

Andre' Boston

#27846 11B/1A

Southern Desert Correctional Center

P.O. Box 208

Indian Springs, NV 89070-0208

Petitioner, Pro Pet/SE

FILED

MAY 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

IN THE SUPREME COURT OF NEVADA

Andre' Boston,
Petitioner,

v.

State of Nevada,
Respondents

Case No. 60819

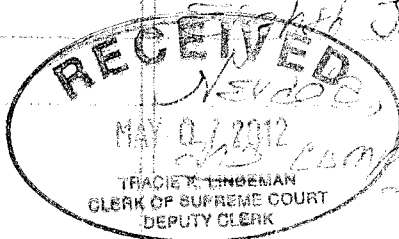
8th Judicial Dist Ct #C84650

PETITION FOR WRIT
OF MANDATE (MANDAMUS)

PETITION FOR WRIT OF MANDATE/PEREMPTORY
MANDAMUS PER N.R.S. 34.150-34.315

TO THE HONORABLE JUDGE/JUSTICES OF THE
NEVADA SUPREME COURT:

1. Andre' Boston, petitioner, proceeding in
proper person hereby submits this Petition For Writ
of Mandamus to compel Respondent - namely the
8th Judicial District Court of the State of
Nevada, to vacate its order dated March 23, 2011
and comply with N.R.S. 34.750 (4) and 34.806 (2).



12-14430

2. The Respondent court refused to comply with said N.R.S. provisions regarding a Petition For Writ of Habeas Corpus that the court ruled on March 23, 2011. The refusal to comply was based on the respondent court deciding a Petition For Writ of Habeas Corpus and ruling in favor of the State on a Motion To Dismiss pleading "laches" and procedural time bar "without" giving petitioner the chance to respond to the Motion prior to a ruling. This violated the applicable statutes and due process of law. The statutes require that petitioner be given 15 days "after-service" to respond to a Motion To Dismiss by the state. (N.R.S. § 34.750(4)) and that petitioner "must" [mandatory language] be given an opportunity to respond to the allegations where the state pleads "laches" (N.R.S. § 34.800(2)). Yet the respondent court made its ruling "with^{out}" the petitioner's response being filed and entered in the record.

3. That there is no appeal from the Respondent's actions. Petitioner filed a Notice of Appeal from the respondent court's ruling on April 19, 2011 with the Nevada Supreme Court. Attached to this appeal was a material fact sheet (encl.) submitted under NRAP Rule 10 and a request to expand the record on appeal with pertinent

material facts to be considered on appeal. The Nevada Supreme Court decided the appeal in this case on February 3, 2012. In the decision, the Nevada Supreme Court noted the issue of the date discrepancy that caused the circumstances where the court made it's ruling on the Motion To Dismiss without giving petitioner the chance to respond¹. However, the court found that any discrepancy did not cause prejudice because appellant response was received on the date set for hearing of the motion. The court did not acknowledge that the hearing was conducted at 8:30 a.m. and accordingly, even if it was received (petitioner's opposition) on March 23, 2011, it was received after the 8:30 a.m. hearing on the Motion. This means

fn. 1 - The State when filing its Motion To Dismiss certified to having mailed the pleading on March 4, 2011 but did not in fact mail the pleading until March 10, 2011. The document was not received until March 15, 2011 which would have by statute (N.R.S. 34.750(4)) given petitioner until March 30, 2011 to have his pleading filed. Yet the court held its hearing on March 23, 2011 before it even filed petitioner's opposition to the Motion To Dismiss.

the court rendered its ruling/decision without having received for consideration the petitioner's opposition. Furthermore the opposition was not actually filed in the court records until March 28, 2011. (see ex. H). Accordingly, with the Nevada Supreme Court having ruled on this issue in the manner it did without due consideration of the extraordinary circumstance, petitioner has no other, plain, speedy or adequate remedy other than mandamus in this matter. (see exhibit K)

WHEREFORE, petitioner prays that a Writ of Mandamus or other appropriate Writ may issue out of this court to the respondent-court commanding them to vacate their order dated March 23, 2011 and follow the applicable N.R.S. provisions by allowing petitioner's opposition to be heard, filed and considered prior to a ruling on the merits of the Habeas Corpus. The opposition raises relevant factors establishing good cause and prejudice against the Motion To Dismiss and plea of "laches" and should have been considered prior to a ruling being made in the Motion To Dismiss. The respondent court is directed immediately after receipt of the writ and no later 30 days thereafter to return and answer why the specific action has not been completed.

Date: May 3, 2012

/s/ Andre Roston

STATEMENT OF THE FACTS

Petitioner was convicted on September 12, 1988 on a number of felonies (including but not limited to: Kidnap, Robbery, Burglary, Assault, Attempt To Dissuade a Victim From Reporting a Crime and Sexual Assault). Petitioner was sentenced on October 20, 1988 to 14 consecutive Life Sentences and 92 consecutive years.

In November 1988, petitioner was returned to California (where he had been extradited from to stand trial on the Nevada charges).

In December 1988, petitioner filed a Post Conviction Petition For Writ of Habeas Corpus in the Nevada Supreme Court. (On December 21, 1988).

On December 27, 1988 the Nevada Supreme Court filed an order denying the petition citing a lack of jurisdiction to hear/entertain the petition under the Nevada State Constitution, Article 6, sec. 4 and sec. 6. (See exhibit A)

Because no state court could hear the Habeas Petition until petitioner was "physically present" in the State of Nevada, petitioner had to wait in excess of 20+ years before he would be present in Nevada to have his claims heard.

On November 17, 2010 petitioner was

extended to the State of Nevada and his physical custody here gave the state court jurisdiction to finally hear his claims.

In January 5, 2011, petitioner filed his Post Conviction Habeas Corpus Petition with the State Court. (8th Judicial District Court)

In January 18, 2011, the state court issued an order directing the respondents (state) to answer or otherwise respond to the petition and file a return in accordance with the provisions of

NRS 34.360 to 34.383 inclusive. (See exhibit B)

The order gave the respondent 45 days from January 18, 2011 to respond.

In March 4, 2011, the respondents (state) established filed and verified to having mailed petitioner their Motion to Dismiss.

[The electronic filing was to the court and the certification was to petitioner.] (See exhibit C)

However, the mailing envelope's postage meter stamp indicates that the Motion to Dismiss was not "electronically" mailed out until March 10, 2011.

and ruled by the last date in March 11, 2011. (See exhibit D)

In March 11, 2011, not having received the state's response, petitioner mailed in to the court a Notice of Intent to file an Answer to the Return/Response pursuant to NRS 34.476

(See exhibit E)

On March 13, 2011, still not having received the state's response (and having only 10 days until the scheduled hearing of the habeas Petition), petitioner filed a Motion of Motion and Motion for Enlargement of Time pursuant to N.R.S. 178.476 in order to afford him additional days to respond to the State's answer. (See exhibit F). This motion was received by the court on March 17, 2011 and filed on March 22, 2011. In March 15, 2011, petitioner finally received the State's response in the form of a Motion to Dismiss pleading "laches" and procedural time bar. (See exhibit G). According to the N.R.S. 9.34.750(4) petitioner should have been afforded 15 days after service of the State's Motion to Dismiss which would have made the due date for response March 30, 2011. (Especially considering that petitioner had filed for an enlargement of time). On March 21, 2011, petitioner trying to get his deposition on before the scheduled hearing rushed in his deposition to the State's response. (See exhibit H). The deposition was stamped received on March 23, 2011 and stamped filed on March 28, 2011. (See exhibit H). On March 23, 2011 at 8:30 a.m. the respondent - court ruled on the State's Motion to

Dismiss denying the Petition For Writ of Habeas Corpus without having filed the petitioner's opposition or given him the chance to respond to the Motion To Dismiss. The court stated in it's Minute Order that "the ruling will be based on the written briefs", however it's clear that the court had not filed petitioner's brief. (See exhibit I)

On April 22, 2011, the court filed it's Findings of Fact, Conclusions of Law and Order. In this pleading the court acknowledged having received the state's response and motion to dismiss prior to ruling on the Motion To Dismiss/Deny the Habeas Petition. However the court does not acknowledge or document having filed/received the petitioner's opposition brief prior to ruling on the Motion To Dismiss. (See exhibit J)

11

STATEMENT OF THE ISSUES

I. WHETHER RESPONDENT HAD AN OBLIGATION TO ALLOW PETITIONER TO RESPOND TO THE STATE'S MOTION TO DISMISS PRIOR TO RULING ON IT.

NAS § 34.750(4) provides in pertinent part: "The petitioner shall respond within 15 days after service to a motion by the

State to dismiss the action."

N.R.S. § 34.800 (2) provides in pertinent part: "The petitioner must be given the opportunity to respond to the allegations in the pleading before a ruling on the motion is made."

While NRS 34.750 (4) establishes the time table for a petitioner to be allowed to respond to a motion by the State to dismiss the action, NRS 34.800 (2) by its mandatory language of "must" imposes upon the court the duty and obligation to give the petitioner an opportunity to respond to a plea of "laches" before a ruling on the motion is made.

These two NRS provisions impose upon the respondent court the obligation and duty to allow petitioner to respond to a Motion To Dismiss prior to a ruling being made. This is especially true where the state pleads "laches".

//

II. WHETHER RESPONDENT-COURT VIOLATED IT'S DUTY/OBLIGATION TO ALLOW PETITIONER TO RESPOND TO THE MOTION TO DISMISS PLEADING "LACHES" PRIOR TO A RULING BEING MADE IN THIS CASE.

As previously indicated, the State did not timely submit/serve their response to petitioner as their certificate of service indicated. As a consequence, when the State's response was mailed "actually", 6 days later, it was not received by petitioner until 9 days ~~later~~ ^{after that}. This discrepancy was "significant" and not insignificant, because the problem reduced the days petitioner would have to respond to the State's Motion To Dismiss and plea of "laches".

The court being cognizant that there was a problem and discrepancy with the reported timeliness of the State's response (acknowledged by petitioner's notice of intent to file an answer and motion for enlargement of time) elected not to extend the due date for petitioner's response and conduct the hearing, 8 days after petitioner was served with the State's Motion to Dismiss the action. This conflicts with the applicable NRS provision that allows for 15 days "after service" to a motion by the State to dismiss the action. To this extent the respondent court violated the NRS by not scheduling the hearing on the Motion to afford petitioner the 15 days "after service" he was entitled to.

