

1 said -- because she said it was going to take a long time, it's a long process.
2 So, you know, she said that was for the whole thing, so basically I was just
3 paying her, you know, as we went along. That was the plan. It was never --
4 the money was never a problem. I was just paying. It was never an issue.

5 Q And so you're saying she was never --

6 A She never asked me about no money, never said nothing. It was
7 always, you know, and I figured, okay, I figured, okay, maybe -- I just tell my --
8 tell my wife at the time to, you know, just drop her some money. I used to
9 always try to, you know, see -- see what was going on, you know with -- as far
10 as money. But she -- money was never an issue. She never said nothing about
11 no money.

12 Q And do you know at the end of the day, do you know how much
13 you ended up paying her?

14 A At least four -- at least 4,000, if not more.

15 Q Okay. Now, Mr. Harris, you mentioned that you found, I want to
16 make sure I understand because you initially said that you found out at the
17 beginning of 2014 that the writ hadn't been filed; is that correct?

18 A Yeah.

19 Q I just want to make sure I'm getting the time right.

20 A I believe, yeah. Yeah.

21 Q So you said -- so that's about -- we're looking at about two years,
22 close to two years ago; is that fair to say?

23 A Yeah, now. Yeah, now it is, yeah.

24 Q Okay. And so around that time is when you realized that it hadn't
25 been filed and you said that --

1 A Maybe a couple years ago.

2 Q Okay. Well, and I -- what I'm trying to figure out is because I show
3 here that it was in March of 2015 that you filed your own, kind of, a
4 handwritten one?

5 A So it -- so it had to be the end of 2014.

6 Q Okay.

7 A Yeah, that's when I found out.

8 Q Because you said that, I'm just trying to figure out the timing, and
9 so you're saying it wasn't until the end 2014 that you -- that you didn't find
10 out?

11 A Yeah. Yeah. That's and -- I started filing all my paperwork in
12 January.

13 Q And during that time, so during the 2000 -- basically, during 2014,
14 did you -- I'm not familiar with completely all the things they have there at
15 prison, but did you look into it, see what's going on with the writ, anything
16 along those lines?

17 A No. I --

18 Q Throughout that whole year?

19 A No. Because I thought I was waiting on the response. Because last
20 time I was waiting on a response, like when I did my appeal, you know, ain't
21 nothing you can do, you know, but wait on a response from the, you know, I
22 get legal mail. That's how they do it. They come around to do the legal mail
23 process. So I, you know, I just -- just took a deal on one case, so I was, you
24 know, just really just waiting, you know, I was in there, I was just waiting to
25 see the outcome.

1 Q Okay. So for 2014 it wasn't until the end of that until you --

2 A Yeah.

3 Q -- until you looked into it?

4 A Yeah. Until I -- until I felt it was around that time -- because they
5 got, like, up to a year to, from my understanding from what they -- what they
6 say around prison, they got, like, a year to respond to you, right, in the -- in the
7 Supreme Courts or whatever, in the courts, they got, like, a year, you know, so
8 I'm thinking I'm waiting on a response.

9 Q During that year were you in touch with Ms. Park?

10 A No.

11 Q During 2014?

12 A No. Because the last -- the last -- the last time, you know, con --
13 what last interactions we had it was -- it was -- I could never really -- it was so
14 hard to get in touch with her, like, she would be busy or, you know, or -- or the
15 secretary wouldn't answer, like, would never -- I never -- I always called on my
16 own money, you know, but they never would answer no calls as far as, you
17 know, collect or nothing like that. So I used to have to get a three-way or -- or,
18 you know? It was just so hard to try to get through to somebody.

19 Q And during that time of 2014 was Ms. Park ever paid in full?
20 Because you talked about having paid a few thousand or paid half, was she
21 ever paid more during 2014?

22 A No.

23 Q Okay.

24 A No.

25 Q And -- and your testimony today is that she never mentioned to you

1 that you needed to pay?

2 A No.

3 Q And that that payment was due, but you knew that you hadn't paid
4 up?

5 A Yeah, yeah, I knew, because I knew it was a process, so maybe
6 when I got -- heard anything or she came to see me about anything or did
7 anything, you know, I'd've always paid her. If anything, if she did anything on
8 my case, I would have, you know, been glad to pay her, if she did anything.

9 Q But you knew that during 2014 you didn't pay her anything?

10 A Yeah, I knew.

11 Q For the year?

12 A Yeah.

13 Q And so you would agree she hadn't been paid in full, even to this
14 day?

15 A No, not as to 2014, no.

16 Q And so, even to today, she hadn't been paid up for everything?

17 A No. No.

18 Q Now as far as -- as far as the timing on this, and so during that, I
19 just want to make sure I'm clear, so during 2014, it wasn't until the end that
20 you looked into it to see what was going on?

