



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

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LAS VEGAS, NEVADA 89155-1160  
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Aug 25 2017 03:14 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Steven D. Grierson  
Clerk of the Court

Brandi J. Wendel  
Court Division Administrator

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August 25, 2017

Elizabeth A. Brown  
Clerk of the Court  
201 South Carson Street, Suite 201  
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. KEVIN M. GIPSON  
**S.C. CASE: 73307**  
D.C. CASE: 10C264079

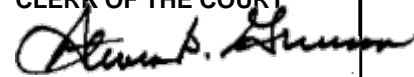
Dear Ms. Brown:

In response to the e-mail dated August 25, 2017, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed August 21, 2017 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, appearing to read "Heather Ungermann", is written over a horizontal line.

Heather Ungermann, Deputy Clerk



1 **FCL**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CAL THOMAN  
6 Deputy District Attorney  
7 Nevada Bar #012649  
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: 10C264079

12 KEVIN MARQUETTE GIPSON, aka,  
13 Kevin Marquette Gipson, #1582343,

DEPT NO: XIX

14 Defendant.

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

17 DATE OF HEARING: JUNE 5, 2017  
18 TIME OF HEARING: 8:30 AM

19 THIS CAUSE having come on for hearing before the Honorable WILLIAM  
20 KEPHART, District Judge, on the 5th day of June, 2017, the Petitioner 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 DICKERSON,  
23 Deputy District Attorney, and the Court having considered the matter, including briefs,  
24 transcripts, 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, CONCLUSIONS OF LAW**

27 On April 28, 2010, Defendant Kevin Marquette Gipson was charged by way of  
28 Indictment with one count of Murder With Use of a Deadly Weapon (Felony – NRS 200.010,  
200.030, 193.165). On December 7, 2011, the parties informed the District Court that the

1 matter was resolved via negotiations. A Guilty Plea Agreement was filed in open court and  
2 Defendant entered a plea of guilty to the charge within the Indictment. Within the Guilty Plea  
3 Agreement, the parties stipulated to recommend a sentence of 20 years to life in the Nevada  
4 Department of Corrections and the State retained the right to argue for a term of not less than  
5 4 to 8 years for use of a deadly weapon.

6 Defendant was present with counsel for sentencing on February 10, 2012. The District  
7 Court adjudicated him guilty and sentenced him to a term of 20 years to life, plus a consecutive  
8 term of 96 to 240 months for use of a deadly weapon, with 686 days credit for time served.  
9 The Judgment of Conviction was filed March 13, 2012. Defendant did not file a timely direct  
10 appeal.

11 Defendant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. The District  
12 Court denied the motion on September 26, 2012.

13 On October 15, 2012, Defendant filed a Pro Per "Ex Parte Motion for Appointment of  
14 Counsel and Request for Evidentiary Hearing." The State filed its Opposition on November  
15 2, 2012. On November 5, 2012, Defendant filed a Pro Per "Memorandum of Points and  
16 Authorities Facts of the Case." That Memorandum sought to file a direct appeal and the  
17 Memorandum was transmitted to the Nevada Supreme Court as a Notice of Appeal. On  
18 December 20, 2012, the Nevada Supreme Court dismissed Defendant's appeal.

19 On January 28, 2013, the District Court granted Defendant's Motion for Appointment  
20 of Counsel. On February 11, 2013, Carmine Colucci, Esq., was confirmed as counsel for  
21 Defendant. On June 17, 2013, counsel advised the District Court that all the documents had  
22 been received and a briefing schedule was set.

23 Defendant, through counsel, filed his first Post-Conviction Petition for Writ of Habeas  
24 Corpus and Points and Authorities in support of his Petition on June 6, 2014. The State filed  
25 a Response and Motion to Dismiss on June 13, 2014. Defendant filed a Reply on August 7,  
26 2014. The District Court denied the State's Motion to Dismiss and ordered briefing on the  
27 merits.

28 ///

1 Defendant filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus  
2 and Supplemental Points and Authorities on December 15, 2014. The State filed its Response  
3 on February 24, 2015.

4 On September 10, 2015, the District Court held an evidentiary hearing, where  
5 Defendant and his former counsel, Christy Craig, Esq., testified. At the conclusion of the  
6 hearing, the District Court denied Gipson's Petition. It issued its Findings of Fact, Conclusions  
7 of Law, and Order reflecting its oral pronouncement on October 22, 2015.

8 Defendant filed a Notice of Appeal from the denial of his Petition on November 12,  
9 2015. The Supreme Court of Nevada affirmed the denial of Defendant's first Petition for Writ  
10 of Habeas corpus. Remittitur issued on January 24, 2017.

