



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

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Feb 12 2014 03:38 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

February 12, 2014

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

RE: STATE OF NEVADA vs. ERICK M. BROWN
S.C. CASE: 64907
D.C. CASE: C189658-1

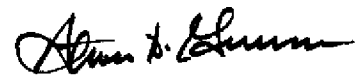
Dear Ms. Lindeman:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated February 5, 2014, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed February 12, 2014 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, reading "Heather Ungermann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

1 **FCL**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **MICHAEL RADOVCIC**
6 **Deputy District Attorney**
7 **Nevada Bar #010964**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

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

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

CASE NO: 03C189658-1

12 **ERICK BROWN,**
13 **aka, Erick Marquis Brown, #1895908**

DEPT NO: XXV

14 **Defendant.**

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 **DATE OF HEARING: JANUARY 8, 2014**
18 **TIME OF HEARING: 9:00 A.M.**

19 **THIS CAUSE** having come on for hearing before the Honorable KATHLEEN E.
20 **DELANEY**, District Judge, on the 8th day of January, 2014, the Defendant not being present,
21 **PROCEEDING IN FORMA PAUPERIS**, the Respondent being represented by **STEVEN B.**
22 **WOLFSON**, Clark County District Attorney, by and through **MICHAEL RADOVCIC**,
23 **Deputy District Attorney**, and the Court having considered the matter, including briefs,
24 **transcripts**, no arguments of counsel, and documents on file herein, now therefore, the Court
25 **makes the following findings of fact and conclusions of law:**

26 **FINDINGS OF FACT**

27 **1. On January 28, 2003, the State charged ERICK BROWN, aka, Erick Marquis**
28 **Brown (hereinafter "Defendant") by way of Information with: COUNT 1 – Burglary While**
in Possession of a Firearm (Felony – NRS 205.060, 193.165); COUNT 2 – First Degree

1 Kidnapping with Use of a Deadly Weapon, Victim 65 Years of Age or Older Resulting in
2 Substantial Bodily Harm (Felony – NRS 200.310, 193.165, 193.167, 0.060); COUNT 3 – First
3 Degree Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm
4 (Felony – NRS 200.310, 193.165, 0.060); COUNT 4 – Robbery with Use of a Deadly Weapon,
5 Victim 65 Years of Age (Felony – NRS 200.380, 193.165, 193.167); and COUNT 5 – Robbery
6 with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165).

7 2. On June 26, 2006, Defendant's jury trial commenced, and on June 30, 2006, the
8 jury returned a verdict of guilty on all counts. On August 8, 2006, Defendant appeared in
9 court with counsel, was adjudged guilty on all counts, and was SENTENCED to the Nevada
10 Department of Corrections (NDC) as to: COUNT 1 – a MAXIMUM term of ONE
11 HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of TWENTY-
12 SIX (26) MONTHS; COUNT 2 – a MAXIMUM term of FORTY (40) YEARS with a
13 MINIMUM Parole eligibility after FIFTEEN (15) YEARS, plus an EQUAL AND
14 CONSECUTIVE MAXIMUM term of FORTY (40) YEARS with a MINIMUM parole
15 eligibility after FIFTEEN (15) YEARS, for Victim over 65 Years of Age or Older, to run
16 CONCURRENT with COUNT 1; COUNT 3 – a MAXIMUM term of FORTY (40) YEARS
17 with a MINIMUM Parole eligibility after FIFTEEN (15) YEARS, plus an EQUAL AND
18 CONSECUTIVE MAXIMUM term of FORTY (40) YEARS with a MINIMUM parole
19 eligibility after FIFTEEN (15) YEARS, for the Deadly Weapon enhancement to run
20 CONSECUTIVE to COUNT 2 and PAY \$143,327.00 RESTITUTION; COUNT 4 – a
21 MAXIMUM term of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole
22 eligibility of TWENTY-SIX (26) MONTHS plus an equal and CONSECUTIVE MAXIMUM
23 term of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of
24 TWENTY-SIX (26) MONTHS, for Victim 65 Years of Age or Older, to run CONCURRENT
25 with COUNT 3; and COUNT 5 – a MAXIMUM term of ONE HUNDRED TWENTY (120)
26 MONTHS with a MINIMUM parole eligibility of TWENTY-SIX (26) MONTHS, and plus
27 an equal and CONSECUTIVE term of ONE HUNDRED TWENTY (120) MONTHS with a
28 MINIMUM parole eligibility of TWENTY-SIX (26) MONTHS, for Use of a Deadly Weapon,