21 A Yes.

22 MR. THUNELL: All right. I'll go ahead and pass, Your Honor.

23 THE COURT: Okay. Any redirect?

24 MR. CARLING: Your Honor, I don't -- I don't think I have any follow-up
25 questions on that line of questioning.

1 THE COURT: All right.

2 So, Mr. Harris, you said that you contacted, you called the Supreme
3 Court, when was it you called?

4 THE WITNESS: No, I wrote 'em.

5 THE COURT: You wrote?

6 THE WITNESS: Yes.

7 THE COURT: Okay. When did you write the Supreme Court?

8 THE WITNESS: Maybe around January.

9 THE COURT: Of?

10 THE WITNESS: Just as -- oh, well, maybe, yeah, maybe December,
11 maybe the end of December, like, 2014, to see -- because I thought I was
12 waiting on the response, so I was just trying to see where was we at, you
13 know, like, you know, like, pending or something. But then when they said it
14 was nothing been going on.

15 THE COURT: I thought that you said you determined at some point that
16 the document had been filed in the wrong court. When was that? When did
17 you do that?

18 THE WITNESS: That was -- that was maybe a couple months after she
19 sent it to me.

20 THE COURT: Okay.

21 THE WITNESS: And she -- so I would say --

22 THE COURT: So why would you have called the Supreme Court or
23 written to the Supreme Court if you knew that it wasn't supposed to be filed in
24 the Supreme Court?

25 THE WITNESS: Just so see where I was at in my case. I don't -- I didn't

1 really know how it worked like, you know, how far the system worked.

2 THE COURT: And so you only wrote to the Supreme Court?

3 THE WITNESS: And the State court.

4 THE COURT: Okay. Did you keep copies of those letters?

5 THE WITNESS: No.

6 THE COURT: Did you receive letters back?

7 THE WITNESS: Yeah, I did. It should be something attached to the -- to
8 the thing saying that nothing has been -- nothing was done.

9 THE COURT: Is there anything that you have in your file?

10 MR. CARLING: Well, Your Honor, I believe he's referring to his *pro se*
11 petition, post-conviction. He attached the exhibits he received from the clerk
12 indicating in the document nothing has been filed.

13 THE WITNESS: Yeah.

14 THE COURT: Do you have that petition?

15 MR. CARLING: I do have that, Your Honor. May I approach? If you'd
16 like to see that.

17 THE COURT: Yes.

18 Are you saying that what you've just handed me, which is the
19 docket -- the docket entries for his Supreme Court appeal is what he attached?

20 MR. CARLING: Yes, Your Honor. Well, the format's diff -- a little
21 different. I actually have the actual ones. Well, he actually attached docket
22 from the Nevada Supreme Court as well as the District Court. You just have
23 the District Court there. He attached them as Exhibits C and D to his *pro se*
24 petition.

25 THE COURT: Okay. What I have in my hand is the docket from the

1 Supreme Court.

2 MR. CARLING: Oh, okay. I've got -- and I've got the actual docket the
3 District Court as well.

4 THE COURT: Do you have the -- a copy of his *pro per* petition there?
5 Because I --

6 MR. CARLING: I do.

7 THE COURT: My law clerk didn't give me the original *pro per* petition this
8 morning.

9 MR. CARLING: May I approach?

10 THE COURT: Yes.

11 So as can be seen, the docketing statement from -- of the case
12 summary for Department V in District Court was printed out on January 6th,
13 2015; and the Supreme Court docket sheet was printed out on Wednesday,
14 December 31st, 2014; and then he filed his petition for writ of *habeas corpus*
15 on March 11th, 2015, do those dates refresh your recollection?

16 THE WITNESS: Yeah.

17 THE COURT: Okay. So the document that you got from Ms. Parks
18 was -- had a date on it of June of 2013, so you believed from that that she had
19 filed that document in the Supreme Court. And when did you tell her, You
20 made a mistake?

21 THE WITNESS: I would say no later than August.

22 THE COURT: No later than August?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Okay. Did you write this petition?

25 THE WITNESS: Yes.

1 THE COURT: Is that in your handwriting?

2 THE WITNESS: Well, no.

3 THE COURT: Is it -- no?

4 THE WITNESS: It's not in my handwriting.

5 THE COURT: Okay. Who wrote it?

6 THE WITNESS: My friend, Mark. He -- he -- he -- he know how to -- I
7 was -- I helped him though.

8 THE COURT: Okay. Do you read, write, and understand English?

9 THE WITNESS: Yes, ma'am.

10 THE COURT: You do read?

11 THE WITNESS: Yes.

12 THE COURT: All right. So I want to refer you to page 10 of your
13 petition -- and if you'll come get that -- bottom paragraph, read that aloud to
14 me.

15 THE WITNESS: Okay. As the direct appeal was denied --

16 THE COURT: No, the bottom paragraph. See there's an indent.

17 THE WITNESS: Okay. Okay. In December of 2013 petitioner made
18 contact with Ms. Park and advised her of the fact that the petition for --

19 THE COURT: And then it goes on on the next page, Writ of *habeas*
20 *corpus* was filed in the wrong court, as it should have been filed in the District
21 Court. So August? You just testified --

22 THE WITNESS: Yeah.

23 THE COURT: -- you contacted her no later than August

24 THE WITNESS: Yeah. It was a couple months later.

25 THE COURT: So which is -- which is -- which is correct August or what

1 you put in your petition back in March of 2015 where you said it was
2 December?

