

Steven D. Grierson

FILED

MAY 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

FREDDY MARTINEZ,
aka Fredys A. Martinez #1361243

Defendant.

No. 75760

CASE NO: 06C226586

DEPT NO: XXV

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

DATE OF HEARING: April 4, 2018
TIME OF HEARING: 9:00 a.m.

THIS CAUSE having come on for hearing before the Honorable KATHLEEN DELANEY, District Judge, on the 4th day of April, 2018, the Petitioner not being present, being represented by BETSY ALLEN, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ALICIA ALBRITTON, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, testimony, 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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MAY 07 2018

18-19622

1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On September 29, 2006, Defendant Fredys Martinez was charged by way of Grand Jury
4 Indictment with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS
5 205.060); Count 2 – Battery with use of a Deadly Weapon (Felony – NRS 200.481); Count 3
6 – First Degree Kidnapping with use of a Deadly Weapon (Felony – NRS 200.310, 200.320,
7 193.165); and Count 4 – Sexual Assault with use of a Deadly Weapon (Felony – NRS 200.364,
8 200.366, 193.165).

9 Defendant's jury trial began on April 11, 2007. On April 12, 2007, the jury found
10 Defendant guilty of: Count 1 – Burglary while in Possession of a Weapon; Count 2 – Battery
11 with use of a Deadly Weapon; and Count 3 – First Degree Kidnapping with use of a Deadly
12 Weapon. The jury found Defendant not guilty of Count 4. Defendant was present in court with
13 counsel on May 24, 2007, adjudicated and sentenced to the Nevada Department of Corrections
14 as follows: Count 1 – 60 to 180 months; Count 2 – 48 to 120 months, to run concurrently with
15 Count 1; and Count 3 – 60 months to life, plus a consecutive term of 60 months to life for the
16 use of a deadly weapon, the entire sentence to run concurrently to Counts 1 and 2. Defendant
17 was given 281 days credit for time served.

18 The Judgment of Conviction was filed on May 31, 2007. Defendant filed a Notice of
19 Appeal on June 5, 2007. The Nevada Supreme Court affirmed Defendant's conviction on May
20 7, 2008. Remittitur issued on June 3, 2008.

21 Defendant filed a Motion to Vacate his Judgment of Conviction on April 21, 2010. The
22 Court denied Defendant's Motion without requiring a response from the State on May 5, 2010.
23 The Court noted that Defendant should have filed a Petition for Writ of Habeas Corpus but it
24 would be time barred as Remittitur issued in 2008.

25 Defendant filed his first Petition for Writ of Habeas Corpus on April 30, 2010. The
26 State filed its Response on July 9, 2010. The Petition was denied, as time-barred, on July 14,

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1 2010 and the Findings of Fact, Conclusions of Law, and Order was entered on January 21,
2 2011. Defendant filed a Notice of Appeal on March 21, 2011. The Nevada Supreme Court
3 affirmed the District Court's decision on May 9, 2011.

4 Numerous other motions have been filed between 2011 and 2018, most of which have
5 been denied by the District Court. Numerous Notices of Appeal have also been filed between
6 2011 and 2018, all of which have either been affirmed or dismissed by the Nevada Supreme
7 Court.

8 On June 27, 2016, the Court granted Defendant's Motion to Appoint counsel and on
9 July 20, 2017, Betsy Allen was appointed. Defendant, through counsel, filed the instant
10 Petition for Writ of Habeas Corpus on December 29, 2017. The State filed its Response on
11 February 12, 2018. This Court heard argument on April 4, 2018.

12 ARGUMENT

13 I. DEFENDANT'S PETITION IS PROCEDURALLY BARRED

14 A. Defendant's Petition Is Time-Barred and Successive

15 Defendant's Petition is time-barred. The mandatory provision of NRS 34.726(1) states:

16 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 after 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
demonstrates to the satisfaction of the court:

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

25 (emphasis added). "[T]he statutory rules regarding procedural defaults are mandatory and
26 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.
27 225, 233, 112 P.3d 1070, 1075 (2005).