1 to run CONCURRENT with COUNT 4, with ONE THOUSAND THREE HUNDRED
2 FORTY-NINE (1,349) DAYS credit for time served. Judgment of Conviction was filed on
3 August 16, 2006. Defendant filed Notices of Appeal on August 11, 15, and 28, 2006,
4 respectively. The Nevada Supreme Court affirmed his convictions on September 13, 2007,
5 and remittitur issued on October 9, 2007.

6 3. On June 17, 2008, Robert Langford was appointed as counsel, and on October
7 10, 2008, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). The State
8 opposed Defendant's Petition on July 17, 2009. Defendant filed a Supplement to his Petition
9 on May 22, 2009, as well as two (2) subsequent Amendments to his Petition on November 19,
10 2009, and January 27, 2010. The District Court denied Defendant's Petition on the merits on
11 January 27, 2012, and entered its Findings of Fact, Conclusions of Law and Order on February
12 13, 2012. Defendant filed a Notice of Appeal from the denial of his Petition on February 7,
13 2012. The Nevada Supreme Court affirmed the denial of Defendant's Petition on January 16,
14 2013, and remittitur issued February 11, 2013.

15 4. On June 27, 2013, Defendant filed an Accused Motion to Dismiss for Lack of
16 Subject Matter Jurisdiction, Notice of Motion and Motion to Appoint Counsel, and Caveat.
17 The State opposed these motions on July 12, 2013, and the District Court denied these motions
18 on July 22, 2013. The Court filed its Orders denying these Motions on August 9, 2013.

19 5. On August 6, 2013, Defendant filed a Motion for Re-Hearing, and an Accused
20 Request for Leave to File Motion for Re-Hearing base upon State and Federal Constitutional
21 Deprivation in Prior Proceedings. The State opposed this Motion and Request on August 16,
22 2013. On August 15, 2013, Defendant also filed a Accused Supplemental To His Motion For
23 Re-Hearing / And / Or Reply To States Opposition And Or Courts Deniel [sic] Of Accused
24 File Motion For Lack Of Subject Matter Juridiction [sic] And Accused Motion To Strike States
25 Opposition For Good Legal Cause Showing. The State did not specifically oppose this
26 Supplemental, and on August 28, 2013, the District Court denied Defendant's Motion and
27 Request. The District Court filed its Order Denying Defendant's Motion for Re-Hearing on
28 November 4, 2013. Defendant filed a Notice of Appeal from the denial of his Motion for

1 Rehearing on November 14, 2013, Case Number 64443. The Nevada Supreme Court
2 dismissed the appeal for want of jurisdiction on January 16, 2014, with issuance of remittitur
3 pending.

4 6. On September 23, 2013, Defendant also filed a Motion for Order for the Accused
5 Immediate Release; Due to State's Failure to Oppose the Accused Motion to Strike State's
6 Opposition for Good Legal Cause Showing because the State did not oppose his Supplemental.
7 The State opposed this Motion on October 9, 2013, and the District Court denied this Motion
8 on October 14, 2013.

9 7. On October 17, 2013, Defendant filed a pro per Petition for Writ of Habeas
10 Corpus (Post-Conviction). The State filed its Response and Motion to Dismiss on December
11 9, 2013.

12 8. On January 8, 2014, a hearing was held in district court in which this Court
13 DENIED Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

14 9. Defendant's Petition was time-barred pursuant to NRS 34.726(1). Remittitur
15 issued on the appeal from Defendant's Judgment of Conviction more than six (6) years ago.
16 Accordingly, Defendant's instant Petition is over five (5) years late.