11 Defendant filed the instant second Petition for Writ of Habeas corpus on March 6, 2017.  
12 The State herein responds.

13 **I. DEFENDANT'S PETITION IS TIME BARRED UNDER NRS 34.726**

14 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause  
15 shown for delay. Pursuant to NRS 34.726:

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

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

26 Defendant's petition does not fall within this statutory time limitation. The Supreme Court of  
27 Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State,  
28 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year  
time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is  
filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084,  
1087, 967 P.2d 1132, 1133-34 (1998).

1 The one-year time limit for preparing petitions for post-conviction relief under NRS  
2 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002), the Nevada  
3 Supreme Court rejected a habeas petition that was filed two days late despite evidence  
4 presented by the defendant that he purchased postage through the prison and mailed the Notice  
5 within the one-year time limit.

6 The Judgment of Conviction was filed in this case on March 13, 2012. Accordingly,  
7 Defendant had until March 13, 2013, to file a timely post-conviction Petition. Defendant's  
8 instant Petition was not filed until March 6, 2017. Absent a showing of good cause for this  
9 delay, the court has a duty to apply the procedural bars and Defendant's Petition is denied  
10 because of its tardy filing.

## 11 **II. DEFENDANT'S PETITION IS SUCCESSIVE**

12 Defendant's second Petition is also denied pursuant to NRS 34.810 as it is successive.  
13 Pertinent portions of NRS 34.810 state:

14 2. A second or successive petition must be dismissed if the judge  
15 or justice determines that it fails to allege new or different grounds  
16 for relief and that the prior determination was on the merits or, if  
17 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.

18 3. Pursuant to subsections 1 and 2, the petitioner has the burden  
19 of pleading and proving specific facts that demonstrate:

20 (a) Good cause for the petitioner's failure to present the  
claim or for presenting the claim again; and

21 (b) Actual prejudice to the petitioner.

22 NRS 34.810(2), (3).

23 In Lozada v. State, the Nevada Supreme Court stated: "Without such limitations on the  
24 availability of post-conviction remedies, prisoners could petition for relief in perpetuity and  
25 thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions  
26 clog the court system and undermine the finality of convictions." 110 Nev. 349, 358, 871 P.2d  
27 944, 950 (1994). The Nevada Supreme Court recognizes that "[u]nlike initial petitions which  
28 certainly require a careful review of the record, successive petitions may be dismissed based

solely on the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

Defendant filed his first Petition on June 6, 2014. The District Court ultimately denied this first Petition on the merits. The denial of Defendant’s Petition was affirmed. Gipson v. State, Docket No. 69174 (Order of Affirmance, December 28, 2016). Defendant then filed this second Petition on March 6, 2017.

### **III. DEFENDANT FAILS TO SHOW GOOD CAUSE AND PREJUDICE TO OVERCOME PROCEDURAL BARS.**

In its decision affirming the denial of the first Petition, the Nevada Supreme Court found that the District Court erred in reaching the merits of Defendant’s first petition and should have dismissed it due to procedural default. Id. “The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.” Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. In his first Petition, which was also untimely, Defendant argued that the ineffective assistance of appellate counsel constituted good cause for his delay and caused him prejudice. Defendant raises the same claim in this second Petition. As the Nevada Supreme Court rejected these arguments on appeal, the law of the case is that the alleged ineffectiveness of appellate counsel does not satisfy the good cause requirement for delay. Therefore, this petition is denied as untimely and successive without good cause for the procedural defects.

### **IV. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY.**

The Nevada Supreme Court has specifically found that the district court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily

1 disregard them. In State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the Court  
2 held that “[a]pplication of the statutory procedural default rules to post-conviction habeas  
3 petitions is mandatory,” and “cannot be ignored when properly raised by the State.” Id. at 231,  
4 233, 112 P.3d at 1074, 1075. There, the Court reversed the district court’s decision not to bar  
5 the defendant’s untimely and successive petition:

6           Given the untimely and successive nature of [defendant’s]  
7 petition, the district court *had a duty imposed by law* to consider  
8 whether any or all of [defendant’s] claims were barred under NRS  
9 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.

10 Id. at 234, 112 P.3d at 1076 (emphasis added). The Court justified this holding by noting that  
11 “[t]he necessity for a workable system dictates that there must exist a time when a criminal  
12 conviction is final.” Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh,  
13 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (wherein the Nevada Supreme Court held  
14 that parties cannot stipulate to waive, ignore or disregard the mandatory procedural default  
15 rules nor can they empower a court to disregard them).