Furthermore because the court conducted its hearing on March 23, 2011 instead of March 30, 2011 (which would have accommodated

the full 15 days "after service") at 8:30 a.m., there is no way that it had time to process, route, review and consider petitioner's opposition prior to the ruling on the Motion by the State. This is further supported by 2 additional factors: #1. The Findings of Fact issued by the court makes no mention or entry of having received petitioner's opposition prior to ruling on the Motion. #2. The opposition was not actually filed until March 28, 2011, well after the hearing conducted on March 23, 2011.

N.A.S. § 34.800(2) is a statute that contains "clear and unambiguous" language that is "plain" on its face and spells out that a petitioner "must" [mandatory language] be given the opportunity to respond to the allegations in a pleading of "laches" before a ruling on the motion is made.

The court did not do this, and violated its duty by not doing so.
11

WHY THIS WRIT SHOULD ISSUE

In this case the respondent-court had a duty to allow petitioner to file a response before ruling on the Motion and failed to do so.

~ A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.

International Game Tech. v. Dist. Ct. 124 Nev.
193, 179 P.3d 556, 558 (2008)

Appellant's appeal from the district court's order denying his motion to vacate the foreign judgment was an adequate remedy in the ordinary course of the law. Karaw v. Mitchell 110 Nev. 958, 878 P.2d 978, 1994 Nev. LEXIS 103 (1994)

Writ of Mandamus proper only when there is no plain, adequate, and speedy legal remedy: the right to appeal is generally an adequate legal remedy that precludes writ relief. Ta-Hsien Pan v. Eighth Judicial District Court of Nevada 88 P.3d 840, 2004 Nev. LEXIS 36 (2004).

Mandamus is a proper remedy to compel performance of a judicial act where there is no plain, speedy and adequate remedy at law in order to compel the performance of an act which the law requires as a duty resulting from that office. Smith v. Eighth Judicial District Court ex rel. County of Clark 107 Nev. 674, 818 P.2d 849, 1991 Nev. LEXIS 159 (1991)

Rehinger asserts that he has no plain, speedy and adequate remedy at law available to him. Rehinger cannot raise this issue in the federal court because the Nevada Supreme Court never reached the underlying merit of his claim. Rehinger's appeal was heard and the court failed to address the grievance of the claim that the respondent ruled on the Motion without Rehinger's response being in the record. There are no other state court or federal court avenues/remedies available to him in this matter. Nor are there any other adequate remedies available to him. The appeal in this matter has been exhausted and is not available to him.

Madamus is not available where the petitioner has a plain, speedy and adequate remedy at law and his court has consistently held that an appeal is generally an adequate legal remedy precluding writ relief. Pan v. District Court 120 Nev. 222, 88 P.3d 840 (2004)

Litigant with relief is not available when a party has failed to timely appeal from an otherwise appealable order. Id. at 224-25, 88 P.3d at 841

The Supreme Court would consider the writ of Mandamus concerning the order denying a Motion to proceed in forma pauperis where the federal district court's actions in

refusing to allow the filing of petitioner's pleadings were not appealable determinations the gravamen of these petitioners was that the district court acted arbitrarily and capriciously when it refused to allow the filing of the petitioner's pleadings, it appeared that the petitioners were without a plain, speedy and adequate remedy in the ordinary course of law to challenge the district court's refusal to file their pleading and it appeared that the district court's actions would escape review if these petitioners were not entertained by this Supreme Court. BARNES v. Eighth Judicial District Court ex. rel. County of Clark 103 Nev. 679, 748 P2d. 483, 1987 Nev. LEXIS 1899 (1987)

In this case minus review by Writ of Mandamus petitioner's claim and the District Court's failure to perform its duty will escape review if not entertained by this court.

Power of the Supreme Court to issue Writs of Mandamus is found in the Nev. Constitution Article 6, sec. 4

Writ must be issued by Superior Authority.
A writ of mandamus will not issue so as

to compel one district judge, in the exercise of a judicial duty, to be governed by the views of another district judge as to the construction of a statute contrary to his own opinion of what that construction should be. This is a situation contrary to the principle of the law of mandamus which presupposes a superior authority to command the doing of a particular act enjoined by law. Jennett v. Stevens 33 Nev. 527, 111 P. 1025, 1910 Nev. LEXIS 36 (1910) cited in Baby Tam & Co. v. City of Las Vegas 199 F.3d 1111, 2000 U.S. App. LEXIS 477 (9th Cir. 2000)

RELIEF SOUGHT

Petitioner is requesting that this court order the respondent-court to vacate its order dated March 23, 2011 denying the Petition for Writ of Habeas Corpus and to comply with NRS 34.750 (4) and 34.800 (2) by letting petitioner file his response demonstrating good cause and prejudice against the procedural time bar and plea of laches. Petitioner would further request that the respondent-court be directed to hear the briefs in their entirety (considering the ruling will determine whether petitioner habeas corpus is

privilege will be further impaired arbitrarily despite manifest evidence of good cause and prejudice against a claim of "laches" and "procedural time bar.") before rendering a decision/ruling.

11

CONCLUSION

Based upon the foregoing stated case precedents and supporting facts, petitioner contends that good cause has been shown and he respectfully request this court to order a hearing on the petitioner's writ, in that all disputed facts by respondents could be heard before this court. (Petitioner would respectfully request the court appoint him counsel for any hearing in this matter.) In lieu of said hearing petitioner respectfully request the granting of this instant petition accordingly.

Date May 3rd, 2012

131. Andre Boston

Andre Boston

PETITIONER PRO PER/SE

VERIFICATION

I declare/verify under penalty of perjury that the foregoing is true and correct in accordance with N.H.S. 268.165 and 28 U.S.C. 1746.

Executed on: May 3rd, 2012

151. Andre Boston

Andre Boston

EXHIBIT

'A'

EXH. A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREE DUPREE BOSTON,

Petitioner,

vs.

ATTORNEY GENERAL OF THE STATE OF
NEVADA, THE HONORABLE BRIAN
McKAY,

Respondent.

No. 19625

FILED

DEC 27 1988

CLERK OF SUPREME COURT
By *[Signature]*
CHIEF DEPUTY CLERK

ORDER DENYING PETITION

FOR A WRIT OF HABEAS CORPUS

This is a proper person petition for a writ of habeas corpus. We note that petitioner is presently incarcerated in a correctional institution in Tehachapi, California.

Pursuant to Article 6, section 4 of the Nevada Constitution, this court may issue writs of habeas corpus only on behalf of persons actually held in custody within this state. Similarly, Article 6, section 6 of the Nevada Constitution authorizes the district courts of this state to issue writs of habeas corpus in favor of persons actually held in custody in their respective districts only. Because petitioner is not incarcerated within the State of Nevada, the district courts of this state lack jurisdiction under NRS Chapter 34 to grant the relief requested in this petition. See Nev. Const. art. 6 § 4 and 6; Marshall v. Warden, 83 Nev. 442, 434 P.2d 437 (1967). Accordingly, we deny this petition.

It is so ORDERED.

[Signature] C. J.
[Signature] J.
[Signature] J.

cc: Hon. Brian McKay, Attorney General
Andree Dupree Boston

32x

25x

32

EXHIBIT
'B'

EXH. B

FILED

JAN 18 2011

John J. Blum
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

88C084650
OPWH
Order for Petition for Writ of Habeas Corpus
1168415



Case No: C084650
Dept No: 6

ANDRE' BOSTON.,

Petitioner,

vs.

ANTHONY SCILLIA WARDEN,
Respondent,

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on January 5, 2011. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 23rd day of March, 2011, at the hour of

8:30
a.m. o'clock for further proceedings.

Elmer F. Goddard

District Court Judge T.P.

FILE WITH
MASTER CALENDAR

DEPARTMENT VI
NOTICE OF HEARING
DATE 3-23-11 TIME 8:30 a.m.
APPROVED BY Tara

EXHIBIT

'C'

EXH C


CLERK OF THE COURT

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ANDRE D. BOSTON,
#0920638

Defendant.

CASE NO: 88C084650

DEPT NO: VI

STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR
WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 03/23/2011

TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
THOMAS CARROLL, Chief Deputy District Attorney, and hereby submits the attached
Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus (Post-
Conviction).

This response and motion to dismiss is made and based upon all the papers and
pleadings on file herein, the attached points and authorities in support hereof, and oral
argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 7, 1988¹, the State of Nevada (hereinafter "State") filed a Criminal Complaint
4 charging Andre Boston (hereinafter "Defendant") with the following: Burglary (Felony –
5 NRS 205.060); Lewdness with a Minor with use of a Deadly Weapon (Felony – NRS
6 201.230); Assault with a Deadly Weapon (Felony – NRS 200.471); Battery with Intent to
7 Commit a Crime with use of a Deadly Weapon (Felony – NRS 200.400, 193.165); First
8 Degree Kidnapping with use of a Deadly Weapon (Felony – NRS 200.310, 200.320,
9 193.165); 6 Counts - Sexual Assault with use of a Deadly Weapon (Felony – NRS 200.364,
10 200.366, 193.165); Robbery with use of a Deadly Weapon (Felony - NRS 200.380,
11 193.165); and Attempt to Dissuade Victim or Witness from Reporting a Crime with use of a
12 Deadly Weapon (Felony – NRS 199.305, 193.330, 193.165).

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

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

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

27
28 ¹ Due to the age of the present case, the dates included in the State's Statement of the Facts reflect
those available through the limited case file uploaded onto microfiche.

