1268303



THE STATE OF NEVADA,

Plaintiff,

-vs-

GARY L. LEWIS,
#1302110

Defendant.

CASE NO: C129824

DEPT NO: XII

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: 01/27/2011
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 27th day of January, 2011, the Petitioner not being present, proceeding IN FORMA PAUPERIS, the Respondent being represented by DAVID ROGER, District Attorney, by and through FRANK M. PONTICELLO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

//

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DEPARTMENT 12 CLERK OF THE COURT

FINDINGS OF FACT

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2 1. On August 15, 1995, Gary Lewis (hereinafter "Defendant") was charged by
3 way of Information with one (1) count of Sexual Assault with a Minor Under Sixteen Years
4 of Age (Felony – NRS 200.364, 200.366). Thereafter, Defendant entered into negotiations
5 with the State and on June 12, 1996, the State filed an Amended Information charging
6 Defendant with one (1) count of Sexual Assault.

7 2. Defendant entered into a Guilty Plea Agreement with the State on June 12,
8 1996, whereby he agreed to plead guilty pursuant to North Carolina v. Alford, 400-U.S. 25
9 (1970), to the charge as alleged in the Amended Information. In exchange for Defendant's
10 *Alford* plea, the State agreed to recommend concurrent time between this case and
11 Defendant's other case, C122079. The State retained the right to argue at the rendition of
12 sentence. Defendant was present in court with counsel on August 2, 1996, and sentenced to
13 LIFE with the possibility of parole to be served concurrently with C122079. Defendant
14 received no credit for time served. The Judgment of Conviction was filed on August 14,
15 1996. Defendant did not file a direct appeal.

16 3. Defendant filed a "First Amendment Petition" Writ of Habeas Corpus on
17 February 19, 2009. The district court held a hearing on Defendant's petition on February 26,
18 2009. The Court ultimately concluded that Defendant's petition was time-barred and that
19 Defendant made no attempt to demonstrate good cause. The Order denying Defendant's
20 petition was filed on May 29, 2009.¹ Defendant filed a Notice of Appeal on May 11, 2009.
21 The Nevada Supreme Court affirmed the denial of Defendant's petition on October 28, 2009.
22 Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009). Remittitur
23 issued on November 24, 2009.

24 4. Defendant filed the instant petition and motions for an evidentiary hearing and
25 appointment of counsel on September 23, 2010. The State filed its response and motion to
26 dismiss on December 30, 2010.

27
28 ¹ Defendant filed an additional petition on March 23, 2009. On May 1, 2009, the district court determined that this petition was not a proper amendment or supplement as the original petition had been denied by the court. The Nevada Supreme Court determined that the district court did not abuse its discretion in declining to permit the original petition to be amended or supplemented after it was denied. Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009).

5. This Court held a hearing on Defendant's petition on January 27, 2011. Defendant was not present and the Court entertained no argument by the State.

6. Since Defendant's Judgment of Conviction was filed on August 14, 1996, and Defendant did not file a direct appeal, Defendant had until Thursday, August 14, 1997, to file his post-conviction habeas petition.

7. Defendant filed the instant petition on September 23, 2010, more than thirteen (13) years after the one-year time limitation had passed.

8. Defendant's petition is time barred as outside the one-year time limitation.

9. A petition subject to procedural bars may be considered on its merits if good cause is shown.

10. Defendant fails to demonstrate to the satisfaction of the court that good cause for delay exists sufficient to overcome the one-year time bar. --

11. Furthermore, the State specifically pled laches in its response and motion to dismiss Defendant's petition.

12. Defendant failed to overcome the presumption that his delay of over fourteen (14) years in filing the instant petition has prejudiced the State.

13. Since Defendant's petition is time-barred with no good cause shown, he is not entitled to the appointment of an attorney or an evidentiary hearing on his claims.

CONCLUSIONS OF LAW

1. The mandatory provisions of NRS 34.726 read:

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.

(Emphasis added).

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1 2. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
2 Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear
3 and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the district court within the one year mandate, absent a
5 showing of "good cause" for the delay in filing. Id. at 593, 590 P.3d at 902. The one-year
6 time bar is therefore strictly construed.

7 3. The Nevada Supreme Court has found that "application of the statutory
8 procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth
9 Judicial Dist. Court ex rel. County of Clark (Riker), 121 Nev. 225, 231, 112 P.3d 1070,
10 1074 (2005) (citing State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003)).
11 "Habeas corpus petitions that are filed many years after conviction are an unreasonable
12 burden on the criminal justice system. The necessity for a workable system dictates that
13 there must exist a time when a criminal conviction is final." Riker, 121 Nev. at 231, 112 P.3d
14 at 1074 (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984).