3 THE WITNESS: It was December then. I mean, if that's -- but I know it
4 was couple months later. I didn't know the exact date. I just know it was a
5 couple months prior to her sending me the paper.

6 THE COURT: After?

7 THE WITNESS: After, yeah. After.

8 THE COURT: Okay. Give me back that page.

9 All right. So then you didn't do anything all of 2014?

10 THE WITNESS: Fourteen, no.

11 THE COURT: Except that you did at the very end, the last day of 2014,
12 you printed out or had printed out the docket sheet?

13 THE WITNESS: Yes.

14 THE COURT: Right? And that was the docket sheet for the Supreme
15 Court. Did you print that out yourself?

16 THE WITNESS: Yes. Well, no, they sent it to me.

17 THE COURT: Sent it to you?

18 THE WITNESS: Yeah.

19 THE COURT: So how long did it take to you receive that.

20 THE WITNESS: Maybe, like, no more than, like, two weeks, no more, it
21 was pretty fast.

22 THE COURT: Okay. All right. And who was it that actually to your
23 knowledge delivered funds, money, to Ms. Park?

24 THE WITNESS: Chartia, Chartia Harris, which was my wife at the time.

25 THE COURT: She's not your wife now?

1 THE WITNESS: I mean, she is, but I'm going -- divorce has been filed and
2 all that type of stuff. So, I mean, legally, yeah, but no. It's in the process.

3 THE COURT: Okay. Did you pay -- how did you pay her? By what
4 means?

5 THE WITNESS: Cash.

6 THE COURT: So --

7 THE WITNESS: Yes.

8 THE COURT: Bills?

9 THE WITNESS: Yeah, cash.

10 THE COURT: And where did you the money come from?

11 THE WITNESS: My wife.

12 THE COURT: I mean, did you take it out of a bank account or something
13 like that where there would be evidence of that?

14 THE WITNESS: I mean, I'm sure she can tell you that. You know, I ain't
15 going to lie about the money, she know she was getting paid.

16 THE COURT: Okay.

17 THE WITNESS: I mean, I don't, I mean, I can try to get receipts or
18 something, I don't know. I don't know.

19 THE COURT: Okay.

20 Any questions as a result of my questions?

21 MR. THUNELL: None, Your Honor.

22 MR. CARLING: No.

23 THE COURT: All right. Do you have any other witnesses?

24 MR. CARLING: You know, if Ms. Park is still present I'd like to recall her
25 based on some of the questions you asked.

1 THE COURT: Okay.

2 Ms. Park.

3 THE CLERK: Still under oath?

4 THE COURT: Yes. You're still under oath.

5 THE WITNESS: Okay.

6 **LESLIE PARK,**

7 [having been recalled as a witness and being previously sworn, testified as
8 follows:]

9 **FURTHER REDIRECT EXAMINATION OF LESLIE PARK**

10 BY MR. CARLING:

11 Q Ms. Park, did you receive any cash payment on behalf of
12 Mr. Harris?

13 A Yes.

14 Q And do you recall approximately how much the total was?

15 A I believe he was correct. I believe I had been paid 4,000.

16 Q And the total amount that -- pursuant to the retainer, was
17 approximately 8,000?

18 A That's correct.

19 MR. CARLING: I'll pass the witness.

20 **RE CROSS-EXAMINATION OF LESLIE PARK**

21 BY MR. THUNELL:

22 Q Ms. Park, around the time of, I mean, we're talking about the time
23 when you dummied up, kind of, that writ, around that time had you been paid
24 additional funds?

25 A No.

1 Q So when you say 4,000, at what point had you been paid 4,000?

2 A I believe it -- the appeal had been filed at that point, but there was
3 still the balance remaining.

4 Q Okay. So the \$4,000 being previous to anything going on with
5 this?

6 A Yes.

7 Q Had there been a payment within, like, a month or so of this whole
8 writ process?

9 A No.

10 Q And I just want to make sure I'm clear, when you spoke with the
11 defendant after giving him this dummy writ, as we'll call it --

12 A Uh-huh.

13 Q -- did you make it clear that you needed to be paid to file that?

14 A Yes. And I believe that that was a conversation that was with his
15 wife present while he was on the phone in the office.

16 Q Okay. So and I just wanted -- so it wasn't just with his wife, it was
17 with his wife and him on the phone listening? And you say -- and you made
18 clear that you had not filed that writ and you would not until you had been
19 paid?

20 A Correct.

21 MR. THUNELL: Thank you.

22 THE COURT: Defense?

23 MR. CARLING: No further questions.

24 THE COURT: Did you ever send them any letters asking them to pay their
25 balance?

1 THE WITNESS: I did not send them letters. I had phone contact with his
2 wife. There were many times she would say that she was going to be in to
3 pay, but she wouldn't come in.