1 On October 20, 1988, Defendant appeared for sentencing. The court sentenced
2 Defendant to the Nevada State Prison ("NSP") as follows: **Count 1** – TEN (10) years;
3 **Counts 2 and 4** – TEN (10) years plus a consecutive TEN (10) years for the use of a deadly
4 weapon; **Count 3** – SIX (6) years; **Counts 5-8 and 10-12** – LIFE with the possibility of
5 parole plus a consecutive term of LIFE with the possibility of parole for the use of a deadly
6 weapon; **Count 13** – FIFTEEN (15) years plus a consecutive term of FIFTEEN (15) years
7 for the use of a deadly weapon; and **Count 14** – THREE (3) years plus a consecutive term of
8 THREE (3) years for the use of a deadly weapon. Defendant's sentences between the counts
9 were to all run consecutively. In addition, the court ruled that Defendant's sentences in the
10 instant case would all run consecutively to the sentence imposed in his California case.² The
11 court granted Defendant zero (0) days credit for time served. Defendant's Judgment of
12 Conviction was filed on November 7, 1988. Defendant filed a Notice of Appeal on
13 November 1, 1988, alleging only insufficient evidence for his convictions. (Boston v. State,
14 SC Docket No 19607.) The Nevada Supreme Court dismissed Defendant's appeal on the
15 merits and Remittitur issued on November 14, 1989.

16 On December 21, 1988, Defendant filed a Pro Per Petition for Writ of Habeas Corpus
17 with the Nevada Supreme Court. On December 27, 1988, the Nevada Supreme Court issued
18 its Order denying Defendant's Petition for Writ of Habeas Corpus due to lack of
19 jurisdiction.³ (SC Docket No 19625). Remittitur issued on January 15, 1989.

20 On October 22, 1990, Defendant filed a Pro Per Petition for Post Conviction Relief
21 Pursuant to NRS 177.315 in which he alleged ineffective assistance of counsel. The State
22 filed its Response to Defendant's Petition On November 28, 1990. On December 18, 1990,
23 the district court issued its Order denying Defendant's Petition on the merits. Defendant
24 filed a Notice of Appeal on January 11, 1991. On September 30, 1991, the Nevada Supreme
25 Court remanded to the district court to hold an evidentiary hearing as to trial counsel's

26
27 ² Defendant was serving a sentence in the California State Prison for kidnapping, sexual assault and
assault in Case No. A-565679.

28 ³ 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 decision not to pursue an insanity defense and whether or not that constituted ineffective
2 assistance of counsel. (Boston v. State, SC Docket No 21871). Remittitur issued on October
3 22, 1991.

4 The district court held the evidentiary hearing ordered by the Nevada Supreme Court
5 on September 4, 1992. During the evidentiary hearing, Defendant's trial counsel testified
6 that in preparing for trial, he considered an insanity defense; however, given Defendant's
7 insistence that he was not guilty and not the perpetrator of the crime, and Defendant's wish
8 to proceed with a defense of innocence, that he decided against the insanity defense.
9 Reporter's Transcript of Evidentiary Hearing, P. 12-13, Sept. 4, 1992. However, the district
10 court noted that this would not have been a valid defense as there was no indication from the
11 evidence that Defendant did not know the difference between right and wrong. Id. at 31.

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

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

26 On January 5, 2011, Defendant filed a Motion for Permission to Extend the Page
27 Limit for a Separate Memorandum of Points and Authorities in Support of the Petition for
28 Writ of Habeas Corpus. The State filed its Opposition on January 14, 2011. The district

1 court denied Defendant motion on January 19, 2011, as moot.

2 Defendant filed the instant petition on January 5, 2011. The State's response is as
3 follows.

4 ARGUMENT

5 **I. DEFENDANT'S PETITION IS TIME BARRED**

6 Defendant's petition is time-barred. The mandatory provisions of NRS 34.726 state:

7 1. Unless there is good cause shown for delay, a petition that challenges the
8 validity of a judgment or sentence must be filed within 1 year after entry of the
9 judgment of conviction or, if an appeal has been taken from the judgment,
10 *within 1 year after the supreme court issues its remittitur*. For the purposes
11 of this subsection, good cause for delay exists if the petitioner demonstrates to
12 the satisfaction of the court:

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

16 NRS 34.726(1) (emphasis added).

17 The one-year time bar is strictly construed. In Gonzales v. State, 118 Nev. 590, 593,
18 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was
19 filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS
20 34.726(1). Gonzales reiterated the importance of filing the petition with the district court
21 within the one year mandate, absent a showing of "good cause" for the delay in filing.
22 Gonzales, 118 Nev. at 593, 590 P.3d at 902.

23 Here, Defendant's Judgment of Conviction was filed on November 7, 1988. The
24 Nevada Supreme Court subsequently affirmed Defendant's conviction and Remittitur issued
25 on Tuesday, November 14, 1989. Consequently, Defendant had until Wednesday,
26 November 14, 1990, to file his post-conviction habeas petition. Defendant filed a pro per
27 Petition for Writ of Habeas Corpus with the Nevada Supreme Court on December 21, 1988.
28 On December 27, 1988, the Nevada Supreme Court issued its Order denying Defendant's
Petition for Writ of Habeas Corpus due to lack of jurisdiction and Remittitur issued on
January 15, 1989.

1 On October 22, 1990, Defendant filed a Pro Per Petition for Post Conviction Relief
2 Pursuant to NRS 177.315. The district court initially denied this petition without an
3 evidentiary hearing on December 18, 1990. However, the Nevada Supreme Court reversed
4 and remanded Defendant's case for an evidentiary hearing on the issue of trial counsel's
5 reasoning for not pursuing an insanity defense. Accordingly, the district court held the
6 evidentiary hearing on September 4, 1992. Following the evidentiary hearing, and after
7 reviewing affidavits provided by Defendant and counsel as well as arguments by counsel, the
8 district court denied Defendant's petition on the merits. The Order denying Defendant's
9 petition on the merits was filed on March 18, 1994. Defendant subsequently appealed and
10 the Nevada Supreme Court affirmed the denial of Defendant's petition on the merits on
11 October 7, 1994. Remittitur issued on October 26, 1994.

12 Defendant filed the instant petition on January 5, 2011, more than twenty (20) years
13 after the deadline to file a petition for post-conviction relief had passed. Defendant's
14 petition is clearly outside of the one-year time limitation and therefore his claims must be
15 dismissed. Gonzales, 118 Nev. at 593, 590 P.3d at 902.

16 II. APPLICATION OF PROCEDURAL BARS IS MANDATORY

17 The Nevada Supreme Court has specifically held that the district court has a duty to
18 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
19 disregard them. In State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070
20 (2005), the Nevada Supreme Court held as follows:

21 Given the untimely and successive nature of [defendant's]
22 petition, the district court *had a duty imposed by law* to consider
23 whether any or all of [defendant's] claims were barred under
24 NRS 34.726, NRS 34.810, NRS 34.800, or by the law of the case
... [and] the court's failure to make this determination here
constituted an arbitrary and unreasonable exercise of discretion.

25 121 Nev. at 234 (emphasis added); see also State v. Haberstroh, 119 Nev. 173, 180-
26 81, 69 P.3d 676, 681-82 (2003) (wherein the Nevada Supreme Court held that parties cannot
27 stipulate to waive, ignore or disregard the mandatory procedural default rules nor can they
28

1 empower a court to disregard them). Defendant is required to show good cause to overcome
2 the procedural bars before his petition may be considered on the merits. Thus, a Defendant's
3 petition will not be considered on the merits if it is subject to the procedural bars and no
4 good cause is shown. Id.

5 **III. DEFENDANT HAS NOT DEMONSTRATED GOOD CAUSE OR**
6 **ACTUAL PREJUDICE SUFFICIENT TO OVERCOME THE ONE-**
7 **YEAR TIME BAR**

8 "In order to demonstrate good cause, a petitioner must show that an impediment
9 external to the defense prevented him or her from complying with the state procedural
10 default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing
11 Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110
12 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d
13 72, 41 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997);
14 Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external impediment could
15 be "that the factual or legal basis for a claim was not reasonably available to counsel, or that
16 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at
17 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645
18 (1986)). Clearly, any delay in filing of the petition must not be the fault of the petitioner.
19 NRS 34.726(1)(a).

20 Defendant claims that the reason he waited over twenty (20) was the district court told
21 him he could not seek habeas relief until he was present in the State. This claim is
22 unsupported by the record and is even belied by the record. There is no indication in the
23 court's microfiche record that Defendant was told he could not seek habeas relief while
24 incarcerated in California. In fact, the district court spent considerable time in the early 90s
25 trying to compel Defendant's presence for an evidentiary hearing, then taped the hearing so
26 Defendant could see it, allowed Defendant to prepare an affidavit in response to his trial
27 counsel's claims, then considered and reviewed the testimony of counsel and Defendant's
28 affidavit, all while he was incarcerated in California to try to resolve Defendant's petition,

1 Claims asserted in a petition for post-conviction relief must be supported with specific
2 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State,
3 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not
4 sufficient, nor are those belied and repelled by the record. Id. Defendant's claim is without
5 merit and should be dismissed.

6 **IV. DEFENDANT'S MOTION IS PRECLUDED BY LACHES AS PER NRS**
7 **34.800**

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

14 The Nevada Supreme Court issued its Remittitur affirming Defendant's conviction on
15 November 14, 1989. Since over twenty-one (21) years have elapsed between the Supreme
16 Court's issuance of Remittitur and the filing of the instant petition, NRS 34.800 directly
17 applies in this case. NRS 34.800 was enacted to protect the State from having to go back
18 years later to re-prove matters that have become ancient history. There is a rebuttable
19 presumption of prejudice for this very reason and the doctrine of laches must be applied in
20 the instant matter. If courts required evidentiary hearings for long delayed petitions such as
21 in the instant matter, the State would have to call and find long lost witnesses whose once
22 vivid recollections have faded and re-gather evidence that in many cases has been lost or
23 destroyed because of the lengthy passage of time. Based on the State's arguments above,
24 this Court should summarily deny the instant petition according to the doctrine of laches
25 pursuant to NRS 34.800, as the delay of more than twenty-one (21) years in filing is
26 unexcused.

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CONCLUSION

Based on the foregoing arguments, the State respectfully requests that Defendant's petition be dismissed.