28 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.

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1 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998); see Pellegrini v.
2 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
3 construed by its plain meaning).

4 In Gonzales v. State, the Nevada Supreme Court rejected a habeas petition that was
5 filed two days late, pursuant to the “clear and unambiguous” mandatory provisions of NRS
6 34.726(1). 118 Nev. 590, 593, 590 P.3d 901, 902 (2002). Gonzales reiterated the importance
7 of filing the petition with the District Court within the one-year mandate, absent a showing of
8 “good cause” for the delay in filing. Gonzales, 118, Nev. at 593, 590 P.3d at 902. The one-
9 year time bar is therefore strictly construed. In contrast with the short amount of time to file
10 a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there
11 is no injustice in a strict application of NRS 34.726(1). Id. at 595, 53 P.3d at 903.

12 Here, there was a timely direct appeal. The remittitur was issued on June 3, 2008.
13 Defendant filed the instant Petition on December 29, 2017, more than *nine* years after the
14 remittitur issued. Accordingly, this Post-Conviction Petition for Writ of Habeas Corpus is
15 time-barred, absent a showing of good cause. NRS 34.762(1).

16 **B. Defendant’s Petition Is Successive**

17 Further, Defendant’s Petition is procedurally barred because it is successive. NRS
18 34.810(2) reads:

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

22 (emphasis added). Second or successive petitions will only be decided on the merits if the
23 petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349,
24 358, 871 P.2d 944, 950 (1994).

25 The Nevada Supreme Court has stated: “Without such limitations on the availability of
26 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
27 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
28 system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950.

1 The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly require
2 a careful review of the record, successive petitions may be dismissed based solely on the face
3 of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,
4 if the claim or allegation was previously available with reasonable diligence, it is an abuse of
5 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).
6 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

7 Here, Defendant filed his first post-conviction Petition for Writ of Habeas Corpus on
8 April 30, 2010. The District Court denied the Petition as time-barred because Defendant failed
9 to present good cause to overcome the procedural bars. Defendant filed a Notice of Appeal on
10 March 25, 2011. The Nevada Supreme Court affirmed the District Court’s decision and
11 Remittitur issued on August 10, 2011. Therefore, this Petition is successive and an abuse of
12 the writ.

13 **C. The State Affirmatively Pleads Laches**

14 NRS 34.800 creates a rebuttable presumption of prejudice to the State if there is “[a]
15 period exceeding five years between . . . a decision on direct appeal of a judgment of conviction
16 and the filing of a petition challenging the validity of a judgment of conviction.” The statute
17 also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The
18 State pleads laches in the instant case.

19 Here, remittitur on direct appeal issued on June 3, 2008. Defendant filed the instant
20 Petition on December 29, 2017. Since over 9 years have elapsed between the remittitur and
21 the filing of the instant Petition, NRS 34.800 directly applies. Defendant has failed to rebut the
22 presumption of prejudice to the State given the excessive delay in the filing of this Petition.

23 **D. Application of the Procedural Bars is Mandatory**

24 The Nevada Supreme Court has specifically found that the district court has a duty to
25 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
26 disregard them. In Riker, the Court held that “[a]pplication of the statutory procedural default

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1 rules to post-conviction habeas petitions is mandatory,” and “cannot be ignored when properly
2 raised by the State.” 121 Nev. at 231-33, 112 P.3d at 1074-75. There, the Court reversed the
3 district court’s decision not to bar the defendant’s untimely and successive petition:

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

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

15 In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the
16 procedural default rules are mandatory when it reversed the district court’s grant of a post-
17 conviction petition for writ of habeas corpus. See State v. Greene, 129 Nev. ___, ___, 307
18 P.3d 322, 326 (2013). There, the Court ruled that the defendant’s petition was untimely and
19 successive, and that the defendant failed to show good cause and actual prejudice. Id.
20 Accordingly, the Court reversed the district court and ordered the defendant’s petition
21 dismissed pursuant to the procedural bars. Id. at ___, 307 P.3d at 327.