4 THE COURT: Okay. So did you file the appeal before receiving any
5 payment?

6 THE WITNESS: No. I had received half of the money -- I wouldn't say I'd
7 received half of the money, maybe close. I believe they made another payment
8 after I had filed it.

9 THE COURT: Okay. So why, given the fact that you hadn't been paid
10 even for the balance of what you were owed, even though it doesn't say that
11 on here.

12 THE WITNESS: It doesn't.

13 THE COURT: Mr. Harris has testified he thinks it was \$8,000, but he
14 thinks it was for everything, but why would you have done any work on a
15 petition for writ of *habeas corpus* if you hadn't been paid?

16 THE WITNESS: Well, when I had the conversation with him he wanted to
17 know what kind of things I would be putting in it and that's why I sent him
18 that, so he would have an idea of what I would -- and honestly, I didn't want to
19 be caught last minute if they did come and pay have to file it, you know, in a
20 two-day time period.

21 But I know he had said something about having the wrong caption
22 on the top, and I had indicated that's something that I would fix, it was just
23 kind of a sample of what I would have done to put in the writ.

24 THE COURT: Okay. And you never wrote him any letter saying, look,
25 there's a deadline for filing this petition?

1 THE WITNESS: No. We'd had conversations about there was a deadline.
2 He was aware there was a one-year deadline for that.

3 THE COURT: Okay. But you never sent him any letter, you never told
4 him in writing, look, this has not been filed and if you want me to file it, you've
5 got to pay; so if you don't, you know, I'm not going to file anything for you or
6 do anything for you unless you pay me; and, therefore, if you don't want to
7 jeopardize your rights, you need to file this; you never did that in writing?

8 THE WITNESS: I never did it in writing, no, there were conversations but
9 never in writing.

10 THE COURT: Okay. So no communication whatsoever with this client or
11 his family in writing?

12 THE WITNESS: Not in writing, no.

13 THE COURT: Did you ever visit him in the prison?

14 THE WITNESS: I did visit him in the prison prior to drafting up that -- that
15 what you see there. We had a conversation about what would be in the writ --
16 and he's shaking his head, no. I'm pretty sure I did. Maybe I'm mistaken. I
17 would have to, you know, I don't know if the prison keeps records, but I believe
18 that I did.

19 THE COURT: Would you not keep a record of your time if you -- if you
20 went and visited?

21 THE WITNESS: I don't bill by the hour.

22 THE COURT: Or your costs for going there? Nothing?

23 THE WITNESS: No, I don't -- I don't bill by the hour. It was a flat fee.
24 So I'm pretty sure that we did have that conversation, that was prior to me
25 drafting that up and that I did go see him, but he's saying no, and maybe I'm

1 mistaken, but I believe I did.

2 THE COURT: Okay. Any questions as a result of my questions?

3 MR. CARLING: No.

4 THE COURT: Thank you, again.

5 THE WITNESS: Okay. Thank you.

6 THE COURT: All right. Mr. Harris, we can get these records from the
7 prison about who visited you, so.

8 THE WITNESS: Yes, ma'am.

9 THE COURT: If we go to all that trouble, is it in the record?

10 THE WITNESS: I already know.

11 THE COURT: Pardon me?

12 THE WITNESS: I said I already know, ma'am. I wouldn't lie about
13 nothing. I wouldn't lie.

14 THE COURT: Okay. So there's going to be a record that she visited you
15 at the prison.

16 THE WITNESS: I never got a visit. Yeah, I --

17 THE COURT: What time frame do you think that was?

18 THE WITNESS: I never got a visit.

19 THE COURT: Oh, I'm sorry, you never got a visit. So she's saying you
20 did and, okay, all right.

21 Anything else? Any witnesses?

22 MR. CARLING: No more witnesses for the defense, Your Honor.

23 THE COURT: None of these family folks out here have anything that they
24 could offer? Okay. All right. Argument.

25 MR. CARLING: Your Honor, this Court asked a lot of the questions that I

1 was going to argue, a lot of the issues that were just sort of hanging out there
2 I refer to Exhibit A, and I refer to the last page, why would an attorney sign a
3 certificate of mailing that that had been done. Mr. Harris is not an articulate
4 man in any sense, in the legal sense as well. And I'm certain that if an inmate
5 receives something like this, he's going to assume that it was taken care of.
6 That's why I think this is really, really paramount as an exhibit, as evidence that
7 he placed his trust in Ms. Parks.

8 The question of money, it's sort of a collateral issue here. Certainly
9 she had a duty, if she files a notice of appeal under the fast track rule, I think
10 it's Rule C, appellate Rule C, she's got to file at least something in that respect
11 and that happened. Whether or not her total fee encompassed doing this,
12 that's pure speculation. Mr. Harris says -- indicates contrary to what Ms. Park
13 says. But what we have is the actual evidence that he received something and
14 it says it was mailed and it was filed. And I think that that is -- that's speaks
15 volumes as to what his understanding of the situation was.