DATED this 4th day of March, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Thomas Carroll
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 4th day of March, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ANDRE D. BOSTON, BAC #27846
P.O. BOX 650 (HDSP)
INDIAN SPRINGS, NV 89070-0650

/s/ C. Bush
Secretary for the District Attorney's Office

cb/TC/ckb

EXHIBIT
'D'

EXH. D



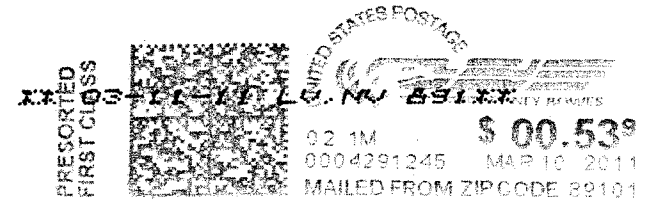
DAVID ROGER, *District Attorney*

Office of the District Attorney

200 LEWIS AVENUE
P.O. BOX 552212
LAS VEGAS, NV 89155-2212

11A9

ANDRE D. BOSTON, BAC#27846
P.O. BOX 650 (HDSP)
INDIAN SPRINGS, NV 89070-0650



45 LRDFN11 89070



EXHIBIT

'E'

EXH. E

March 11, 2011

* ORIGINAL

To: The Clerk of the Court
Eighth Judicial District Court
280 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

ATTENTION: DISTRICT COURT JUDGE
ELISSA F. CADISH

From: Andre D. Boston
27846 H.D.S.P. 11A/9A
P.O. Box 650
Indian Springs, NV 89070

88C084650
LSF
Left Side Filing
1304138



SUBJECT: PETITIONER'S NOTICE OF INTENT TO FILE AN ANSWER TO THE
RETURN/RESPONSE PURSUANT TO NRS 34.470 (INFORMAL NOTICE)
RE: PETITION FOR WRIT OF HABEAS CORPUS
CASE NAME: BOSTON V. SCILLIA, et. al.
CASE NUMBER: C084650 DEPT NO. 6

Dear Honorable Judge Cadish,

Please let this Informal Notice serve as my intent to file and submit an Answer to the Respondent's Return/Response in this case, in accordance with N.R.S. 34.470.

While I am ready to proceed expeditiously in resolving this Habeas Corpus matter, (with my cognizance that you have scheduled this matter for further proceedings on March 23rd, 2011) I find it of the utmost importance to Answer the Return/Response in this matter and deny/controvert any material facts or matters set forth in the Return/Response.

As of this date, I have yet to receive Respondent's Return/Response and may need to request an Enlargement of Time to submit my Answer to the Return/Response, if this is not received timely to prepare my Answer. However, I wanted the court to be aware of my intent to submit an Answer to the Return/Response.

Thank you for your time and attention in this matter.

Respectfully Submitted
Andre D. Boston
Petitioner, Proper/Se

* cc. Respondent/D.A. office

EXHIBIT
'F'

EXH. F

Case no. 0084650

Dept. no. 6

FILED

MAR 22 2011

John J. Hill
CLERK OF COURT

88C084650
MOT
Motion
1304159



IN THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA
COUNTY OF CLARK

Andre D. Boston

Petitioner

v.

Anthony Scillia, Warden,

Respondent

NOTICE OF MOTION AND MOTION
FOR ENLARGEMENT OF TIME
PURSUANT TO N.R.S. 178.476

VI

4-4-11

Comes now, Andre D. Boston, Petitioner Pro-Per/SE
who hereby submits before the court this Notice of Motion
and Motion For Enlargement of Time in accordance with
N.R.S. 178.476.

This court issued an Order To Show Cause in the above
entitled case matter directing the Respondent to answer/
respond to the Petition For Writ of Habeas Corpus within
45 days from the court's order dated Jan. 18, 2011.

As of the date of this Motion, petitioner has yet
to receive the Respondent's Response/Return. Petitioner
fully plans to file an Answer to the Return in accordance
with N.R.S. 34.476 to deny/contravert any of the material
facts or matters set forth in the Return/Response.

1 BECAUSE Petitioner did not receive the Return/Response
2 in a timely fashion to adequately research and prepare
3 his answer, petitioner may need to request an
4 Enlargement of Time for a period of thirty (30) days
5 for the submission of his answer to the Return/Response.
6 Petitioner does not want the court to render a decision/
7 ruling disposing of this case summarily without his
8 Answer to the Return and Request For a Prompt
9 Evidentiary Hearing becoming a part of the record.

10 Accordingly, petitioner hereby requests that he
11 be given a thirty day (30) enlargement of time up to
12 and including April 23, 2011 in which to submit to
13 this court his Answer to the Return/Response in this
14 matter, before the court proceeds summarily to
15 dispose of the case as justice may require. Petitioner
16 may not require the full thirty (30) days to prepare and
17 submit his Answer to the Return/Response (depending on
18 the nature and content in the response), however it is
19 being requested as a precautionary measure.

20 This motion is being submitted only for the good faith
21 reason indicated above and is the first such request
22 submitted by the petitioner.

23
24 Date: 3/13/11

25 151 Andre D. Boston
26 Andre D. Boston
27 Petitioner, Pro-Per/SE
28

CERTIFICATE OF SERVICE BY MAIL

I, Andre Baston, hereby certify, pursuant to N.R.C.P. 5(b), that in this 13th day of the month March of the year 2011, I mailed a true and correct copy of the foregoing "Notice of Motion and Motion For Enlargement of Time Pursuant to N.R.S. 178.474" addressed to:

Office of the District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

151 ~~Andre Baston~~
Andre D. Baston
Petitioner, Pro Per/SE

EXHIBIT
'G'

INMATE REQUEST FORM

1.) INMATE NAME	DOC #	2.) HOUSING UNIT	3.) DATE
BASTEN, Andre	27840	HOSP. 11A/9	4/26/11

4.) REQUEST FORM TO: (CHECK BOX)

<input type="checkbox"/> CASEWORKER	<input type="checkbox"/> MEDICAL	<input type="checkbox"/> MENTAL HEALTH	<input type="checkbox"/> CANTEEN
<input type="checkbox"/> EDUCATION	<input type="checkbox"/> VISITING	<input type="checkbox"/> LAW LIBRARY	<input type="checkbox"/> DENTAL
<input type="checkbox"/> LAUNDRY	<input type="checkbox"/> PROPERTY ROOM	<input checked="" type="checkbox"/> OTHER	Mailroom/Legal Mail

5.) NAME OF INDIVIDUAL TO CONTACT: Correctional Officer Arenas

6.) REQUEST: (PRINT BELOW) I have a legal matter pending appeal in various courts. I was served/received a copy of a document from David Roger, District Attorney - Office of the District Attorney between March 4, 2011 and March 16, 2011. [This should have been my first legal mail receipt/entry from David Roger in the "month of March" that I signed for.] Can you please confirm for me the date of this first entry from the D.A.'s Office? Thank You for your time and assistance.

7.) INMATE SIGNATURE Andre Basten DOC # 27840

8.) RECEIVING STAFF SIGNATURE _____ DATE _____

9.) RESPONSE TO INMATE

THE ABOVE MENTIONED CORRESPONDENCE WAS RECEIVED AND SIGNED FOR ON MARCH 15, 2011

10.) RESPONDING STAFF SIGNATURE [Signature] DATE 5-12-11

EXHIBIT
'H'

EXH. H

1 Andre' Boston

2 27846 H.D.S.P. 114/9A

3 P.O. Box 650

4 Indian Springs, NV 89070

5 Petitioner, Pro-Per/SE

FILED

MAR 28 2011

Debra L. Hume
CLERK OF COURT

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

88C084650
OPPM
Opposition to Motion
1316385



10 Andre' D. Boston }
11 Petitioner, }
12 v. }
13 State of Nevada, et al., }
14 Respondents }

CASE NO. 88C084650

DEPT. NO. VI

16 PETITIONER'S OPPOSITION TO THE STATE'S RESPONSE AND
17 MOTION TO DISMISS THE PETITION FOR WRIT OF HABEAS CORPUS

19 Comes now, Andre' D. Boston, Petitioner Pro-Per/SE and hereby
20 submits his Opposition to the State's Response and Motion To
21 Dismiss the Petition For Writ of Habeas Corpus.

22 This Opposition is made and based upon all papers
23 and relevant pleadings in this case (on file herein or judicially
24 available), the attached Point of Clarification and Points &
25 Authorities and any other information deemed necessary by the

26 Court.
27 Petitioner hereby opposes the position, statements, contentions
28 and assertions by the State upon the following points:

POINT OF CLARIFICATION

Petitioner hereby provides the court with this critical and relevant point of clarification that he would ask the court to duly consider regarding the State's Motion To Dismiss.

In the Motion To Dismiss the Habeas Petition, the State is advancing a couple of procedural issues that are non-existent to justifying dismissing the Petition. Petitioner would point out the following to contravert and deny the State's position.

It is the State "itself" who "removed" the availability of Habeas Corpus procedures (post conviction) from petitioner [within approximately sixty (60) days of the Entry of Judgment of Conviction] by denying petitioner's "timely" Habeas Petition citing "lack of jurisdiction". By "removing" the availability of Habeas Corpus to petitioner based on the "lack of jurisdiction", the state also, in turn, "removed" the relevant procedural requirements governing petitioner's non-existent Habeas Corpus, "until" such time as the State could acquire jurisdiction to hear and issue the Writ.

Consequently, the "interests of justice" do not allow the State to remove the availability of Habeas Corpus (on one hand) and then to "conveniently" penalize petitioner for "non-compliance" with procedures that are not available to him (on the other hand).

The use of such questionable tactics to systematically strip away a substantial State and Federally protected right (like Habeas Corpus), would cast a "shadow of uncertainty" upon the integrity and/or public reputation of State proceedings.

The State's position in the Motion To Dismiss lacks merit on this basis alone. However, petitioner will address the State's Motion sequentially for further consideration.

On page 5, lines 6-11 of the response, the state contends that the Petition is time barred, citing N.R.S. 34.726 to support its position. Petitioner opposes this contention and asserts that the State appears to be overlooking the true context of N.R.S. 34.726 and selectively paraphrasing portions which could be construed to support their position. Petitioner asserts that his Petition is not time barred for several substantial reasons:

1.) N.R.S. 34.726 states in pertinent part "[u]nless there is good cause shown for the delay a petition... must be filed within one year of the judgment of conviction, or if an appeal has been taken... within 1 yr after the Supreme Court issues its remittitur for the purposes of this subsection good cause for delay exists if petitioner demonstrates...

