



**EIGHTH JUDICIAL DISTRICT COURT
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Tracie K. Lindeman
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Steven D. Grierson
Clerk of the Court

March 11, 2014

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

RE: STATE OF NEVADA vs. JUSTIN D. PORTER
S.C. CASE: 64996
D.C. CASE: C174954

Dear Ms. Lindeman:

Pursuant to your Notice to Transmit Required Document, dated March 5, 2014, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed February 14, 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, which appears to read "Heather Ungermann", is written over a horizontal line.

Heather Ungermann, Deputy Clerk

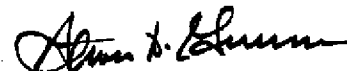
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1 **ORDR**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565

5 JAMES R. SWEETIN
6 Deputy District Attorney
7 Nevada Bar #005144
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff



CLERK OF THE COURT

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 THE STATE OF NEVADA,

15 Plaintiff,

16 -vs-

17 JUSTIN PORTER,
18 #1682627

19 Defendant.

CASE NO: **01C174954**

DEPT NO: **VI**

20 **FINDINGS OF FACT, CONCLUSIONS OF**

21 **LAW AND ORDER**

22 DATE OF HEARING: JANUARY 13, 2014
23 TIME OF HEARING: 8:30 A.M.

24 THIS CAUSE having come on for hearing before the Honorable ELISSA CADISH,
25 District Judge, on the 13th day of January, 2014, the Petitioner not being present, proceeding
26 IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON,
27 Clark County District Attorney, by and through DENA RINETTI, Deputy District Attorney,
28 and the Court having considered the matter, including briefs, transcripts, no arguments of
counsel, and documents on file herein, now therefore, the Court makes the following
findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Petitioner") with over forty (40) felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to nine events over a four month period, involving twelve victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

2. On May 15, 2008, Petitioner filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Petitioner's Motion to Sever and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Petitioner with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

3. On May 8, 2009, a jury found Petitioner guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Petitioner was found not guilty of Counts 1 and 2.

4. On September 30, 2009, the Court sentenced Petitioner to the Nevada Department of Corrections for One Hundred Twenty (120) Months to Life, plus a consecutive term of One Hundred Twenty (120) Months to Life for the use of a deadly weapon. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Petitioner filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

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1 5. On February 10, 2012, Petitioner filed a pro per Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its Response and Motion to Dismiss on March 21, 2013.
3 On April 23, 2012, the Court denied Petitioner's Petition as untimely. The Findings of Fact,
4 Conclusions of Law, and Order were filed on June 11, 2012. The Notice of Entry of Order
5 was filed on June 15, 2012. Petitioner appealed the denial of his Petition on May 8, 2012
6 and on February 13, 2013, the Nevada Supreme Court affirmed the denial. The Remittitur
7 issued on March 11, 2013.

8 6. On August 26, 2013, Petitioner filed a second Petition for Writ of Habeas Corpus and
9 a separate Motion to Appoint Counsel. On January 3, 2013, the State filed a Response and
10 Motion to Dismiss the Petition and an Opposition to motion to appoint counsel. On January
11 13, 2014, this Court held a hearing on the Petition and found as follows.

12 7. The Petition for Writ of Habeas Corpus is procedurally time barred per NRS
13 34.726(1). Following the direct appeal, the Remittitur issued on December 3, 2010. Thus, the
14 August 26, 2013 Petition was nearly two years beyond the time permitted. Therefore, this
15 Court must dismiss the Petition absent a showing of good cause.

16 8. Petitioner failed to show good cause to overcome the procedural bar. Petitioner
17 offered no facts upon which good cause might be based.

18 9. Petitioner is not entitled to post conviction counsel because Petitioner cannot show
19 that any petition at this time or in the future would not be frivolous and summarily
20 dismissed.

21 CONCLUSIONS OF LAW

22 1. The mandatory provision of NRS 34.726(1) states:

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

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

1 (Emphasis added). “[T]he statutory rules regarding procedural default are mandatory
2 and cannot be ignored when properly raised by the State.” State v. Eighth Judicial Dist.
3 Court, 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

4 2. The one-year time bar prescribed by NRS 34.726 begins to run from the date
5 the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
6 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
7 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
8 construed by its plain meaning).