16 Another issue that this Court brought up that I was going to argue
17 is, when you receive an affirmance decision from the Supreme Court, and very
18 shortly you're going to get a remittitur, appellate counsel should always, in
19 writing, say, okay, your next remedy is a post-conviction writ for *habeas*
20 *corpus*. You've got one year that starts from the entry of the judgment of
21 conviction, but it's tolled on appeal, but then after the remittitur's issued, it
22 starts counting again.

23 My calculation said that that -- the -- that the deadline for filing a
24 post-conviction petition would have been approximately the middle of January,
25 2004. Good practice is is you always put that in writing so that these types of

1 issues don't happen because certainly defense -- a defendant is going to argue,
2 I didn't know, she said a year, he said a year, I didn't how that was calculated.

3 And -- and when he's got retained counsel, which there's no
4 question she was retained for post-conviction matters, that's something that
5 counsel needs to address, certainly put in writing, so counsel can protect
6 themselves when these types of issues.

7 Your Honor, based upon the totality of the evidence, the testimony
8 here I think Mr. Harris was under the impression that this was taken care of and
9 the fact that he waited so long, I think, is of no consequence here when he said
10 I filed stuff and when I didn't get a response, then I'm thinking something's up,
11 I need to check for myself, and he did that. Unfortunately, it was way after the
12 deadline had tolled. So, and my argument is it was a circumstance that was
13 exterior or outside his control because he put his faith in retained counsel;
14 therefore, the Court should waive the timeliness matter and look at the petition
15 on its merits.

16 THE COURT: And what I want you to address is, specifically, how does
17 the facts -- how do the facts of this case compare with the facts of *Hathaway*
18 where they said there was basically sufficient showing to get over the time bar?

19 MR. THUNELL: Well, and I think, and what's touched on in discussing
20 *Hathaway* -- let me make sure I -- the difference being is *Hathaway*, if I'm not
21 mistaken, has to do with the appeal. I mean, *Hathaway* has to do with the
22 appeal, this being the writ, it's a different standard. There is a different
23 standard as to --

24 THE COURT: Well, the difference, it was a time bar issue, it was a time
25 bar issue as to the filing a writ, was it not? And the facts were that the

1 defendant believed that his lawyer was still pursuing the appeal; therefore, the
2 time hadn't begun to run per the one year from remittitur after the decision on
3 the appeal. So basically, its reliance -- reliance on counsel doing something,
4 believing that something has been done. In that case it was that the appeal
5 hadn't been decided but he believed that counsel had filed it and was pursuing
6 it and he was waiting.

7 In this case the difference is he knew the appeal was done, but he
8 believed his lawyer had, in fact, filed the writ.

9 MR. THUNELL: Well --

10 THE COURT: So that's what I'm --

11 MR. THUNELL: Okay. And I appreciate, Your Honor, I mean, with
12 *Hathaway*, in all candor, I did not write this. I mean, so I'm not going to sit
13 here and pretend I know everything about this. But as far as my understanding
14 is, is that *Hathaway* has to do with on direct appeal in which he has a right to
15 counsel. This being a writ, it's a different issue because it's not the same -- it's
16 not the same counsel -- not the same right to counsel. So it's differentiated in
17 that sense. I mean, and so I think that alone would be enough to differentiate
18 that from *Hathaway* in that split.

19 But I just, I feel like I do need to interject, we've heard from counsel
20 here today that she had this conversation very clearly with him that it had not
21 been filed. And so I know we have this paper and that it's been signed and
22 that's, you know, obviously, hindsight is 20-20, though. it was not a good idea
23 to sign it if you're not filing it, but she had a conversation and he said he had
24 conversations with her after the fact, and that these conversations were it had
25 not been filed, I need to be paid, and that it's going to be taken care of. I know

1 it wasn't in writing, but we've heard testimony from -- from the counsel that he
2 had been informed of this, he had been told this, that he understood this. And
3 he admits that he had had conversations after the fact, and even talks about
4 how he said -- told her, well, you can't -- this was filed in the wrong spot.

5 Now, I guess the difference is what his -- what he's saying here
6 today, but she said she was very clear that it wasn't going to be in that. And
7 so we've heard testimony that he knew that it needed to be paid up to have
8 that filed. As to *Hathaway* though, I mean, I'll need to submit it. In all candor,
9 I'm sure Your Honor understands the case a little bit better than myself, but, I
10 mean, just in looking at this, it's a difference as to direct appeal versus writ,
11 right to counsel versus don't have that same.

12 THE COURT: Well, I guess, I mean, the argument that the State has
13 posed is that you don't have a right to post-conviction counsel. But I don't
14 know whether the State's trying to argue that the difference with *Hathaway* is,
15 well, that the error, if there was error or problems with counsel, it was
16 ineffectiveness of counsel was by not filing the appeal, *vis-a-vis*, not filing the
17 petition. But I'm -- I guess I'll have to reread *Hathaway* again, that's why I was
18 hoping you could address that aspect of it.

