



**CLARK COUNTY COURTS  
EIGHTH JUDICIAL DISTRICT COURT  
CLERK OF THE COURT**



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May 12 2011 01:40 p.m.  
Tracie K. Lindeman

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May 12, 2011

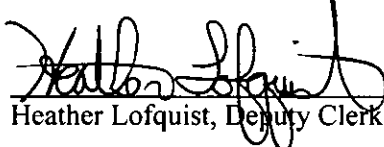
Tracie Lindeman  
Clerk of the Supreme Court  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs, ANDRE DUPREE BOSTON  
**S.C. CASE: 58216**  
D.C. CASE: C084650

Dear Ms. Lindeman:

Pursuant to your Notice to Transmit Required Document, dated May 5, 2011, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed April 22, 2011 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,  
STEVEN D. GRIERSON, CLERK OF THE COURT

  
Heather Lofquist, Deputy Clerk

ORIGINAL

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ORDR

DAVID ROGER  
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*Ann L. Blum*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

ANDRE D. BOSTON, #0920638

Defendant.

CASE NO: C084650

DEPT NO: VI

88C084650

FCL

Finding of Fact and Conclusions of Law  
1371313



FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

DATE OF HEARING: 03/23/2011  
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable ELISSA F. CADISH, District Judge, on the 23rd day of March, 2011, the Petitioner not being present, proceeding in forma pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through ROBERT STEPHENS, 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:

FINDINGS OF FACT

1. On July 7, 1988, the State of Nevada (hereinafter "State") filed a Criminal Complaint charging Andre Boston (hereinafter "Defendant") with the following: Burglary (Felony - NRS 205.060); Lewdness with a Minor with use of a Deadly Weapon (Felony -

1 NRS 201.230); Assault with a Deadly Weapon (Felony – NRS 200.471); Battery with Intent  
2 to Commit a Crime with use of a Deadly Weapon (Felony – NRS 200.400, 193.165); First  
3 Degree Kidnapping with use of a Deadly Weapon (Felony – NRS 200.310, 200.320,  
4 193.165); 6 Counts - Sexual Assault with use of a Deadly Weapon (Felony – NRS 200.364,  
5 200.366, 193.165); Robbery with use of a Deadly Weapon (Felony - NRS 200.380,  
6 193.165); and Attempt to Dissuade Victim or Witness from Reporting a Crime with use of a  
7 Deadly Weapon (Felony – NRS 199.305, 193.330, 193.165).

8 2. On July 7, 1988, the Juvenile Division of the Eighth Judicial District Court of  
9 the State of Nevada certified Defendant to be tried as an adult. In doing so, the juvenile  
10 division of the district court noted the nature and seriousness of offenses charged against  
11 Defendant and the persistency and seriousness of Defendant's past adjudications or admitted  
12 criminal offenses.

13 3. On August 2, 1988, the State filed an Information charging Defendant with the  
14 following: Count 1 – Burglary; Count 2 – Lewdness with a Minor with use of a Deadly  
15 Weapon; Count 3 – Assault with a Deadly Weapon; Count 4 – Battery with Intent to Commit  
16 a Crime with use of a Deadly Weapon; Count 5 – First Degree Kidnapping with use of a  
17 Deadly Weapon; Counts 6 through 12 – Sexual Assault with use of a Deadly Weapon;  
18 Count 13 – Robbery with use of a Deadly Weapon; Count 14 – Attempt Dissuade Victim or  
19 Witness from Reporting a Crime with use of a Deadly Weapon.

20 4. On September 12, 1988, Defendant's jury trial commenced. On September 15,  
21 1988, Defendant's jury returned finding him guilty of Counts 1 – 8 and Counts 10-14.

