IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MARQUETTE GIPSON, Appellant, v. THE STATE OF NEVADA, Respondent.	)	CASE NO: 69174 District Court Case No. 10C264079

APPELLANT'S REPLY BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County, Nevada
Honorable David B. Barker and William D. Kephart

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ISSUES PRESENTED FOR REVIEW

I.

1. Whether the District Court Issued Findings Regarding Any Procedural Defects.

2. Whether the Standard to Determine Competence to Waive Constitutional Rights is Different than the Standard to Determine Competence to Stand Trial.

3. Whether Procedural Due Process Requires a Subsequent Competency Hearing.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement stands as enunciated in the Opening Brief.

ROUTING STATEMENT

The Routing Statement stands as enunciated in the Opening Brief.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Opening Brief.

STATEMENT OF THE FACTS

The rendition of the facts is not necessary for the purpose of this appeal.

ARGUMENT

I.

There Have Been No Findings Issued by the District Court Assessing the Record and Determining Whether There is Any Procedural Default in this Case.

In Respondent's Answering Brief, the State recites an accurate chronology of the events leading up to the filing of the instant appeal. Moreover, the citations of State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2205); State v. Haberstroh, 119 Nev. 173, 60 P.3d 676 (2003) and State v. Greene, 129 Nev. ___, 301 P.3d 322 (2013) are poignant to the issue at hand.

Nevertheless, Respondent contends that Appellant's Petition is time-barred because it was not filed within the one year window prescribed by NRS 34.726(1).

More specifically, said statute dictates that absent the exceptions set forth in subsections (a) and (b), the one year filing period begins once the judgment is filed, or, if an appeal is taken, when the remittitur is filed. Pellegrino v. State, 117 Nev. 860, 873, 590 P.3d 519, 528 (2001).

Here, the Judgment of Conviction was filed on March 12, 2012. Moreover, Appellant did not file a notice of direct appeal per NRAP 4(b). However, there is a colorable argument that a proper person notice of appeal was filed on November 5, 2012. (KMG@32). Nevertheless, this Court has recognized that the filing of notice

of appeal must be timely. Dickerson v. State, 114 Nev. 1084, 1089, 967 P.2d 1132 (1998).

Significantly, the issue of "where," the determination of such default must be addressed was unequivocally, set forth by this Court in Riker. There, as here, the State raised the issue of procedural default. This Court stated in pertinent part:

> "In this case, the district court disregarded the applicable law and invoked incorrect standards in rejecting the State's assertions of procedural default. But we do not ourselves decide the question of procedural default, as the State requests; rather, we direct the district court to assess the record and Riker's specific claims, consider and apply the appropriate rules of procedural default, and decide in a written order whether claims are procedurally barred."
>
> (Emphasis added)

121 Nev. at 233

Hence, at minimum, this Court should remand the case back to the district court, where the appropriate findings can be made.

Moreover, Respondent is consumed with the wrongfulness of the district court addressing the merits of Appellant's Petition (Supplemental), when, according to Respondent, the pleading was time-barred. Such a claim is, at best, hypocritical. In this case, the district court ordered the briefing schedule of filing of the Supplemental Petition as follows:

> "COURT ORDERED, the following briefing schedule; Deft's Supplemental Petition due by December 15, 2014, State's Opposition due by February 17, 2015, Deft's Reply due by March 17, 2015, and matter SET for hearing."
>
> (Emphasis added)

(RA@52)

However, Respondent didn't file its Opposition until February 24, 2015 – one week late. (RA@54). Pursuant to Respondent's reasoning, said Opposition was time-barred. The failure of the opposing party to serve and file a timely written opposition:

> "may be construed as an admission that the motion (petition) is meritorious and consent to granting of the same."

Eighth Judicial District Court Rules 3.20(c)

Clearly, the question of when postconviction petitions should be filed raises arguable issues. Moreover, it hardly needs to be stated that claims for collateral relief should be presented as early as possible. Stale claims are attended by obvious difficulties in the search for truth. Records are lost, witnesses become unavailable, and memories fade. It is in the interest of both the Petitioner and the Respondent to begin the necessary investigation of claims at the earliest opportunity. Still, it is in the nature of postconviction remedies that they are often pursued long after the

events giving rise to prisoners' arguments. Petitioners usually are unable to retain professional assistance in seeking out potential claims for relief, and they certainly are unable to identify claims for themselves. Years may pass before they become aware of claims, by chance or through the efforts of a prison legal services project.

As such, the United States Supreme Court has required, regarding such issues in federal court, that such remedies are available "without limit of time." United States v. Smith, 331 U.S. 467, 475, 67 S.Ct. 1330, 91 L.Ed. 1610 (1997). And, accordingly, the equitable defense of laches is inapposite in postconviction litigation in federal court, on constitutional issues. See, Sutton v. Lash, 576 F.2d 738 (7th Cir. 1998) (involving a delay of twenty-one years).

II.