16           In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the  
17 procedural bars are mandatory when it reversed the district court’s grant of a post-conviction  
18 petition for writ of habeas corpus. See State v. Greene, 129 Nev. \_\_\_, 307 P.3d 322 (2013).  
19 There, the Court ruled that the defendant’s petition was “untimely, successive, and an abuse  
20 of the writ” and that the defendant failed to show good cause and actual prejudice. Id. 307  
21 P.3d at 324. Accordingly, the Court reversed the district court and ordered the defendant’s  
22 petition dismissed pursuant to the procedural bars. Id. 307 P.3d at 323.

23           As explained above, Defendant’s Petition is procedurally barred under NRS 34.810 and  
24 34.826 and therefore is denied.

25           **V.     DEFENDANT’S REQUEST THAT HIS GOOD TIME CREDITS BE RE-**  
26           **CALCULATED MUST BE DISMISSED.**

27           NRS 34.738(3) provides:  
28

1 A petition must not challenge both the validity of a judgment of conviction  
2 or sentence and the computation of time that the petitioner has served  
3 pursuant to that judgment. If a petition improperly challenges both the  
4 validity of a judgment of conviction or sentence and the computation of time  
5 that the petitioner has served pursuant to that judgment, the district court for  
6 the appropriate county shall resolve that portion of the petition that  
7 challenges the validity of the judgment of conviction or sentence and dismiss  
8 the remainder of the petition without prejudice.

9 Since Defendant is challenging both his judgment of conviction and the computation of  
10 his credit for good time, NRS 34.738(3) requires the court to resolve only that portion of  
11 Defendant's petition which challenges the validity of the judgment of conviction or sentence,  
12 and dismiss the remainder of the petition without prejudice. As such, claims two and three,  
13 which questions whether his credit for good time is correct are dismissed without prejudice.

14 ORDER

15 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus  
16 shall be, and it is, hereby denied.

17 DATED this 17<sup>th</sup> day of August, 2017.

18   
19 DISTRICT JUDGE

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

23 BY 

24 CAL THOMAN  
25 Deputy District Attorney  
26 Nevada Bar #012649

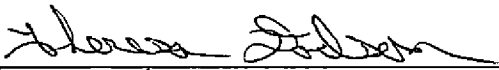


CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2017, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

Kevin Marquette Gipson, BAC #1082776  
High Desert State Prison  
P.O. Box 650  
Indian Springs, Nevada 89070-0650

BY

  
Theresa Dodson  
Secretary for the District Attorney's Office

ms/CT/td/dvu



*Clerk of the Courts*  
*Steven D. Grierson*

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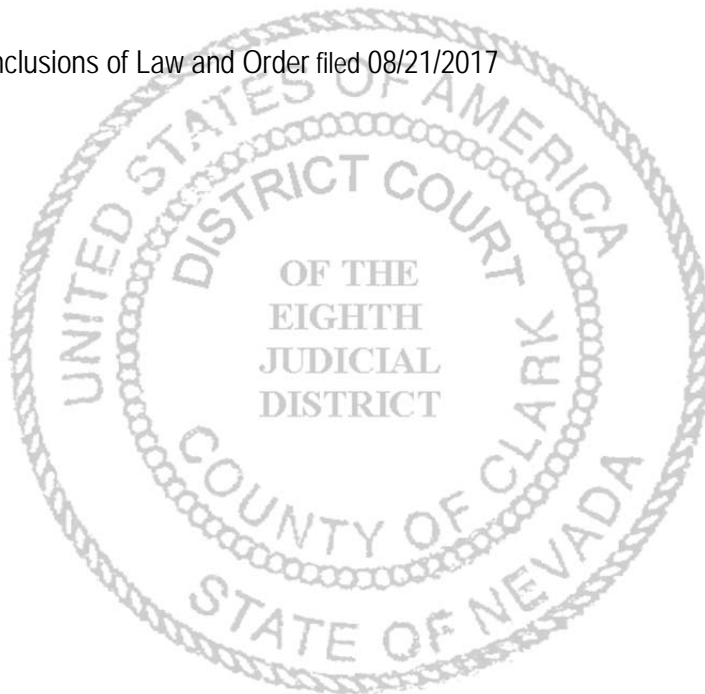
August 25, 2017

Case No.: 10C264079

### **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 08/21/2017



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 2:09 PM on August 25, 2017.

  
STEVEN D. GRIERSON, CLERK OF THE COURT