22 5. On October 20, 1988, Defendant appeared for sentencing. The court sentenced  
23 Defendant to the Nevada State Prison ("NSP") as follows: **Count 1** – TEN (10) years;  
24 **Counts 2 and 4** – TEN (10) years plus a consecutive TEN (10) years for the use of a deadly  
25 weapon; **Count 3** – SIX (6) years; **Counts 5-8 and 10-12** – LIFE with the possibility of  
26 parole plus a consecutive term of LIFE with the possibility of parole for the use of a deadly  
27 weapon; **Count 13** – FIFTEEN (15) years plus a consecutive term of FIFTEEN (15) years  
28 for the use of a deadly weapon; and **Count 14** – THREE (3) years plus a consecutive term of

1 THREE (3) years for the use of a deadly weapon. Defendant's sentences between the counts  
2 were to all run consecutively. In addition, the court ruled that Defendant's sentences in the  
3 instant case would all run consecutively to the sentence imposed in his California case.<sup>1</sup> The  
4 court granted Defendant zero (0) days credit for time served. Defendant's Judgment of  
5 Conviction was filed on November 7, 1988. Defendant filed a Notice of Appeal on  
6 November 1, 1988, alleging only insufficient evidence for his convictions. (Boston v. State,  
7 SC Docket No 19607.) The Nevada Supreme Court dismissed Defendant's appeal on the  
8 merits and Remittitur issued on November 14, 1989.

9 6. On December 21, 1988, Defendant filed a Pro Per Petition for Writ of Habeas  
10 Corpus with the Nevada Supreme Court. On December 27, 1988, the Nevada Supreme  
11 Court issued its Order denying Defendant's Petition for Writ of Habeas Corpus due to lack  
12 of jurisdiction.<sup>2</sup> (SC Docket No 19625). Remittitur issued on January 15, 1989.

13 7. On October 22, 1990, Defendant filed a Pro Per Petition for Post Conviction  
14 Relief Pursuant to NRS 177.315 in which he alleged ineffective assistance of counsel. The  
15 State filed its Response to Defendant's Petition On November 28, 1990. On December 18,  
16 1990, the district court issued its Order denying Defendant's Petition on the merits.  
17 Defendant filed a Notice of Appeal on January 11, 1991. On September 30, 1991, the  
18 Nevada Supreme Court remanded to the district court to hold an evidentiary hearing as to  
19 trial counsel's decision not to pursue an insanity defense and whether or not that constituted  
20 ineffective assistance of counsel. (Boston v. State, SC Docket No 21871). Remittitur issued  
21 on October 22, 1991.

22 8. The district court held the evidentiary hearing ordered by the Nevada Supreme  
23 Court on September 4, 1992. During the evidentiary hearing, Defendant's trial counsel  
24 testified that in preparing for trial, he considered an insanity defense; however, given  
25 Defendant's insistence that he was not guilty and not the perpetrator of the crime, and  
26

27 <sup>1</sup> Defendant was serving a sentence in the California State Prison for kidnapping, sexual assault and  
28 assault in Case No. A-565679.

<sup>2</sup> As Defendant was in the custody of the California State Prison, the Nevada Supreme Court lacked jurisdiction to issue a writ in his case.

1 Defendant's wish to proceed with a defense of innocence, that he decided against the  
2 insanity defense. Reporter's Transcript of Evidentiary Hearing, P. 12-13, Sept. 4, 1992.  
3 However, the district court noted that this would not have been a valid defense as there was  
4 no indication from the evidence that Defendant did not know the difference between right  
5 and wrong. Id. at 31.

6 9. On June 8, 1993, the Court noted that Defendant would not be able to come to  
7 Nevada to participate in an evidentiary hearing until he was released from his incarceration  
8 in California as every mechanism the State had attempted to compel Defendant's attendance  
9 was unsuccessful. There is no indication in the record that Defendant was told that he could  
10 not file for habeas relief since he was incarcerated in California. Rather, since there was no  
11 mechanism by which the State could compel Defendant's presence at his evidentiary  
12 hearing, the district court videotaped the hearing, allowed Defendant to view the videotape,  
13 allowed Defendant to prepare an affidavit regarding the issues he wanted to present to the  
14 Court, and then took the testimony, affidavits, and arguments of counsel under advisement.

15 10. On October 14, 1993, the court denied Defendant's Petition for Post  
16 Conviction Relief on the merits. The Order denying Defendant's petition on the merits was  
17 filed on March 18, 1994. Defendant filed a Notice of Appeal on July 25, 1994. (Boston v.  
18 State, SC Docket No 26034). On October 7, 1994, the Nevada Supreme Court affirmed the  
19 district court's denial of Defendant's Petition on the merits. Remittitur issued on October  
20 26, 1994.