9 3. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
10 Supreme Court rejected a habeas petition that was filed two (2) days late, pursuant to the
11 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
12 importance of filing the petition with the District Court within the one-year mandate, absent
13 a showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
14 time bar is therefore strictly construed. In contrast with the short amount of time to file a
15 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition,
16 so there is no injustice in a strict application of NRS 34.726(1), despite any alleged
17 difficulties with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

18 4. To avoid procedural default under NRS 34.726, a defendant has the burden of
19 pleading and proving specific facts that demonstrate good cause for his failure to present his
20 claim in earlier proceedings or comply with the statutory requirements. See Hogan v.
21 Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep’t of
22 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

23 5. “To establish good cause, appellants *must* show that an impediment external to
24 the defense prevented their compliance with the applicable procedural rule.” Clem v. State,
25 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119
26 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519,
27 537 (2001). Such an external impediment could be “that the factual or legal basis for a claim
28 was not reasonably available to counsel, or that ‘some interference by officials’ made

1 compliance impracticable.” Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S.
2 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 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)). Any delay in
4 filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

5 6. The Nevada Supreme Court has clarified that, “appellants cannot attempt to
6 manufacture good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause
7 there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at
8 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
9 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition, as well
10 as the failure of trial counsel to forward a copy of the file to a petitioner have been found not
11 to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by
12 statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
13 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

14 7. In State v. Eighth Judicial District Court, 121 Nev. 225, 234, 112 P.3d 1070
15 (2005), the Nevada Supreme Court held as follows:

16 Given the untimely and successive nature of [defendant’s]
17 petition, the district court **had a duty imposed by law** to
18 consider whether any or all of [defendant’s] claims were barred
19 under 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.

20 (Emphasis added), see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82
21 (2003) (wherein the Nevada Supreme Court held that parties cannot stipulate to waive,
22 ignore or disregard the mandatory procedural default rules nor can they empower a court to
23 disregard them), State v. Greene, 129 Nev. Ad. Op. 58, 307 P.3d 322, 326 (2013) (The
24 district court abused its discretion by considering the merits of the defendant’s post-
25 conviction writ of habeas corpus where the defendant failed to demonstrate that an
26 impediment external to the defense prevented him from complying with the procedural-
27 default rules).

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1 8. NRS 34.750 provides, in pertinent part:

2 A petition may allege that the Defendant is unable to pay the costs
3 of the proceedings or employ counsel. If the court is satisfied that
4 the allegation of indigency is true and the petition *is not dismissed*
5 *summarily*, the court may appoint counsel at the time the court
 orders the filing of an answer and a return. In making its
 determination, the court may consider whether:

- 6 (a) The issues are difficult;
- 7 (b) The Defendant is unable to comprehend the
 proceedings; or
- 8 (c) Counsel is necessary to proceed with discovery.

9 (Emphasis added). Under NRS 34.750, it is clear that the court has discretion in
10 determining whether to appoint counsel.

11 9. Further, in Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566
12 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right
13 to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 163, 912
14 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that “[t]he Nevada
15 Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we
16 interpret the Nevada Constitution’s right to counsel provision as being coextensive with the
17 Sixth Amendment to the United States Constitution.” In McKague, the Nevada Supreme
18 Court specifically held that with the exception of cases in which appointment of counsel is
19 mandated by statute, one does not have “[a]ny constitutional or statutory right to counsel at
20 all” in post-conviction proceedings. Id. at 164. The Nevada Supreme Court has observed
21 that a petitioner “must show that the requested review [for post-conviction relief] is not
22 frivolous before he may have an attorney appointed.” Peterson v. Warden, Nevada State
23 Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

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ORDER

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

DATED this 12 day of ^{February} ~~January~~, 2014.


DISTRICT JUDGE

WSH

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

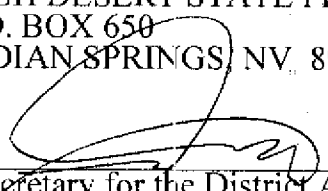
BY


DENA RINETTI
Deputy District Attorney
Nevada Bar #009897

NOTICE OF SERVICE

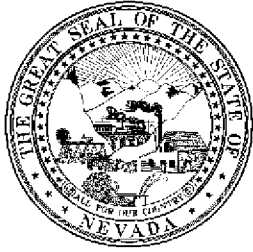
I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 30th day of JANUARY, 2014, to:

JUSTIN PORTER #1042449
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89018.



Secretary for the District Attorney's Office

hjc/SVU



Clerk of the Courts
Steven D. Grierson

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

March 11, 2014

Case No.: C174954

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 02/14/2014

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 10:41 AM on March 11, 2014.


STEVEN D. GRIERSON, CLERK OF THE COURT