(a) That the delay is not the fault of petitioner; and (b) That dismissal of the petition as untimely will unduly prejudice the petitioner...". Petitioner asserts several factors that are relevant to this matter.

a. Petitioner, a lay man and inexperienced litigant at law did [it nothing else] in fact attempt to comply with applicable N.R.S. provisions regarding his Post Conviction Habeas Petition by submitting it within one year of the judgment of conviction, as required by N.R.S. provisions. Petitioner, who was then incarcerated in Leiff, was appointed Counsel who appeared the conviction to address matters in the record. Petitioner filed his Habeas Petition in attempt to address matters exclusive

1 of the record with his timely submission. To that extent
2 Petitioner's Habeas was not delayed, and was timely.
3 b. When petitioner did submit his petition, the court
4 declined to hear, consider, or entertain the Petition
5 citing a lack of jurisdiction for "any" state court
6 (District Courts or the Nevada Supreme Court) to hear
7 the petitioner's claims via habeas corpus. Accordingly,
8 by the State's position and the Court's order, petitioner
9 had "NO" habeas corpus avenues available to be consider-
10 ed in "any" State Court. This position would not change
11 no matter when "any" petition was submitted at "any" point.
12 Thus, the State's position seems to be an attempt to
13 convolute the issues in this. The main crux of all is
14 that timely or untimely, the petitioner had no habeas
15 corpus avenues available to him.

16 c. The issue of petitioner not being able to be present in
17 Nevada to obtain his Habeas Corpus privileges was an
18 impediment that was "not" his fault and due instead
19 to State statutes of which petitioner cannot be
20 held accountable. Yet that is what the State is
21 attempting to do.

22 GOOD CAUSE FOR ANY DELAY

23 Petitioner asserts that even if, assuming arguendo, the
24 State's claim exist on a small level, under the circumstances of
25 this case there is good cause shown for "any" delay.

26 In this case, as previously stated, petitioner did in fact
27 submit his Petition for Post Conviction Habeas Corpus "within" one
28 year of the Judgment of Conviction. After this submission

(which was timely) petitioner learned from the court's order that he did not and would not have habeas corpus privileges "until" he was physically in the State of Nevada. The court's order on December 27, 1988, (Nevada Supreme Court Order) cemented the fact that "no" State Court in Nevada could entertain a Habeas Corpus Petition from Petitioner while he was not in the physical custody of Nevada. Effectively, petitioner was not able to have a Habeas Petition heard by "any" state court "until" he was physically present in Nevada (from 1988 - Nov. thru 2010 - Nov. [date of extradition return to Calif. until the date of parole from Calif. & subsequent return to Nevada]).

The "impediment" was the interference from officials who denied petitioner the opportunity to have his writ heard. This interference made petitioner's compliance not only impracticable but also "impossible." Thus, the State's position that petitioner should continue to file repetitive Habeas Petitions to State Courts who lacked jurisdiction to entertain them lacks merit. In this case, once the Nevada Supreme Court issued its ruling citing jurisdictional complications for "any" State Court to hear petitioner's habeas petition it negated the need for petitioner to continue filing pointless, successive petitions "until" he could resolve the jurisdictional complication by being physically present in Nevada prior to submitting any further Habeas petitions. This impediment was clearly "not" the fault of petitioner (who did submit a prompt & timely petition initially) and "external" to the defense in this case. Furthermore this impediment formed the legal basis for petitioner's claim that due to jurisdictional complications, habeas pursuits

1 would not be available literally and realistically until petitioner
2 could be physically present in Nevada.

3 Petitioner asserts that the dismissal of the petition as
4 untimely will unduly prejudice the petitioner and bases this
5 on the following factors:

6 a) Petitioner has never had a chance to have his claims
7 heard (several of which are constitutional violations
8 and exists in matters outside of the record) before
9 any tribunal.

10 b) Habeas Corpus is the avenue to raise claims that
11 exist outside of the record before the court.

12 c) Petitioner initially tried to present his claims before the
13 Nevada Supreme Court and the petition was denied citing
14 jurisdictional complications until petitioner was physically
15 present in Nevada.

16 d) Petitioner had to wait for 26+ years before he could be
17 physically present in Nevada to resubmit his writ to a
18 court of competent jurisdiction to get his day in court.

19 e) There has never been a full and fair hearing on the
20 issues raised in this petition by any State Court.

21 f.) To deny the petition so untimely (after petitioner followed
22 the court's instruction and waited until the court had
23 jurisdiction via his physical presence) would essentially be
24 tooust petitioner of any chance for state court
25 consideration (and/or federal court consideration) of the
26 claims.

27 g.) The interests of justice for all of petitioner's claims
28 (especially those of constitutional magnitude) would not

be served by a petition dismissed as untimely.

h) A dismissal of the petition as untimely would leave petitioner with no recourse to pursue his claims and his otherwise potentially meritorious constitutional claims would never be heard.

Accordingly petitioner asserts that he has demonstrated good cause for "any" alleged delay; that the delay was "not" his fault; that the impediment was "external" to his defense; that the "interference by officials (preventing him from filing his writ of Habeas Corpus) made compliance impracticable."¹

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

11

The State contends that on pg. 5, line 20-27 in pertinent part: "... Defendant's Judgment of Conviction was filed on November 7, 1988... Consequently Defendant had until Wednesday November 14, 1990 to file his post conviction habeas petition... Defendant filed a Pro Per Petition for Writ of Habeas Corpus with the Nevada Supreme Court on December 21, 1988..." This contention contains contradictory statements. It is clear from the state's contention that petitioner "did" in fact file a "timely" Habeas Corpus to the Nevada Supreme Court within one year of the Judgment of Conviction and subsequently was notified by Court Order that

fn. 1 - Note:

The order from the Nev. Supreme Court essentially removed from petitioner the entire procedure available for Habeas Corpus. Thus without the availability of a procedure, there could be no default of rules.

1 no other habeas petition could be entertained as State Courts
2 lacked jurisdiction to issue said writ.

3 On pg 6, lines 12-15, the State advances that the
4 petition before the court presently was filed more than
5 twenty years (21) after the deadline to file a petition for
6 post conviction relief had passed and that the petition is
7 clearly outside of the one year time limit so it must be
8 dismissed. Petitioner asserts this is a misconstruing of the
9 facts and selectively leaves out 2 significant factors: (1)
10 Petitioner did in fact file a timely habeas petition following the
11 Judgment of Conviction. (2) It was the court, who informed
12 petitioner (via it's order on Dec. 27, 1988 - exhibit H to the
13 Petition) that the District Court and Nev. Supreme Court
14 could not hear/issue a Habeas Writ until petitioner was
15 physically present in Nevada. Thus the twenty (21) year
16 delay in submitting the instant was due to petitioner
17 following the court's order, and waiting until the court had
18 jurisdiction to hear the submitted habeas petition.

19 On pg 6, lines 17-19 the State contends that the Nev.
20 Supreme Court has held the district court has a duty to consider
21 whether the procedural bar applies to a post conviction petition
22 and not arbitrarily disregard them. Petitioner agrees with this
23 contention and would add the following caveat: Petitioner does
24 not dispute the district court's duty to consider whether a
25 procedural bar applies to this post conviction petition nor request
26 the court to disregard it's duty. Petitioner does however
27 request the court to consider a few exceptional circumstances
28 in it's review process. 1) Petitioner did in fact submit a

1 timely post conviction petition "within" a year of the Judgment of
2 Conviction. 2) Based on the decision of the court, petitioner
3 waited until the jurisdictional complication had been resolved
4 so the court could entertain/consider/issue the writ. 3)
5 Petitioner did not default on procedural rules, as the court's
6 order, essentially "removed" the availability of the procedure
7 and any such related rules "until" such time as it (the court)
8 had the jurisdictional authority to apply them. 4) Petitioner
9 should not be penalized for abiding by the court's order
10 in allowing it to acquire jurisdiction before submission of the
11 petition, versus tedious, repetitive submissions to courts that
12 clearly lacked jurisdiction to hear the claims. These factors
13 are all relevant and should be considered accordingly by the
14 court.

15 On pg. 7 lines 20-24, the State claims that the reason
16 petitioner indicated he waited over twenty (21) years was the
17 District Court told him he could not seek habeas relief until he
18 was present in the state and that the claim is unsupported
19 by the record and is even belied by the record. Petitioner
20 asserts that the State is incorrect in it's position. Petitioner
21 was informed that the court could not and would not be able
22 to entertain/consider or issue a Habeas Writ "until" he was
23 physically in the state. This information was adduced and
24 raised in a subsequent pleading from the State (Attorney
25 General's Office) in a Habeas Petition presented to the
26 U.S. District Court challenging the jurisdictional issue to
27 hear the Writ at the State Court level. (U.S. District Court
28 for the Central District of California, case no. CV-95-00254-

1 PMP where Dep. State Atty General - Frankie Sue Del Papa,
2 Esq. - helped respond with pleadings for the state. *Please
3 see attachment to question 16 (c) of the preprinted
4 State Habeas Petition for identifying case info.) It was
5 during these pleading that the State advanced petitioner
6 was without Habeas relief in the State of Nevada until such
7 time as he was physically present in the state. This claim has merit.

8 On pg 7 lines 22-24 the state contends "There is no
9 indication in the court's microfiche record that Defendant was
10 told he could not seek habeas relief while incarcerated in CA."
11 Petitioner asserts that this is partially incorrect. Petitioner
12 does not know what is contained in the court's microfiche record,
13 but petitioner does know that the State advanced this position
14 in the pleadings before the U.S. District Court (as indicated
15 supra) with that Court and the Ninth Circuit rendering decisions
16 that supported the State's position. Furthermore the initial
17 court order in the Nevada Supreme Court for the jurisdictional
18 conflict was nothing short of telling an inexperienced Pro-Per
19 litigant exactly "that" legal premise - "The Nev. Courts could
20 not entertain or issue the Habeas Writ because petitioner
21 was not in the physical custody of Nevada". Because petitioner
22 would not be in the physical custody of Nevada "until" 2010
23 and the previous Writ having been denied for this same
24 reason petitioner was left with no other conclusion.