19 MR. THUNELL: My apologies, Your Honor.

20 THE COURT: But to see whether they're focusing on the ineffectiveness,
21 the merits, in other words, but I don't know that they were because it -- I
22 thought with *Hathaway* it was remanded back to consider the merits of the
23 petition, where the District Court had said, no, it's time barred; and they said,
24 no, because he was relying on counsel. As I say, I'll reread the case again.

25 MR. THUNELL: I guess the State -- the State's position is that that that's

1 differentiated under *Brown*, that a direct appeal would be different than the writ
2 as to what -- with counsel.

3 THE COURT: Okay. As far as Ms. Park's testimony, there, I mean, I
4 wish I had a better confidence in the accuracy of the testimony, but I don't
5 understand why. number one, you would do any work on something where you
6 were trying to get paid for something you hadn't been paid for already; that you
7 would have a fee agreement that doesn't have any fees, you know, it's mostly
8 blank except for the name of the client and the signature by someone other
9 than the client; that you would not do -- you would not have clear
10 communications with your client in writing. I mean, so all of those things, and I
11 guess I -- I was inclined initially to ask for further information from the defense
12 as far as the jail or, excuse me, the prison visitation record perhaps, but the
13 thing is is that now Ms. Parks, when she's recalled, says, well, you know, I
14 don't remember that, but maybe he's right. So even if it, you know, it doesn't
15 show any visit, I don't know that that changes anything because her testimony
16 is ambiguous in that regard.

17 MR. THUNELL: Well, and I would propose to the Court that I think the
18 important thing is what happened afterwards, because so much seems to be
19 couched on this writ, the dummy writ, I guess there's no other way to say it, I
20 mean, the bare bones thing, is what was the discussion after that. I mean,
21 that's how the State --

22 THE COURT: Well --

23 MR. THUNELL: -- is whether he knew that that was -- had been filed,
24 was going to be filed, things along those lines.

25 THE COURT: Well, his testimony was that he thought it had been filed.

1 If she -- if she never visited him in the prison, as he says, she's got no record of
2 communication with him whatsoever, I mean. Frankly, her testimony alone at
3 this point is not really convincing to the Court given how this case was handled,
4 you know, given what I see. It's, at best, sloppy, at best, you know, to
5 characterize it as that. I just -- this is --

6 Marshal, you can return this to Ms. Parks for her file.

7 THE CLERK: And counsel Exhibit A back, it was never admitted.

8 THE COURT: Exhibit A --

9 MR. CARLING: May I approach the clerk?

10 THE COURT: -- was admitted by stipulation.

11 THE CLERK: Was it? Oh, I didn't hear.

12 THE COURT: And then, of course, the Court Exhibit -- the retainer
13 agreement is Court Exhibit 1.

14 THE CLERK: I have it.

15 MR. THUNELL: The last thing the State would just -- and I won't argue,
16 I'll just put -- I'll just refer back to what we'd written -- is the State -- even if
17 there was reliance and everything kind of went the way the defendant is
18 saying, the State still believes there wouldn't be actual prejudice considering the
19 merits underlying, but I'll submit it there to Your Honor.

20 THE COURT: Oh, yeah, but the Court has not consider -- I mean --

21 MR. THUNELL: I understand. That's all. I was just going to put in there,
22 Your Honor.

23 THE COURT: -- just because I know that at the last hearing the deputy or
24 the person, I can't remember if it was a law clerk, you know, sworn in to
25 practice, was arguing, well, but the, you know, there's the other prong. But I

1 had made it clear that this hearing was only as to the issue of time bar and that
2 if I didn't -- if I wasn't convinced that there was, you could get past the time
3 bar, then there would be no point in addressing the merits.

4 MR. THUNELL: Good point, Your Honor.

5 THE COURT: But even if there is, if I found that there was no time bar,
6 there still has to be a showing on the merits of the petition and under, you
7 know, the *Strickland* standard, so we hadn't even gotten there.

8 MR. THUNELL: Thank you, Your Honor.

9 THE COURT: I was trying to basically save money and resources of the
10 State since he's got appointed counsel, there's no need to address the merits of
11 the petition until we know. I think some of the merits were argued in the
12 supplemental petition, but not in the manner, I think, that it would be if we
13 made the decision.

14 So I'm going to reread *Hathaway* and then I'll go ahead and issue
15 an order concerning whether or not I think that we need additional briefing on
16 the merits.

17 MR. THUNELL: Sounds good. Thank you, Your Honor.

18 THE COURT: Did you want to add --

19 MR. CARLING: Yeah, yeah. I can discuss *Hathaway* because --

20 THE COURT: Okay.

21 MR. CARLING: The Nevada Supreme Court cited a Ninth Circuit case,
22 *Loveland*, in which the -- and the *Hathaway* I think where the State's confused,
23 and rightfully so, *Hathaway* was a direct appeal that wasn't filed, but he
24 immediately, when he found out, filed a post-conviction petition because that
25 was his remedy, that was the vehicle to use. And the Court used the Ninth

1 Circuit's analysis to see if there was good cause to overcome the time bar by
2 citing three things: That the defendant actually believed his counsel was
3 pursuing the direct appeal, or that his belief was objectively reasonable, and
4 that he filed a post-conviction petition within a reasonable time of finding out
5 what was going on.