15 4. "In order to demonstrate good cause, a petitioner must show that an
16 impediment external to the defense prevented him or her from complying with the state
17 procedural default rules." Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
18 Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110
19 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72
20 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v.
21 Director, 104 Nev. 656, 764 P.2d 1303 (1988).

22 5. Such an external impediment could be "that the factual or legal basis for a
23 claim was not reasonably available to counsel, or that 'some interference by officials' made
24 compliance impracticable." Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S.
25 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
26 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998). Clearly, any
27 delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

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1 6. In addition, to find good cause there must be a "substantial reason; one that
2 affords a legal excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235,
3 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
4 1981). The lack of the assistance of counsel when preparing a petition, and even the failure
5 of trial counsel to forward a copy of the file to a petitioner, have been found to be non-
6 substantial, not constituting good cause. See Phelps v. Director Nevada Department of
7 Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d
8 797 (1995).

9 7. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a]
10 period exceeding five years between the filing of a judgment of conviction, an order
11 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
12 conviction and the filing of a petition challenging the validity of a judgment of
13 conviction...." The statute also requires that the State plead laches in its motion to dismiss
14 the petition. NRS 34.800.

15 8. In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme
16 Court ruled that the Sixth Amendment provides no right to counsel in post-conviction
17 proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada
18 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a
19 right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's
20 right to counsel provision as being coextensive with the Sixth Amendment to the United
21 States Constitution."

22 9. NRS 34.750 provides, in pertinent part:

23 "[a] petition may allege that the Defendant is unable to pay the
24 costs of the proceedings or employ counsel. If the court is
25 satisfied that the allegation of indigency is true and the petition *is*
26 *not dismissed summarily*, the court may appoint counsel at the
time the court orders the filing of an answer and a return. In
making its determination, the court may consider whether:

27 (a) The issues are difficult;

28 (b) The Defendant is unable to comprehend the proceedings; or

1 (c) Counsel is necessary to proceed with discovery."
2 (emphasis added).

3 10. Under NRS 34.750, it is clear that the court has discretion in determining
4 whether to appoint counsel. McKague specifically held that with the exception of NRS
5 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one
6 does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction
7 proceedings. Id. at 164.

8 11. The Nevada Supreme Court has observed that a defendant "must show that the
9 requested review is not frivolous before he may have an attorney appointed." Peterson v.
10 Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS
11 177.345(2)).

12 12. A defendant is entitled to an evidentiary hearing if his petition is supported by
13 specific factual allegations, which, if true, would entitle him to relief, unless the factual
14 allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603,
15 605 (1994), Hargrove, 100 Nev. at 503, 686 P.2d at 225. "The judge or justice, upon review
16 of the return, answer and all supporting documents which are filed, shall determine whether
17 an evidentiary hearing is required." NRS 34.770(1). Defendant's claims were all resolved
18 based on the record without the need to take further evidence so he is not entitled to an
19 evidentiary hearing.

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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 24 day of February, 2011.


DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY

 for
FRANK M. PONTICELLO
Chief Deputy District Attorney
Nevada Bar #000370

hjc/SVU

THE SEALED PORTION
OF THESE MINUTES
WILL FOLLOW VIA
U.S. MAIL.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

January 27, 2011

95C129824

The State of Nevada vs Gary L Lewis

January 27, 2011

8:30 AM

All Pending Motions

HEARD BY: Leavitt, Michelle

COURTROOM: RJC Courtroom 14D

COURT CLERK: April Watkins

RECORDER: Kerry Esparza

REPORTER:

PARTIES

PRESENT: Ponticello, Frank M. Attorney
State of Nevada Plaintiff

JOURNAL ENTRIES

- DEFT'S PETITION FOR WRIT OF HABEAS CORPUS...DEFT'S PRO PER MOTION TO APPOINT COUNSEL...DEFT'S PRO PER MOTION FOR EVIDENTIARY HEARING

Court FINDS petition is successive, time barred, no good cause and ORDERED, petition and motions DENIED. State to prepare the order.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Gary Lewis, BAC#47615, S.D.C.C., P.O. Box 208, Indian Springs, NV 89070. aw

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

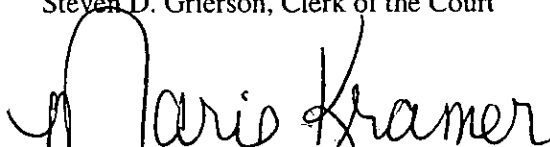
NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF
DECISION AND ORDER; DISTRICT COURT MINUTES;

STATE OF NEVADA,)	
)	
Plaintiff(s),)	Case No: 95D129824
)	Dept No: XII
vs.)	
)	
GARY L. LEWIS,)	
)	
Defendant(s),)	
)	

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 17 day of March 2011.

Steven D. Grierson, Clerk of the Court


Marie Kramer, Deputy Clerk