

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,

v.

THE STATE OF NEVADA
Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 77002

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, KAREN MISHLER, and answers the Petition for Rehearing in the above-captioned appeal.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 11th day of March, 2022.

Respectfully submitted,

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

BY */s/ Karen Mishler*

KAREN MISHLER
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MEMORANDUM
POINTS AND AUTHORITIES

On December 30, 2021, a panel of this Court (“the Panel”) issued an Order affirming the district court’s denial of James Chappell’s postconviction petition for a writ of habeas corpus. State v. Chappell, Docket No. 77002 (Order of Affirmance, Dec. 30, 2021) (“Order”). On February 17, 2022, Chappell filed a Petition for Rehearing. On February 28, 2022, this Court filed an Order directing the State to answer Chappell’s Petition.

Pursuant to NRAP 40(c)(2), this Court considers rehearing only when it has overlooked or misapprehended a material fact or question of law. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 609-10, 245 P.3d 1182, 1184 (2010); McConnell v. State, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005). Additionally, rehearing is warranted where the Court has overlooked, misapplied, or failed to consider directly controlling legal authority. Bahena, 126 Nev. at 109-10, 245 P.3d at 1184.

The Petition should be denied as the Panel did not overlook a material fact, misapprehend a question of law, or ignore controlling precedent. Ultimately, Chappell’s request for rehearing warrants rejection because his arguments are premised upon erroneous allegations of fact and law. The Panel properly found that Chappell failed to overcome the mandatory procedural bars contained in NRS Chapter 34, because Chappell did not raise his good cause claim—that his first

postconviction counsel was ineffective—within a reasonable time after the claim became available. The Panel also properly found that while Chappell’s claims of ineffective assistance of second postconviction counsel were not procedurally barred, Chappell failed to demonstrate the merits of these claims.

I. THE PANEL PROPERLY FOUND THAT CHAPPELL DID NOT TIMELY RAISE HIS GOOD-CAUSE CLAIM BASED UPON THE INEFFECTIVE ASSISTANCE OF FIRST POSTCONVICTION COUNSEL

Contrary to Chappell’s claim, the Panel’s decision regarding Chappell’s failure to raise his good cause claim in a timely manner was not error, but rather was mandated by NRS Chapter 34 and the case law interpreting these statutes. The Panel properly recognized that as Chappell claimed the ineffective assistance of his second postconviction counsel as good cause and prejudice for raising his procedurally barred claims, he was required to do so within a reasonable time from when the claim become available. The Panel did not misapprehend a question of law or ignore controlling precedent; to the contrary, the Panel scrupulously followed precedent.

The Panel properly recognized that Chappell’s third petition was procedurally barred pursuant to NRS 34.726(1), NRS 34.810(1)(b)(2), and NRS 34.810(2), and thus all of Chappell’s claims, other than his claims of ineffective assistance regarding his second postconviction counsel, could not be considered in the absence of a showing of good cause and prejudice. Order, at 03-04. This Court has repeatedly held that the district court has a *duty* to consider whether a defendant's post-

conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory,” noting:

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

Id.

This Court has recognized that a claim of ineffective assistance of counsel may serve to excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. Hathaway, 119 Nev. at 252, 71 P.3d at 506. However, “in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” Id.; State v. Eighth Judicial Dist. Court (Riker), 121 Nev. at 235, 112 P.3d at 1077. Good cause claims based on ineffective assistance of counsel must be raised within a reasonable time after they become available. Rippo v. State, 134 Nev. 411, 419-22, 423 P.3d 1084, 1095-97 (2018). Such a claim is raised within a reasonable time if it is raised within one year of “the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred.” Id. at 420, 423 P.3d at 1096. Accordingly, this Panel properly recognized that Chappell’s good cause claims of ineffective assistance of counsel were not raised within a reasonable time, as they were raised well over a decade after

remittitur issued from the appeal of the denial of Chappell's first petition. Order, at 7.

Chappell unsuccessfully attempts to circumvent this Court's precedent by claiming that, due to his death sentence being vacated as a result of his first petition, he did not have both a conviction and a sentence that could have been challenged in a second postconviction petition while his counsel was representing him in his second penalty proceedings. Chappell misinterprets NRS 34.724(1) as prohibiting him from filing a petition until the conclusion of his penalty hearing, simply due to the fact that it requires a person who files a petition to be under a sentence of death or imprisonment. This reasoning is faulty because, as the Panel recognized, a judgment of conviction remains final when a defendant is granted a new penalty hearing on habeas review. Order, at 8. This fact was recognized by this Court in 2009, on consideration of Chappell's appeal from his second penalty hearing, when it noted that "[t]he relief granted to Chappell during post-conviction proceedings was expressly limited to the penalty phase" and therefore the issue of Chappell's guilt became final on October 4, 1999. Chappell v. State, Docket No. 49478, 2009 WL 3571279, at *13.

This Court's decision in Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) does not support Chappell's argument that he was unable to raise claims regarding the ineffective assistance of his counsel until remittitur issued on appeal from the

denial of his second petition. In Johnson, this Court expressly noted that a defendant who obtains relief from a death sentence on collateral review “has had the opportunity to raise guilt-and-penalty-phase claims in a single postconviction proceeding.” 133 Nev. at 575 n.1, 402 P.3d 1273 n.1. Chappell has had this opportunity as well: he raised guilt phase and penalty phase claims in his first petition, through which he obtained a new penalty hearing; he then raised claims related to the second penalty phase in his second petition.