25 On pg. 7 lines 24-28 and pg. 8 lines 1-2, the State
26 elaborates on the alleged process the district court under-
27 took during the court ordered evidentiary hearing on the
28 Petition For Post Conviction Relief. While petitioner doesn't

dispute the facts, he does assert that during the process he
 vehemently objected to the conducting of the evidentiary
 hearing outside of his physical presence.
 "I didn't object when it made findings of fact
 concerning prisoner's knowledge and consent to his counsel's
 representation of a witness against Hayman without notice to
 Hayman or Hayman's presence at the evidentiary hearing," see U.S.
 v. Hayman 512 U.S. 205 (1992)
 "The Nevada Supreme Court has held that the presence of
 petitioner for a habeas corpus petition itself is required
 at any evidentiary hearing conducted in the merits of the
 claim asserted in the petition." See Gebert v. Nevada, 118
 Nev. 518 (2002).
 Because the evidentiary hearing in question involved
 material facts within the scope of petitioner's knowledge his
 presence should have been mandatory. Yet it was not required
 and the hearing proceeded without petitioner's presence. The
 State admitted this hearing outside of petitioner's presence
 hoping to allow video taped proceedings and affidavits submission
 to reach a ruling. But for petitioner's habeas petition in the
 State Court, the State made no attempt to offer evidence or
 permit hearing of the habeas outside petitioner's presence.
 On pg. 8 lines 8-26, the State is pleading "latency"
 in its Motion To Dismiss the Petition For writ of Habeas
 Corpus. Specifically the State advances that N.R.S. 34.800
 creates a rebuttable presumption of prejudice to the State
 if [a] period exceeding five years between the filing of a
 judgment of conviction... and the filing of a petition

1 'challenging the validity of a judgment of conviction...' (id at
2 lines 8-13). Petitioner asserts this N.R.S. provision is
3 inapplicable because he did in fact file a Petition
4 challenging the validity of the judgment of conviction
5 within the one year period as required, thereby negating
6 the attachment of laches in this case.

7 The State contends specifically in lines 14-17 (pg. 8)
8 that since over twenty-one (21) years have elapsed between
9 the Supreme Court's issuance of Remittitur and the filing of
10 the instant petition, N.R.S. 34.804 directly applies in this
11 case. Petitioner asserts that this is incorrect. The period
12 was lengthy in this case because of the court's order
13 to petitioner. When the initial petition for Habeas Corpus
14 was filed with the State Court, promptly following the
15 judgment of conviction, (both the State and Federal
16 Courts) an order denying the petition was issued due
17 to the jurisdictional conflict. Accordingly, the
18 submission of any further petitions "until" the court had
19 the authority to exercise its jurisdiction would have
20 been a waste of the court's time and exercise of
21 futility. The court lacked authority to exercise its
22 jurisdiction in the habeas matter and thus all procedures
23 relevant and pertaining to State Habeas Corpus
24 proceedings were essentially suspended "until" jurisdiction
25 and authority could be acquired. Once the court issued its
26 denial upon jurisdictional conflict and lack, "any" subsequent
27 Petition would have been met with the same fate (as the timely
28 initial petition) no matter when it was submitted, as the court

1 lacked the authority and jurisdiction to act on the writ. Thus
2 the delay is due to circumstances beyond his control.
3 On pg 8, lines 17-26 the State attempts to argue
4 that the length of time applies prejudice in trying to
5 "re-prove" matters that have become ancient history
6 citing witness location problems, faded memories and etc.
7 The irony in this matter is that there are the same type
8 of arguments that petitioner attempted to raise when he
9 submitted his Habeas Petition to the U.S. District Court.
10 (See case in re attachment 16 (c) to the pre-printed writ
11 form). However, in that matter the State argued that the
12 writ could not be heard until petitioner was physically
13 present in Nevada (despite the claims from petitioner relative
14 to hardship, prejudice and etc.). Now the State seeks to
15 extend prejudice in a delay that they initially condemned
16 as a matter of law. The State cannot have it both ways
17 (ignore the obvious prejudice petitioner notices them will
18 exist due to a lengthy delay - then, claim their own prejudice
19 once the delay they supported occurs). Petitioner asserts
20 that the doctrine of laches is inapplicable and only
21 presumption of prejudice already existed and was
22 assumed by the State when it argued for the petitioner
23 to have to wait until he was physically in Nevada before
24 his State Habeas could be heard. Furthermore any delay
25 is "excusable" as it was the result of the court lacking
26 authority and jurisdiction to hear the Habeas Petition. The
27 delay (if any) was directly attributable to the court's
28 order in this case.

PRIMA FACIE SHOWING/CASE MERITS

Petitioner asserts that in this case he has met the initial hurdle of presenting a prima facie case showing to the court. In doing so he had to establish factors which if proven true would entitle him to relief. Thus, the court's order to the state, to file a response to help determine the lawfulness of his detention/restraint of his liberty. To deny the petition prior to a full and fair hearing (which petitioner has never had in this case) on the claims of the interesting factors which frame his contentions. A denial would allow potentially meritorious claims to be washed away with no hope of ever being heard.

INTEREST OF JUSTICE

Petitioner asserts that dismissal of the petition as untimely would be tantamount to a miscarriage of justice that has cumulatively occurred in this case.

The petitioner has NEVER had his day in court with either "full or fair" proceedings on his claims. Many of these claims are of constitutional magnitude and affect numerous rights that petitioner should have been entitled to but NEVER received. Because habeas corpus is the appropriate vehicle to present colorable claims that exist outside of the record, dismissal of this petition would be to act contrary to the interest of justice.

The State seeks to dispose of this case by having it dismissed as a means of resolving a case that is "over ripe" with significant and substantial constitutional violations. Any one of the several claims would

1 be substantial enough to warrant a reversal of the
2 conviction and a possible discharge or retrial, because
3 petitioner's rights were violated before, during and after
4 trial. Petitioner has never had the opportunity to have
5 a full and fair hearing on the claims or to controvert
6 material facts. Petitioner has NEVER been allowed to
7 demonstrate his imprisonment is unlawful, and habeas corpus
8 is his only opportunity. Petitioner had his Habeas Corpus
9 privilege suspended and abridged through jurisdictional
10 conflict for over 20+" years. Now that he is poised to
11 finally be heard in an appropriate judicial tribunal with
12 competent jurisdiction, the State is seeking to remove any
13 opportunity for habeas consideration by dismissal of the
14 petition. Such a dismissal will have removed and abridged
15 petitioner's entire post conviction habeas corpus rights/
16 privileges. This, the interests of justice cannot allow.
17 Habeas Corpus is a State and Federally protected right/
18 privilege. The State enacts rights and privileges (especially
19 Habeas Corpus) for its citizens to afford due process of law.
20 The interest of justice will always be served by due
21 process of law. Petitioner has not received due process of
22 law during any of his proceedings in this case and this
23 Habeas proceeding is his only chance for any type of
24 due process of law. He has already been made to
25 wait for over 20+" years for this chance of possible
26 due process of law, and thus the State's attempt to
27 close out this opportunity to be heard would work
28 contrary to the interest of justice in this case.

CONCLUSION

In conclusion, petitioner has demonstrated several things in his opposition. Most significantly that the State who is responsible for removing the availability of Habeas Corpus has now sought in the Motion To Dismiss to penalize the petitioner for non compliance with procedures that are not available to him. Petitioner's Habeas Petition should not be time barred or procedurally barred for the reasons set forth in this opposition. Petitioner's claims are meritorious and should be allowed to proceed in the interests of justice because he has never had a full and fair hearing on his claims. The Petition should NOT be dismissed and should be advanced to be heard in an evidentiary hearing to resolve the numerous material issues.

11

Date: March 21, 2011

151 Andre' Boston
Andre' Boston
PETITIONER, PRO PER/SE

CERTIFICATE OF MAILING

I hereby certify that service of the above "Opposition To the State's Response & Motion To Dismiss the Petition" was made on this 21 day of March, 2011 by depositing a true and copy (correct) of the document in the mail addressed to:

David Roger
Office of the District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

151 Andre' Boston

EXHIBIT
'I'

EXH. I

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

March 23, 2011

88C084650

The State of Nevada vs Andre D Boston

March 23, 2011

8:30 AM

Petition for Writ of Habeas
Corpus

HEARD BY: Cadish, Elissa F.

COURTROOM: RJC Courtroom 15B

COURT CLERK: Keith Reed

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES

PRESENT:	Public Defender	Attorney
	Spells, Jasmin	Attorney
	State of Nevada	Plaintiff
	Stephens, Robert	Attorney

JOURNAL ENTRIES

- In the absence of the Deft. Court stated there will not be any argument; the ruling will be based upon the written briefs. Court stated findings and ORDERED, Petition For Writ Of Habeas Corpus DENIED, it's untimely, successive, without good cause for the procedural defects and has failed to rebut the state's defense of laches; motion to dismiss GRANTED; Public Defender RELIEVED as counsel of record.

NDC

CLERK'S NOTE: Minutes distributed to: Andre D. Boston #27846 HDSP 11A/9A, Indian Springs Nv.
89070

EXHIBIT
'J'

EXH. J

FILED

MAY 31 2011

Heather Ungermann
CLERK OF COURT

NOED

DISTRICT COURT
CLARK COUNTY, NEVADA

ANDRE D. BOSTON,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 88C084650

Dept No: VI

NOTICE OF ENTRY OF
DECISION AND ORDER

PLEASE TAKE NOTICE that on April 22, 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 May 31, 2011.

STEVEN D. GRIERSON, CLERK OF THE COURT

By: *Heather Ungermann*

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 31 day of May 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:
Andre Boston # 27846
P.O. Box 650
Indian Springs, NV 89070

Heather Ungermann
Heather Ungermann, Deputy Clerk

ORIGINAL

5

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT STEPHENS
Deputy District Attorney
Nevada Bar #011286
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

APR 22 3 54 PM '11

Ann L. Shuman
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.¹ 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.² (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 ¹ Defendant was serving a sentence in the California State Prison for kidnapping, sexual assault and
28 assault in Case No. A-565679.

² 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.