22 **II. DEFENDANT HAS NOT SHOWN GOOD CAUSE TO OVERCOME THE** 23 **MANDATORY PROCEDURAL BARS**

24 Defendant’s Petition for Writ of Habeas Corpus is time-barred with no good cause
25 shown for delay. Pursuant to NRS 34.726(1):

26 Unless there is good cause shown for delay, a petition that
27 challenges the validity of a judgment or sentence must be filed
28 within 1 year of the entry of the judgment of conviction or, if an
 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:

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

4 The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain
5 meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the
6 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
7 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
8 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

9 The one-year time limit for preparing petitions for post-conviction relief under NRS
10 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
11 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
12 evidence presented by the defendant that he purchased postage through the prison and mailed
13 the Notice within the one-year time limit.

14 Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to
15 consider whether a defendant's post-conviction petition claims are procedurally barred. State
16 v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The
17 Riker Court found that "[a]pplication of the statutory procedural default rules to post-
18 conviction habeas petitions is mandatory," noting:

19 Habeas corpus petitions that are filed many years after conviction
20 are an unreasonable burden on the criminal justice system. The
21 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

22 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
23 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
24 has granted no discretion to the district courts regarding whether to apply the statutory
25 procedural bars; the rules *must* be applied.

26 Here, remittitur issued on June 3, 2008. Thus, the one-year time bar began to run from
27 this date. The instant Petition was not filed until December 29, 2017. This is more than *nine*
28 years after the remittitur was issued and in excess of the one-year time frame. Absent a

1 showing of good cause for this delay and undue prejudice, Defendant's claim must be
2 dismissed because of his tardy filing.

3 A showing of good cause and prejudice may overcome procedural bars. "To establish
4 good cause, appellants *must* show that an impediment external to the defense prevented their
5 compliance with the applicable procedural rule. A qualifying impediment might be shown
6 where the factual or legal basis for a claim was not reasonably available at the time of default."
7 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court
8 continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526.
9 In order to establish prejudice, the defendant must show "not merely that the errors of [the
10 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
11 disadvantage, in affecting the state proceedings with error of constitutional dimensions."
12 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
13 Fraday, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a
14 "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252,
15 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
16 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner.
17 NRS 34.726(1)(a).

18 **A. Equitable Tolling**

19 Defendant argues that his Petition should not have been time-barred because of
20 equitable tolling, citing to NRS 34.726. Defendant then cites numerous federal cases
21 discussing equitable tolling. Pet. at 11-13. However, Nevada does not recognize equitable
22 tolling like federal courts, as Defendant acknowledges. Pet. at 13. Defendant also does not cite
23 a single Nevada case to support his contention. Id. Thus, Defendant is not entitled to equitable
24 tolling, as there is no binding authority to support his argument. In fact, the Nevada Supreme
25 Court has rejected the federal equitable tolling standard. Brown v. McDaniel, 130 Nev. Adv.
26 Rep. 60, 331 P.3d 867, 872 (2014). The Nevada Supreme Court stated:

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1 ***We decline Brown's invitation to adopt an equitable exception to the general***
2 ***rule*** in Nevada that the ineffective assistance of post-conviction counsel does
3 not establish cause for a habeas petitioner's procedural default of an ineffective-
4 assistance-of-trial-counsel claim unless the appointment of post-conviction
5 counsel was mandated by statute.