Chappell’s reliance on Nika v. State, 120 Nev. 600, 97 P.3d 1140 (2004) is misplaced, as this case is not directly controlling of the procedural issue in this case. In Nika, this Court simply recognized that the SCR 250 proceeding did not provide Nika with “a full and fair opportunity to raise claims of ineffective trial counsel” and therefore NRS 34.810(1)(b) did not barr Nika from raising such claims in a postconviction petition, and that the simultaneous litigation of both the direct appeal and the SCR 250 proceeding placed counsel in an “untenable position.” 120 Nev. at 606-07, 97 P.3d at 1144-45.

Nika does not provide a defendant good cause to refrain from raising ineffective assistance of counsel claims within a reasonable time frame simply because that counsel has obtained a new penalty proceeding on collateral review. The Panel properly recognized that had Chappell filed a petition challenging the effectiveness of first postconviction counsel, any resulting effect on counsel’s

performance could have been addressed by the district court. The district court could have determined there was a potential for conflict and appointed new counsel to represent Chappell at the second penalty hearing. Alternatively, Chappell could have raised issues related to second postconviction counsel's performance in a subsequent habeas petition.

Furthermore, Chappell's contention that the Panel's decision violated NRS 34.820 is disingenuous at best. The fact that this statute requires a court to instruct petitioner's counsel in a death case to raise all claims in a single petition does not permit a petitioner to refrain from raising postconviction claims in a timely manner. This statute simply requires postconviction counsel appointed in a capital case, to raise all claims available at the time in a single petition, rather than multiple proceedings. This statute does not implicate the procedural bars to such petitions, or the good cause and prejudice necessary to overcome them.

Chappell's contention that the Panel's decision creates constitutional, ethical, and practical concerns is unpersuasive. To the contrary, if Chappell's request were granted, and the granting of a new penalty hearing were found to justify litigating the effectiveness of postconviction counsel nearly a decade after the fact, this would create a great deal of confusion and ambiguity regarding the applicable procedural rules, which this Court has repeatedly sought to avoid. This Court has repeatedly emphasized the importance of strictly construing the procedural rules and of

obtaining finality in convictions. “Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions.” Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

Chappell attempts to support his claim that requiring simultaneous litigation of a postconviction petition and a penalty retrial will unfairly prejudice defendants by citing to the inapplicable case of Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994). In that case, the defendant’s death sentence was vacated not on collateral review, but *on direct appeal*. Id. at 1095, 881 P.2d at 650. Thus, this defendant was not similarly situated to Chappell. Smith’s death sentences were vacated and there was no final judgment stating the sentences for his convictions to trigger the time to file a habeas petition. Chappel was granted a new penalty hearing on collateral review, and thus his original judgment remained final throughout the penalty retrial.

Chappell’s contention that the Panel announced a new procedural rule that should not retroactively apply to him is without merit. It is Chappell that requests the adoption of a new rule, as he requests an exception to the procedural rules due to having been granted a new penalty hearing on collateral review, when no legal authority permits such an exception. The Panel’s decision strictly followed the procedural rules contained in NRS 34.726 and NRS 34.810, as well as this Court’s

interpretation of them as stated in Riker and Rippo. “When a decision merely interprets and clarifies an existing rule ... and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law.” Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (quoting Buffington v. State, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994)). As the Panel did not announce a new rule, but merely clarified existing law, there is no violation of Chappell’s rights in denying him the opportunity to litigate procedurally barred claims.

II. THE PANEL PROPERLY REJECTED CHAPPELL’S CLAIM’S OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE ALLEGED FAILURE OF PENALTY RETRIAL COUNSEL AND SECOND POSTCONVICTION COUNSEL TO PRESENT FASD EVIDENCE

The Panel did not overlook or misapprehend any material facts or law regarding Chappell’s claim that he received ineffective assistance of counsel for the failure to investigate and present evidence of FASD. The Panel properly recognized that the presentation of information regarding FASD at the penalty hearing would have provided the jury with additional information as to the cause of Chappell’s deficits, Chappell had failed to establish that presentation of such information would have likely changed the jury’s decision at the second penalty hearing. The jury found seven mitigating factors, including that Chappell’s mother was addicted to drugs and alcohol and that he had a learning disability. 4AA00916-00917. Chappell provides

no compelling basis for his contention that presenting FASD as the cause of Chappell's substance abuse and cognitive deficits would have caused the jury to determine that these seven mitigating factors outweighed the aggravating circumstance.

Importantly, in his Petition for Rehearing Chappell fails to address that part of the reason the Panel denied this claim was Chappell's failure to demonstrate both that penalty phase counsel was ineffective for failing to present FASD-related information and that second postconviction counsel was ineffective for failing to present the claim that first postconviction counsel was ineffective on this basis. See Rippo, 134 Nev. at 424, 423 P.3d at 1098. As good cause for raising this procedurally barred claim, Chappell alleged second postconviction counsel was ineffective for failing to sufficiently support this claim. Considering that second postconviction counsel did in fact argue that first postconviction counsel was ineffective for failing to investigate FASD-related evidence, the Panel reasonably found that second postconviction counsel was not ineffective. 4AA00987, 993-94; Order, at 17.

Chappell has failed to establish that the Panel overlooked any controlling authority. Nor has he identified any material facts that undermine the Panel's conclusions that Chappell failed to timely raise his good-cause claims based on the ineffective assistance of first postconviction counsel, and that he failed to support his substantive claim that second postconviction counsel rendered ineffective

assistance. Therefore, Chappell's Petition for Rehearing must be denied.

Dated this 11th day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more, contains 2,155 words and 11 pages.

Dated this 11th day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 11, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY /s/ J. Hall
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KM/jh