17 10. Defendant's Petition is successive pursuant to NRS 34.810(2). As his first
18 petition for post-conviction relief was denied on the merits on January 27, 2012, his Petition
19 is: 1) successive to the extent he asserts grounds that have already been decided in his previous
20 petition, and 2) abuse of the writ to the extent that he alleges grounds he should have alleged
21 in his previous petition(s).

22 11. Defendant did not demonstrate good cause for the delayed filing of a successive
23 Petition. While he alleges that the reason he filed the instant Petition more than one (1) year
24 after the filing of a judgment of conviction or remittitur issuing from a direct appeal is that his
25 appellate counsel failed to file his appeal in a timely fashion, the record clearly belies this
26 claim. A Notice of Appeal from Mr. Langford's office was filed on February 7, 2012,¹ before
27

28 ¹ The State also noted that timely Notices of Appeal were also filed on Defendant's direct appeal which did not involve Mr. Langford, who was only appointed for post-conviction proceedings.

1 the district court even filed the order denying Defendant's Petition (on February 13, 2012).
2 Moreover, both the District Court and Nevada Supreme Court heard and denied Defendant's
3 first Petition on the merits. As Defendant does not attempt to demonstrate other good cause
4 for the untimely filing of his instant Petition, he fails to demonstrate any good cause here.

5 CONCLUSIONS OF LAW

6 1. The mandatory provisions of NRS 34.726 read:

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

- 11 (a) That the delay is not the fault of the Defendant; and
- 12 (b) That dismissal of the petition as untimely will
unduly prejudice the Defendant.

13 The one-year time bar is strictly construed. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d
14 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2)
15 days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1).
16 Gonzales reiterated the importance of filing the petition with the district court within the one-
17 year mandate, absent a showing of "good cause" for the delay in filing. Id. at 593, 590 P.3d
18 at 902

19 2. The mandatory provisions of NRS 34.810(2) read:

20 A second or successive petition must be dismissed if the judge or
21 justice determines that it fails to allege new or different grounds
22 for relief and that the prior determination was on the merits or, if
23 new and different grounds are alleged, the judge or justice finds
that the failure of the Defendant to assert those grounds in a prior
petition constituted an abuse of the writ.

24 Second or successive petitions either fail to allege new or different grounds for relief and the
25 grounds have already been decided on the merits, or allege new or different grounds, but a
26 judge or justice finds that the Defendant's failure to assert those grounds in a prior petition
27 would constitute an abuse of the writ. Second or successive petitions will only be decided on
28

1 the merits if the Defendant can show good cause and prejudice. NRS 34.810(3); Lozada v.
2 State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

3 Without limitations on the availability of post-conviction remedies, prisoners could
4 petition for relief in perpetuity and thus abuse post-conviction remedies. Id. In addition,
5 meritless, successive, and untimely petitions clog the court system and undermine the finality
6 of convictions. Id. A showing of prejudice is essential to prevent the filing of successive and
7 meritless petitions for post-conviction relief. Id. "Unlike initial petitions which certainly
8 require a careful review of the record, successive petitions may be dismissed based solely on
9 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995), cert.
10 denied 516 U.S. 1130 (1996). Where a claim or allegation was previously available with
11 reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McCleskey
12 v. Zant, 499 U.S. 467, 497-98 (1991)

13 3. In order to demonstrate good cause, a Defendant must show that an impediment
14 external to the defense prevented him or her from complying with the state procedural default
15 rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Pellegrini v.
16 State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353,
17 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)).
18 Such external impediment may be demonstrated by a showing "that the factual or legal basis
19 for a claim was not reasonably available to counsel, or that 'some interference by officials,'
20 made compliance impracticable." Hathaway, 119 Nev. at 252, 71 P.3d at 506 (citing Murray
21 v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted)). Good cause is a "substantial reason;
22 one that affords a legal excuse." Hathaway, 119 Nev. at 252, 71 P.3d at 506 (citations omitted).
23 Appellants cannot manufacture good cause. Clem v. State, 119 Nev. 615, 621, 81 P.3d 521,
24 526 (2003).