21 11. On January 5, 2011, Defendant filed a Motion for Permission to Extend the  
22 Page Limit for a Separate Memorandum of Points and Authorities in Support of the Petition  
23 for Writ of Habeas Corpus. The State filed its Opposition on January 14, 2011. The district  
24 court denied Defendant motion on January 19, 2011, as moot.

25 12. Defendant filed the instant Petition for Writ of Habeas Corpus on January 5,  
26 2011. The State filed its response and motion to dismiss on March 4, 2011.

27 13. This Court held a hearing on Defendant's petition on March 23, 2011.  
28 Defendant was not present and the Court entertained no argument from the State.

14. Since Remittitur issued from the denial of Defendant's appeal on November 14, 1989, Defendant had until Wednesday, November 14, 1990, to file his post-conviction habeas petition. After a prolonged evidentiary hearing, Defendant's first petition was ultimately denied on October 14, 1993. The Nevada Supreme Court subsequently affirmed the district court's denial of Defendant's petition and Remittitur issued on October 26, 1994.

15. Defendant filed the instant petition on January 5, 2011, more than twenty (20) years after the one-year time limitation had passed.

**16. Defendant's petition is successive and time-barred.**

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

18. Defendant fails to demonstrate to the satisfaction of the court that good cause for delay exists sufficient to overcome the successive petition and one-year time bars.

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

20. Defendant failed to overcome the presumption that his delay of over twenty (20) years in filing the instant petition has prejudiced the State.

## **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).

2. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the “clear and unambiguous” mandatory provisions<sup>1</sup> of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the district court within the one year mandate, absent a

1 showing of "good cause" for the delay in filing. Id. at 593, 590 P.3d at 902. The one-year  
2 time bar is therefore strictly construed.

3 3. NRS 34.810(1)(b)(2) reads in pertinent part:

4 The court shall dismiss a petition if the court determines that:

5 (b) The petitioner's conviction was the result of a trial and the grounds for the  
petition could have been: . . .

6 (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or  
post conviction relief. . . .

7 4. The Court further noted in Evans v. State, "A court must dismiss a habeas  
8 petition if it presents claims that either were or could have been presented in an earlier  
9 proceeding, unless the court finds both cause for failing to present the claims earlier or for  
10 raising them again and actual prejudice to the petitioner." 117 Nev. 609, 646-47, 29 P.3d  
11 498, 523 (2001).

12 5. The Nevada Supreme Court has found that "application of the statutory  
13 procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth  
14 Judicial Dist. Court ex rel. County of Clark (Riker), 121 Nev. 225, 231, 112 P.3d 1070,  
15 1074 (2005) (citing State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003)).  
16 "Habeas corpus petitions that are filed many years after conviction are an unreasonable  
17 burden on the criminal justice system. The necessity for a workable system dictates that  
18 there must exist a time when a criminal conviction is final." Riker, 121 Nev. at 231, 112 P.3d  
19 at 1074 (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984).

20 6. "In order to demonstrate good cause, a petitioner must show that an  
21 impediment external to the defense prevented him or her from complying with the state  
22 procedural default rules." Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing  
23 Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110  
24 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72  
25 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v.  
26 Director, 104 Nev. 656, 764 P.2d 1303 (1988).

27 7. Such an external impediment could be "that the factual or legal basis for a  
28 claim was not reasonably available to counsel, or that 'some interference by officials' made

1 compliance impracticable.” Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S.  
2 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;  
3 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998). Clearly, any  
4 delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

5 8. In addition, to find good cause there must be a “substantial reason; one that  
6 affords a legal excuse.” Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235,  
7 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.  
8 1981). The lack of the assistance of counsel when preparing a petition, and even the failure  
9 of trial counsel to forward a copy of the file to a petitioner, have been found to be non-  
10 substantial, not constituting good cause. See Phelps v. Director Nevada Department of  
11 Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d  
12 797 (1995).

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

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ORDER

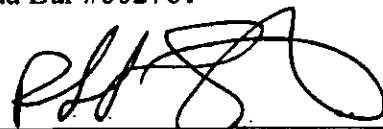
THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 21 day of March, 2011.

  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY

  
ROBERT STEPHENS  
Deputy District Attorney  
Nevada Bar #011286

CERTIFIED COPY  
DOCUMENT ATTACHED IS A  
TRUE AND CORRECT COPY  
OF THE ORIGINAL ON FILE

  
CLERK OF THE COURT

MAY 12 2011