6 I think all three of those prongs have been established here pursuant
7 to Mr. Harris's testimony. Whether or not supported by Ms. Park is up to the
8 Court to make that determination. But he relied on her. I think it's objectively
9 reasonable that he relied on her. And then when he got those docketing
10 statements in December of 2014 and January 2015, by March of 2015, he
11 filed a petition which is a reasonable amount of time. And I'll submit it.

12 THE COURT: Do you recall in *Hathaway* how long it was from the time
13 he dis -- well, yeah, how long from the time he discovers that the appeal had
14 not been filed and therefore the time has been running?

15 MR. CARLING: I don't recall the specific facts of how many months it
16 was.

17 THE COURT: Okay. I'll look at it. All right. Thank you very much for all
18 the information provided today.

19 MR. THUNELL: Thank you for your time, Your Honor.

20 MR. CARLING: Thank you.

21 THE COURT: Court's in recess.

22 PROCEEDING CONCLUDED AT 9:41 A.M.

23 * * * * *

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2 ATTEST: Pursuant to Rule 3C(9) of the Nevada Rules of Appellate Procedure, I
3 acknowledge that this is a rough draft transcript, expeditiously prepared, not
4 proofread, corrected, or certified to be an accurate transcript.

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6 SARA RICHARDSON
7 Court Recorder/Transcriber
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CLERK OF THE COURT

1 FFCL

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 **THE STATE OF NEVADA,**

5 *Plaintiff,*

6 -vs-

7 **LAMAR HARRIS**

8 *Defendant.*

CASE NO: C-11-274370-1

DEPT NO: V

9 **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON**
10 **DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

11 On December 8, 2015, this matter came on for an evidentiary hearing before the Court on
12 Defendant's Supplement to his Post-Conviction Petition for Writ of Habeas Corpus. The Defendant
13 was present with counsel Matthew D. Carling, Esq. The State was present by and through Deputy
14 District Attorney Peter Thunell, Esq. The Court, having heard the arguments of counsel, and
15 considered the pleadings and papers on file herein, finds as follows:

16 **I. FINDINGS OF FACT**

17 1. On June 24, 2011, Defendant was charged by way of Information with Attempted
18 Murder with use of a Deadly Weapon, in violation of NRS 200.010, 200.030, 193.330, and
19 193.165, and Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, in
20 violation of NRS 200.481(2)(c).

21 2. Defendant was tried on those charges during a four day jury trial commencing
22 August 30, 2011. Defense counsel at trial was Adam Gill, Esq.

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24 but acquitted Defendant of attempted murder.

25 4. Defendant was sentenced on November 21, 2011 to a minimum term of seventy (70)
26 months and a maximum term of one hundred seventy five (175) months in the Nevada Department
27 of Corrections and given one hundred and eighty two (182) days of credit for time served.

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CAROLYN ELLSWORTH
DISTRICT COURT JUDGE
DEPARTMENT V

000901

1 6. After the conclusion of the trial, Defendant engaged attorney Leslie Park, Esq.
2 ("Park"), to represent him in post-trial proceedings.

3 7. Defendant pursued a direct appeal with the Nevada Supreme Court, represented by
4 Park. A Notice of Appeal was filed in this case on December 8, 2011, and the Supreme Court
5 affirmed Defendant's convictions on December 13, 2012. The remittitur issued on January 15,
6 2013.

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8 filed a pro per petition on March 11, 2015. An initial hearing was held on that petition on May 13,
9 2015, at which time the Court made the preliminary finding that Defendant may be able to show
10 good cause to excuse the untimeliness of his petition and appointed Matthew D. Carling, Esq. to file
11 supplemental briefing on that sole issue. A briefing schedule was set and an evidentiary hearing
12 date of September 16, 2015.

13 9. At the September 16, 2015 hearing, Senior Judge J. Charles Thompson denied
14 Defendant's petition and declined to hold an evidentiary hearing. Mr. Carling then filed a Motion
15 for Reconsideration of that decision, on behalf of Defendant, which was granted by this Court on
16 October 14, 2015. An evidentiary hearing date was then set at that time for December 8, 2015.

17 10. At the evidentiary hearing, Defendant called Park as a witness and he also testified
18 himself.

19 11. Defendant testified that Park was to handle both his direct appeal and a post-
20 conviction petition for a writ of habeas corpus.

21 12. The fee agreement for Park's retainer purportedly signed by Defendant's wife on
22 behalf of Defendant was a stock form and would be used for the defense of initial criminal charges
23 in the lower court. In the blank where the nature of the criminal charges at issue would be filled in
24 was written the word "appeal." The form itself states that the agreement does *not* cover trial, appeal,
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3 conviction petition.

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9 of Appeal documents and the Fast Track Statement, but did not file a Fast Track Reply pursuant to
10 NRAP 3(C)(e)(3). The Court further notes that Park attempted to file the Statement on July 3, 2012,
11 but it was rejected for failure to comply with the Supreme Court's brief formatting requirements.