THE STANDARD TO DETERMINE COMPETENCE TO WAIVE CONSTITUTIONAL RIGHTS IS THE SAME AS THE STANDARD TO DETERMINE COMPETENCE TO STAND TRIAL

In the Opening Brief, Appellant cited the case of Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992) as authority for the proposition that the standard of competence to stand trial was different than the standard to determine competence to waive constitutional rights. Appellant's counsel must confess error.

The United States Supreme Court subsequently determined that the standards to determine competency, in each setting, are the same.

As such, Appellant respectfully withdraws his citation of Moran v. Godinez, supra, for that proposition and apologizes for any inconvenience it may have caused the Court and Counsel for Respondent.

III.

APPELLANT IS ENTITLED TO AN ADDITIONAL EVIDENTIARY HEARING AS TO HIS COMPETENCE

Respondent argues that "Gipson was found competent to stand trial by Dr. Slagle, and Craig (his counsel) testified as the evidentiary hearing that she (Craig) was confident Gipson was competent and monitored him to ensure he was competent throughout proceedings. 1 AA 112-14, 150." (Respondent's Answering Brief, p. 31). However, the issue of Appellant's competency to enter the guilty pleas was, with all due respect to the district court, pretty much "glossed –over" at the September 10, 2015, evidentiary hearing.

More specifically, only two witnesses testified at that hearing – Christy Craig, an attorney, and Appellant. Neither of those witnesses is an expert in the field of mental health.

Nevertheless, the district court, in rather conclusory fashion, summarily denied Appellant's writ on the competency issue. This is evident by the Court's remarks:

> "THE COURT: Okay. Mr. Gipson?
>
> THE DEFENDANT: Yes.

THE COURT: Your petition for a writ of habeas corpus, at this point in time, I'm going to deny it on the two issues, the issue with respect to whether or not there was sufficient information – or investigation into – into your mental issue background. I believe that the Public Defender in this case expended their resources with – quite honestly, Ms. Craig is their top person that handles those type of cases, so I'm very confident based on her testimony here today that she did what she could, to the extent that she could an used whatever information that she had to the extent that she could. So for that reason, I'm denying that.

As to any claims that you were coerced in your plea, I believe that you understood you plea. I don't believe that Ms. Craig had coerced you. And that's why I asked the questions whether or not you discussed it – or she discussed it with your family and that you knew what you were doing. It was in your best interest to enter into this.

You got a deal that was probably favorable to you under the circumstances that she was highly effective in obtaining that and that any advice that she had addressed you with, I believe, was probably good advice. I also believe that you knowingly and freely and voluntarily entered into this plea under that advice. . . ."

(KMG@170, 71)

In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court." Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985). "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." Siripongs v. Calderon, 35 F.3d 1308, 1310 (9th Cir. 1994).

Moreover, it is unequivocal, that competency claims may be based on violations of both procedural and substantive due process. "A procedural competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent." McGregor v. Gibson, 248 F.3d 946, 952 (10th Cir. 2001). The standards of proof for procedural competency claims differ. To make a procedural competency claim, a defendant "must raise a bona fide doubt regarding his competency to stand trial . . . ." Id. This requires a demonstration that "a reasonable judge should have doubted" the defendant's competency. Id. at 954. It

does not require proof of actual incompetency. Id. A substantive competency claim, on the other hand, requires the higher standard of proof of incompetency by a preponderance of the evidence. Cooper v. Oklahoma, 517 U.S. 348, 368-69, 116 S.Ct. 1373 (1996); Walker v. Attorney General, 167 F.3d 1339, 1344 (10th Cir. 1999).

Here, Petitioner respectfully submits that he was denied an adequate hearing on the issue of procedural competency. The court in McGregor, supra, indicated that:

> ". . . to prevail on a procedural competency claim . . . petitioner must establish that a reasonable judge should have had a bona fide doubt as to his competence at the time of trial . . ."
>
> To prevail on a procedural competency claim, petitioner need not establish facts sufficient to show he was actually incompetent by a preponderance of the evidence. However, the mere fact that the trial court granted a competency hearing will not suffice to demonstrate a bona fide doubt.

248 F.3d at 954

At the competency hearing held in this case, there was no testimony from a psychiatrist or psychologist. However, Dr. Slagle's psychiatric forensic report (which was not addressed at the competency hearing) concluded with this observation:

> "Mr. Gipson is suffering from delusions and hallucinations, but these symptoms do not render him incompetent at this time. He is in need of continuing psychiatric treatment."

Nevertheless, the fact that Petitioner was hallucinating and delusional was never addressed by the district court at the competency hearing. Rather, there were just some conclusory remarks about the experience of his counsel.

Clearly, Gipson's procedural due process rights were violated. The only fair and viable remedy is a new competency hearing, which specifically addresses these issues.

VIII.

CONCLUSION

For the above-stated reasons, Appellant asserts that the Judgment of Conviction should be set aside, his conviction vacated, and this case remanded for trial.

DATED this 8th day of August, 2016.

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IX.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared in a proportionally spaced typeface using Word in Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) and NRAP 28.1(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,148 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of August, 2016.

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X.

CERTIFICATE OF SERVICE

I hereby certify on the 8th day of August, 2016, that Appellant's Reply Brief was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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