1 14. Since Remittitur issued from the denial of Defendant's appeal on November
2 14, 1989, Defendant had until Wednesday, November 14, 1990, to file his post-conviction
3 habeas petition. After a prolonged evidentiary hearing, Defendant's first petition was
4 ultimately denied on October 14, 1993. The Nevada Supreme Court subsequently affirmed
5 the district court's denial of Defendant's petition and Remittitur issued on October 26, 1994.

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

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

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

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

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

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

17 CONCLUSIONS OF LAW

18 1. The mandatory provisions of NRS 34.726 read:

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

26 (a) That the delay is not the fault of the petitioner; and
27 (b) That dismissal of the petition as untimely will unduly
28 prejudice the petitioner.

(Emphasis added).

29 2. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
30 Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear
31 and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the
32 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
6 petition could have been: . . .

(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 24 day of March, 2011.


DISTRICT JUDGE

J.P.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY

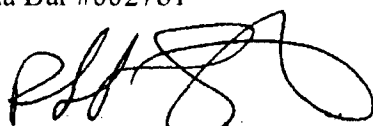

ROBERT STEPHENS
Deputy District Attorney
Nevada Bar #011286

EXHIBIT
'K'

EXH-K

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE DUPREE BOSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58216

FILED

FEB 03 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anger*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In 1988, appellant, a juvenile at the time he committed his offenses, was convicted of one count of burglary, one count of lewdness with a minor with the use of a deadly weapon, one count of assault with a deadly weapon, one count of battery with the intent to commit a crime with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, six counts of sexual assault with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of attempting to dissuade a victim from reporting a crime with the use of a deadly weapon. The district court sentenced appellant to

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

serve fourteen consecutive terms of life with the possibility of parole and consecutive terms totaling 92 years. This court dismissed the direct appeal. Boston v. State, Docket No. 19607 (Order Dismissing Appeal, October 24, 1989). The remittitur issued on November 14, 1989.

On December 21, 1988, appellant, while incarcerated in a California correctional facility, filed an original petition for a writ of habeas corpus in this court. This court denied the petition, noting that the Nevada Constitution did not authorize this court or the district court to issue a writ of habeas corpus on behalf of someone not actually held in custody in Nevada. Boston v. Attorney General, Docket No. 19625 (Order Denying Petition for a Writ of Habeas Corpus, December 27, 1988).

On October 22, 1990, appellant filed a petition for post-conviction relief pursuant to NRS 177.315. The district court denied the petition without conducting an evidentiary hearing. On appeal, this court entered an order of remand for the purpose of conducting an evidentiary hearing on appellant's claim that his counsel was ineffective for failing to investigate a defense of insanity. Boston v. State, Docket No. 21871 (Order of Remand, September 30, 1991). On remand, the district court was not able to conduct an evidentiary hearing in appellant's presence. Rather, the district court caused the evidentiary hearing to be videotaped, and provided appellant an opportunity to view the videotape and submit an affidavit regarding the issues that he wanted presented.² The district court again denied the petition. Appellant's appeal from this order was dismissed for lack of jurisdiction as the notice of appeal was untimely.

²Appellant was represented by counsel in the post-conviction proceedings.

Boston v. State, Docket No. 26034 (Order Dismissing Appeal, October 7, 1994).

On January 5, 2011, appellant filed a proper person post-conviction petition for a writ of habeas corpus.³ In his petition, appellant claimed that his trial counsel was ineffective for failing to investigate mitigating factors for sentencing and that his speedy trial rights were violated by the four-year delay in bringing him to trial.⁴ Appellant also claimed that the sentence structure amounted to cruel and unusual punishment because he received a sentence that was the functional equivalent of a life-without-parole sentence. Appellant relied, in part, on the recent decision in Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011 (2010), holding that the Constitution prohibits a sentence of life without parole for a juvenile offender who did not commit homicide.

In an attempt to demonstrate good cause for the petition as a whole, appellant argued that in 1988 this court informed him that he could not pursue habeas corpus relief while incarcerated in another state and that this excused his procedural defects. Further, it appears that appellant was relying upon the Graham decision as good cause for those claims relating to his sentence structure because those claims were not

³The petition was untimely filed pursuant to NRS 34.726(1) and a successive petition pursuant to NRS 34.810(1)(b)(2) and NRS 34.810(2).

⁴Appellant also claimed that the detainer Nevada placed on him during his period of incarceration in California caused him to lose opportunities for rehabilitation and affected his security level. Such claims challenge the conditions of confinement and are not permissible in a post-conviction petition for a writ of habeas corpus. See Bowen v. Warden, 100 Nev. 489, 686 P.2d 250 (1984).

available previously. See Bejarano v. State, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006) (recognizing that good cause may be established where the legal basis for a claim was not reasonably available).

The State filed a motion to dismiss the petition, arguing that the petition was procedurally barred and barred by laches.⁵ The district court rejected appellant's argument relating to the 1988 order because the district court found that the record contained no evidence of such an order. The district court did not address appellant's argument that Graham provided good cause to litigate his claims relating to the sentence structure. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate that the 1988 order provided good cause for the late and successive petition. However, we conclude that the district court erred in denying the petition without appointing counsel for the claims relating to Graham.

The district court incorrectly found that the 1988 order did not exist; a copy of the order is included in the record. Nevertheless, the district court did not err in determining that the 1988 order did not excuse the procedural defects in this case. While the statements in the 1988 order may explain the delay in timing because of the language employed regarding custody and habeas relief, the 1988 order did not provide good cause for filing a petition raising claims litigated in the 1990 petition for

⁵We note that there may be a discrepancy regarding the date the State mailed a copy of the motion to dismiss. Appellant's response to the motion to dismiss was received on the date set for hearing of the motion. For the reasons discussed below, any discrepancy did not cause prejudice in the instant case.

post-conviction relief on the merits or raising new claims that could have been raised in the 1992 petition for post-conviction relief. 1985 Nev. Stat., ch. 435, § 10, at 1232 (NRS 34.810(1)(b), (2), (3)). Thus, we affirm that portion of the district court's order rejecting a good cause argument based upon the 1988 order. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).


The district court did not specifically address the good cause argument related to Graham.⁶ The applicability and scope of the decision in Graham—whether Graham applies only to a sentence of life without parole or whether Graham applies to a lengthy sentence structure that is the functional equivalent of life without parole—is complex and novel. Appellant is serving a severe sentence.⁷ Appellant requested the appointment of counsel in the prayer for relief in his petition and appellant has been previously determined to be indigent. Under these circumstances, the failure to appoint post-conviction counsel prevented a meaningful litigation of the Graham good cause argument. NRS 34.750(1). Thus, we reverse the district court's denial of this portion of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings. Accord

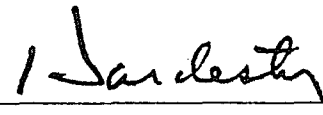
⁶We further note that the district court did not provide any specific discussion of the applicability of NRS 34.800(2) in light of Graham.

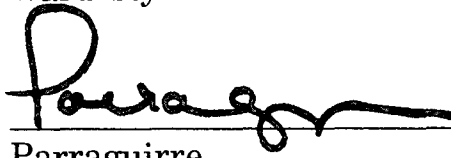
⁷In the instant case, it appears that appellant would have to serve a minimum of approximately 100 years before he will be eligible for parole. 1977 Nev. Stat., ch. 598, § 1, at 1626 (NRS 200.366(2)(b)); 1973 Nev. Stat., ch. 798, § 6, at 1804-05 (NRS 200.320(2)); 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165); NRS 209.446(6); NRS 213.120(1).

Rogers v. State, 127 Nev. ___, ___ P.3d ___ (Adv. Op. No. 88, December 29, 2011). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁸

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Andre Dupree Boston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁸We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

EXHIBIT
'L'


EXH-L

original 6

1 Andre' Boston 27846
2 Defendant In Proper Person
3 P.O. Box 650 H.D.S.P.
4 Indian Springs, Nevada 89018

FILED
APR 19 2011
CLERK OF COURT

5 DISTRICT COURT
6 CLARK COUNTY NEVADA

88C084650
NOASC
Notice of Appeal (criminal)
1362808


8 Andre' D. Boston
9 Petitioner
10 -v-
11 The State of Nevada et. al.,
12 Respondents
13

Case No. 88C084650
Dept.No. VI
Docket

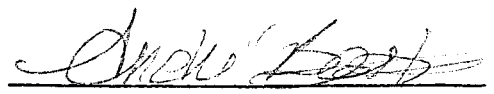
14 NOTICE OF APPEAL

15 Notice is hereby given that the Petitioner, Andre' D.
16 Boston, by and through himself in proper person, does now appeal
17 to the Supreme Court of the State of Nevada, the decision of the District
18 Court (Eighth Judicial District) denying Petitioner's Writ of
19 Habeas Corpus on March 23, 2011.

20
21 Dated this date, April 17, 2011.

22
23 ** See attached additional
24 material fact sheet/exhibit.
25 Appeal Record info.

Respectfully Submitted,



In Proper Person

RECEIVED
APR 19 2011
CLERK OF THE COURT

Case Name: Andre' Boston v. Anthony Scillia, et. al. (State of Nev.)
Case Number: C084650

Petitioner/Appellant Andre' Boston, hereby provides the court with this document pursuant to NRAP Rule 10 and request to expend the record on appeal with pertinent material facts to be considered with the appeal in this matter. This information is pertinent for the Nevada Supreme Court's consideration of the appeal in this matter. This information is required for preservation of the issue on appeal and may not be disclosed in the record on appeal. However, the Supreme Court in it's review of the denial for Post-Conviction Habeas Corpus needs to be aware of these facts and petitioner/appellant discloses this info. to make an adequate appellate record.

"It is the appellant's responsibility to make an adequate appellate record." Rules Civ. Proc. Rule 51; Rules App. Proc. Rule 10 (c) Carson Ready Mix, Inc. v. First Nat. Bank of Nevada 1981, 635 P.2d 276, 97 Nev. 474.

RELEVANT MATERIAL FACTORS

The District Court ruled on the Motion To Dismiss where the State pled "laches" without giving the petitioner/appellant the opportunity to respond to the allegations as outlined in N.R.S. §34.800 (2), despite notice that the petitioner intended to respond and a Motion For Enlargement of Time so that he could respond to the State's Motion To Dismiss and plea of "laches".