6 ***Id.*** (emphasis added). The Nevada Supreme Court further explained:

7 While we have looked to the Supreme Court for guidance, we have not followed
8 Supreme Court decisions when they are inconsistent with state law. For example,
9 we have rejected the prison mailbox rule to allow for tolling of the one-year
10 period for state post-conviction habeas petitions, despite the application of it by
11 federal habeas courts. See Gonzales v. State, 118 Nev. 590, 594-95, 53 P.3d 901,
12 903-04 (2002). ***We have also rejected equitable tolling of the one-year filing***
13 ***period set forth in NRS 34.726 because the statute's plain language requires a***
14 ***petitioner to demonstrate a legal excuse for any delay in filing a petition.*** See
15 Hathaway, 119 Nev. at 252, 254 n.13, 71 P.3d at 506, 507 n.13. We are not
16 bound by Supreme Court decisions in our interpretation of the "cause"
17 exceptions under NRS 34.726 and 34.810, and because the Martinez, 566 U.S.
18 1 (2012) rule does not fit within our State's statutory post-conviction framework,
19 we decline to extend it to state post-conviction proceedings.

20 Brown, 130 Nev. Adv. Rep. 60, 331 P.3d at 872. Thus, equitable tolling does not apply.
21 Defendant can only overcome the mandatory procedural bars through a showing of good
22 cause. Defendant provides "extraordinary circumstances" in support of his equitable tolling
23 argument; however, the State will address those as good cause arguments as that is the
24 controlling legal authority in Nevada and equitable tolling does not apply. NRS 34.726.

25 Defendant argues that he was unable to speak, read, or write English, was a proper
26 person litigant, and lacked meaningful access to the prison law library, which caused delay in
27 his filing of the Petition. Defendant again cites to federal cases to support this claim and fails
28 to provide any binding authority, whatsoever. Pet. at 14-17. This is not external to Defendant
29 and therefore does not constitute good cause. Defendant had a year to timely file his Petition
30 and has not had difficulty filing other motions, based on the numerous other post-conviction
31 motions that have been filed by Defendant. In Gonzales, 118 Nev. at 596, 53 P.3d at 904, the
32 Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence
33 presented by the defendant that he purchased postage through the prison and mailed the Notice

1 within the one-year time limit. Thus, the fact that Defendant does not speak English, was a
2 proper person litigant, or did not have meaningful access to the library does not establish good
3 cause for filing a Petition 9 years late.

4 Next, Defendant argues that he could not obtain a copy of his appellate case file, which
5 cause him delay in filing his Petition. Pet. at 17. Yet again, Defendant cites to federal cases to
6 support this claim and fails to provide any binding authority. Pet. at 17-18. This claim is also
7 insufficient to establish good cause, under NRS 34.726. Because Defendant was unable to
8 obtain his appellate case file is no excuse to file a Petition over *9 years late*. Defendant appears
9 to have no trouble filing motions and appealing. Defendant had many options available to him
10 to determine the status of his case and had numerous opportunities to bring this up in prior
11 proceedings. Defendant cannot now attempt to manufacture good cause to overcome the
12 procedural bar. Clem, 119 Nev. at 621, 81 P.3d at 526. The Nevada Supreme Court rejected a
13 petition that was a mere two days late despite evidence that postage was purchased and the
14 notice was mailed prior to the deadline. Gonzales, 118 Nev. at 596, 53 P.3d at 904. Defendant
15 cannot establish good cause for being over 9 years late because none of his "extraordinary
16 circumstances" has demonstrated a legal excuse for any delay in filing his petition, let alone a
17 9 year delay. See Hathaway, 119 Nev. at 252, 254 n.13, 71 P.3d at 506, 507 n.13.

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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 14th day of April, 2018.


DISTRICT JUDGE

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

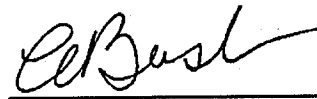
BY


STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #4352

CERTIFICATE OF ELECTRONIC MAILING

I hereby certify that service of Findings of Fact and Conclusions of Law and Order, was made this 30th day of April, 2018, by Electronic Mailing to:

BETSY ALLEN, ESQ.
Email: Betsyallenesq@yahoo.com


Secretary for the District Attorney's Office

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