25 4. Claims asserted in a petition for post-conviction relief must be supported with
26 specific factual allegations which, if true, would entitle the Defendant to relief. Hargrove v.
27 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A Defendant is not entitled to relief on
28 claims that are belied by the record. Id.

ORDER

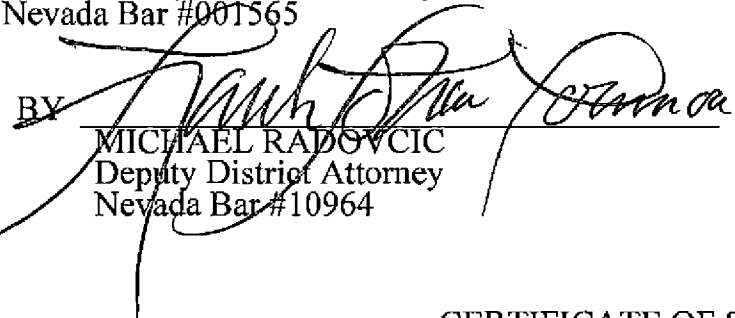
THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 4th day of January, 2014.


DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #007565

BY



MICHAEL RADOVCIC
Deputy District Attorney
Nevada Bar #10964

CERTIFICATE OF SERVICE

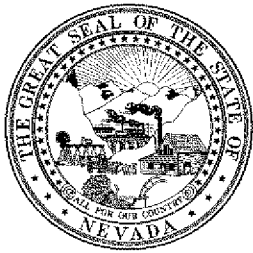
I certify that on the 30th day of January, 2014, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

ERICK BROWN,
aka, Erick Marquis Brown #92713
SOUTHERN DESERT CORRECTIONAL CENTER
20825 COLD CREEK RD.
P. O. BOX 208
INDIAN SPRINGS, NV 89070

BY


R. JOHNSON
Secretary for the District Attorney's Office

MW/MR/rj/M-1



Clerk of the Courts
Steven D. Grierson

200 Lewis Avenue
Las Vegas, NV 89155-1160
(702) 671-4554

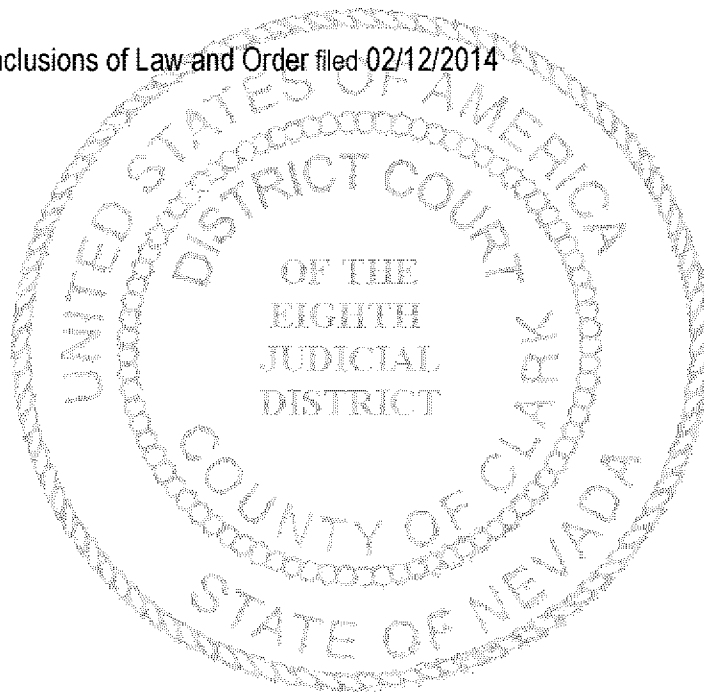
February 12, 2014

Case No.: C189658-1

CERTIFICATION OF COPY

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

Findings of Fact, Conclusions of Law and Order filed 02/12/2014



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 12:34 PM on February 12, 2014.


STEVEN D. GRIERSON, CLERK OF THE COURT