The District Court issued a ruling without giving the petitioner the chance to respond to the State's Motion To Dismiss within 15 days "after service" to a Motion by the State To Dismiss the action as outlined in N.R.S. §34.470(1) and 34.750(4).

- * The State certified serving the Motion To Dismiss on March 4, 2011
- * However, the Motion to Petitioner was not actually mailed until March 10, 2011, routed by the Post Office on March 11, 2011, and not physically received by the petitioner until March 15, 2011. (See exhibit A to this document) Therefore "service" was not effected until March 15, 2011.
- * The Petitioner mailed an Informal Notice of Intent To File An Answer to the State's Response, and a Notice/Motion For Enlargement of Time on March 13, 2011, after "NOT" receiving the State's Motion To Dismiss timely. The petitioner's documents were received by the court on March 17, 2011 and filed with the court on March 22, 2011.
- * Petitioner received the State's Motion To Dismiss on March 15, 2011 Six Days later he mailed in his Opposition to the Motion To Dismiss.
- * The District Court ruled on the Habeas Petition on March 23, 2011, denying the Petition without having read or considered the petitioner's Opposition to the Motion To Dismiss. Said Opposition demonstrated that there was "NO" Procedural violation, there was "GOOD CAUSE" for any delay, there was "ACTUAL PREJUDICE" AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN PETITIONER'S CASE.

The District Court appointed an attorney (without notifying the petitioner) at the Habeas Hearing. Counsel was ineffective, in that, she did nothing at the hearing to act as an advocate for petitioner allowing the habeas petition to be denied without:

- a.) Requesting a continuance to review the case file that she had been assigned to represent petitioner in for the hearing.
- b.) Requesting an Enlargement of Time under N.R.S. § 34.750(3) to file/serve supplemental pleadings.
- c.) Ensuring that in view of the Notice of Intent To File An Answer/Motion For Enlargement of Time, petitioner's Answer was received and reviewed by the court prior to a ruling being made, as required by applicable statutes.
- d.) Ensuring that once the State pled "laches", petitioner would be given the opportunity to respond to the Motion To Dismiss as required by N.R.S. § 34.800(2)

Petitioner hereby notifies the District Court of the foregoing and indicated procedural errors in this case and request that this information be made a part of the record for consideration of the appeal in this case by the Nevada Supreme Court for appropriate consideration of the appeal in this matter.

Petitioner further requests the reincorporation of the claims raised in the initial petition for writ of habeas corpus to be considered by the Nevada Supreme Court.

Date: April 11, 2011

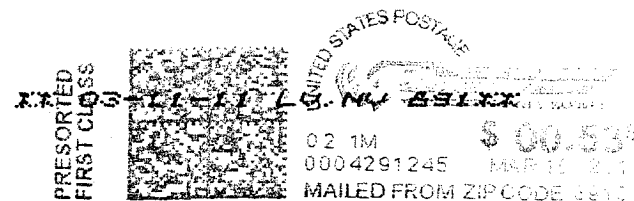
/s/ 
Andre' D. Boston
Petitioner/Appellant, Pro-Se/Per



DAVID ROGER, *District Attorney*
Office of the District Attorney
200 LEWIS AVENUE
P.O. BOX 552212
LAS VEGAS, NV 89155-2212

11A9

ANDRE D. BOSTON, BAC#27846
P.O. BOX 650 (HDSP)
INDIAN SPRINGS, NV 89070-0650



45 LRDFN11 89070

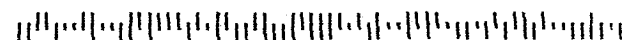


Exhibit A

CERTIFICATE OF SERVICE BY MAILING

I, Andre' Barton, hereby certify, pursuant to NRCP 5(b), that on this 11
day of April, 20 11, I mailed a true and correct copy of the foregoing, "Notice of Appeal / Request to Expand Appeal Record"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

David Reger
Office of the District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

DATED: this 11 day of April, 20 11.

Andre' Barton # 27846
/In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Notice of Appeal
(Title of Document)

filed in District Court Case number CD84650

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Andre Rusten
Signature

4/10/11
Date

Andre Rusten
Print Name

Petitioner/Appellant
Title

CERTIFICATE OF SERVICE BY MAILING

I, Marie Robison, hereby certify, pursuant to NRCP 5(b), that on this 3rd day of May, 2012, I mailed a true and correct copy of the foregoing, "

Petition For Writ of Mandate / Appointment of Counsel

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Office of the District Attorney
200 Lewis Ave.
LV, NEV. 89155-2212

CC:FILE

DATED: this 3rd day of May, 2012.

Marie Robison 29846

/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

CIVIL COVER SHEET

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): Andre Boston

Defendant(s) (name/address/phone): State of Nevada

Attorney (name/address/phone): PRB-Per/SE

Attorney (name/address/phone): District Attorney

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

Real Property

- ☐ Landlord/Tenant
 - ☐ Unlawful Detainer
- ☐ Title to Property
 - ☐ Foreclosure
 - ☐ Lien
 - ☐ Quiet Title
 - ☐ Specific Performance
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property
 - ☐ Partition
 - ☐ Planning/Zoning

Torts

- ☐ Negligence
 - ☐ Negligence - Auto
 - ☐ Negligence - Medical/Dental
 - ☐ Negligence - Premises Liability (Slip/Fall)
 - ☐ Negligence - Other
- ☐ Product Liability
 - ☐ Product Liability/Motor Vehicle
 - ☐ Other Torts/Product Liability
- ☐ Intentional Misconduct
 - ☐ Torts/Defamation (Libel/Slander)
 - ☐ Interfere with Contract Rights
- ☐ Employment Torts (Wrongful termination)
- ☐ Other Torts
 - ☐ Anti-trust
 - ☐ Fraud/Misrepresentation
 - ☐ Insurance
 - ☐ Legal Tort
 - ☐ Unfair Competition

Probate

- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside Estates
- ☐ Trust/Conservatorships
 - ☐ Individual Trustee
 - ☐ Corporate Trustee
- ☐ Other Probate

Other Civil Filing Types

- ☐ Construction Defect
 - ☐ Chapter 40
 - ☐ General
- ☐ Breach of Contract
 - ☐ Building & Construction
 - ☐ Insurance Carrier
 - ☐ Commercial Instrument
 - ☐ Other Contracts/Acct/Judgment
 - ☐ Collection of Actions
 - ☐ Employment Contract
 - ☐ Guarantee
 - ☐ Sale Contract
 - ☐ Uniform Commercial Code
- ☐ Civil Petition for Judicial Review
 - ☐ Other Administrative Law
 - ☐ Department of Motor Vehicles
 - ☐ Worker's Compensation Appeal
- ☐ Appeal from Lower Court (also check applicable civil case box)
 - ☐ Transfer from Justice Court
 - ☐ Justice Court Civil Appeal
- ☒ Civil Writ
 - ☒ Other Special Proceeding
- ☐ Other Civil Filing
 - ☐ Compromise of Minor's Claim
 - ☐ Conversion of Property
 - ☐ Damage to Property
 - ☐ Employment Security
 - ☐ Enforcement of Judgment
 - ☐ Foreign Judgment - Civil
 - ☐ Other Personal Property
 - ☐ Recovery of Property
 - ☐ Stockholder Suit
 - ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

May 3 2012
REC'D
 Date

MAY 07 2012

Nevada AOC - Planning and Analysis Division
 CLERK OF SUPREME COURT
 DEPUTY CLERK

Andre Boston
 Signature of initiating party or representative

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Petition For writ of Mandate

(Title of Document)

filed in District Court Case number L-84650

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Andre Boston
Signature

5/3/12
Date

Andre Boston
Print Name

Petitioner D13-PS/SE
Title

1 Andre Boston #27846
2 Defendant / In Propria Personam
3 SDOC, Post Office Box-208
4 Indian Springs, Nevada 89070-0208.

5 SUPREME COURT
6 STATE OF NEVADA

7 Andre Boston)
8 Plaintiff,)
9 Vs.)
10 State of Nevada)
11 Defendant.)

Case No. # _____
Dept. No. # _____
Docket No. # _____
8th Judicial Dist. Ct. C84650

12
13 MOTION TO APPOINT COUNSEL

14 Date Of Hearing: _____
15 Time Of Hearing: _____
16

17 COMES NOW the Defendant Andre Boston in proper person and
18 hereby moves this Honorable Court for an ORDER granting him Counsel in the herein
19 proceeding action.

20 This Motion is made and based upon all papers and pleadings on File herein
21 and attached Points and Authorities.

22
23 Dated: This 3rd Day Of May, 20 12.

24
25 Respectfully Submitted,

26 BY: Andre Boston

27846

27 Defendant, In Forma Pauperis:

28 RECEIVED

MAY 07 2012

TRICIE K. LINDEMAN
CLERK OF COURT

POINTS AND AUTHORITIES

NRS.34.750 Appointment of Counsel for indigents;pleading sipplemental to
petition;response to dismiss:

"If the Court is satisfied that the allegation of indigency is True and the
petition is Not dismissed summarily,the Court may apppoint counsel to represent
the-"petitioner/defendant."

NRS.171.188 Procedure for appointment of attorney for indigent defendant:

"Any defendant charged with a public offense who is an indigent may, by oral
statement to the District Judge,justice of the peace,municipal judge or master,
request the appointment of an attorney to represent him."

NRS 178.397 Assignment of counsel;

"Every defendant accused of a gross misdemeanor or felony who is financially
unable to obtain counsel is entitled to have counsel assigned to represent him at
every stage of the proceedings from his initial appearance before a magistrate or
the court through appeal,unless he waives such appointment."

WHEREFORE ,petitioner/defendant,prays this Honorable Court will grant his
motion for the appointment of counsel to allow him the assistance that is needed
to insure that justice is served.

Dated:This 3rd Day Of May, 20 12.

Respectfully Submitted,

BY:

[Signature]
29846

Defendant, In Forma Pauperis:

////

////

////

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Appointment of Counsel

(Title of Document)

filed in District Court Case number 284650

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

Andre Boston

Signature

5/3/12

Date

Andre Boston

Print Name

Petitioner Pro-Per

Title