12 17. Sometime just after June 6, 2013, Defendant received a copy of a document drafted
13 by Park entitled "Petition for Writ of Habeas Corpus" (the "Park Petition"). The Park Petition was
14 marked and admitted as evidence at the hearing.

15 18. As confirmed by Park's testimony, this document was signed by Park and dated June
16 6, 2013. It attached a certificate of service that was dated June 6, 2013 by Park, listing the Clerk of
17 the Supreme Court, the Clark County District Attorney, and the Nevada Attorney General as service
18 recipients.

19 19. The caption on the Park Petition stated that the Petition was to be filed in the Nevada
20 Supreme Court.

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22 education and knowledge.

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24 Petition and told him it appeared to have been filed in the wrong court, as post-conviction petitions
25 are to be filed in the first instance in the district courts.¹

26 22. Defendant contacted Park in December 2013 to point out this deficiency and was
27 told that she would immediately correct it and file it in the district court.²

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¹ A specific date on this point could not be gleaned from the testimony at the evidentiary hearing, but it seemed to be within a few months after June 6, 2013 that Defendant came to this realization.

23. Defendant had no contact with Park after he alerted her to the deficient filing of the Park Petition, but he did unsuccessfully attempt to contact her office several times to obtain a status update. This period of no contact includes all of the year 2014.

24. Defendant did not attempt to check the status of his petition in the district court for the majority of 2014, as he was told that it takes some time and he thought he was waiting on the State's response to the Park Petition.

25. Towards the end of 2014, Defendant contacted the Supreme Court Clerk and asked for a status update on his petition. In response, he received a docket sheet from his Fast Track appeal printed on December 31, 2014.

26. Defendant also contacted the district court clerk around that time and in response received a docket sheet from the instant case, printed on January 6, 2015.

27. When he received these docket sheets, he realized that the Park Petition had never been filed.

28. Park confirmed that she had never filed the Park Petition.

29. The Park Petition itself is clearly deficient in many ways, in that it captions the incorrect court and it does not comply with the procedural and formatting requirements set forth in NRS 34.730 and NRS 34.735.³

30. The Court specifically notes that Park testified she had never before prepared a post-conviction petition for a writ of habeas corpus for any client.

31. When Park was asked why she would sign a petition that she did not in fact intend to file, she at first had no answer and then stated that she did not want to have to scramble to get a petition together if Defendant ended up paying his balance a few days before the filing deadline.⁴

³ Defendant's testimony as to when he contacted Park regarding where the Park Petition had been filed was that he contacted her in August of 2013, but his Pro Per Petition states December 2013. The Court attributes this discrepancy to lack of memory and passage of time and finds that December 2013 is the more likely date, as he wrote the Pro Per Petition well before the evidentiary hearing was held and that date was fresher in his mind at that time. It is also more consistent with other dates given in his testimony, such as the fact that he did not check the status of his petition throughout 2014 because he thought he was waiting for the State's response.

⁴ Although not addressed herein, Defendant's Supplemental Briefing in Support of his Pro Per Petition points out that the substance of the Park Petition is also likely legally inaccurate as well.

⁵ This is troubling, as it indicates that Park would have been willing to file the Park Petition if Defendant paid his balance, even though that petition is clearly deficient.

1 32. Upon realizing no petition had ever been filed, Defendant drafted a Pro Per Petition
2 and filed it with this Court on March 11, 2015, alleging most of the same facts recited above
3 regarding the lateness of his petition.

4 33. This Court entered an Order on March 19, 2015, requiring the State to file a
5 Response within forty five days of the date of the Order and set it for hearing on May 13, 2015.

6 34. At the initial hearing, the Court noted there was an preliminary issue of whether
7 Defendant could show good cause for failing to timely file a petition and thereby escape the time
8 bar. Matthew D. Carling, Esq., was appointed to represent the Defendant and file supplemental
9 briefing on that issue.

10 35. The supplemental briefing was initially heard on September 16, 2015, at which time
11 the Honorable J. Charles Thompson, sitting as a Senior Judge, denied the request for an evidentiary
12 hearing and the Defendant's Pro Per Petition.

13 36. On September 19, 2015, Defendant's appointed counsel filed a Motion for
14 Reconsideration of the September 16, 2015 decision, which was granted at a hearing on October 14,
15 2015 and the matter was set down for an evidentiary hearing.

16 37. The evidentiary hearing was held on December 8, 2015, revealing the facts recited
17 above.

18 38. Overall, the Court finds that the Defendant's testimony was more credible than
19 Park's, as Park's responses were equivocal in nature, she stated that she lacked knowledge in
20 response to many questions, and she conceded to many factual positions put forth by Defendant.

21 39. Any findings of fact that are more appropriately considered conclusions of law shall
22 be so construed.

23 **II. CONCLUSIONS OF LAW**

24 40. The Defendant had until January 22, 2014 to file a post-conviction petition for a writ
25 of habeas corpus. *See* NRS 34.726(1).

26 41. No such petition was ever filed in this case until Defendant's Pro Per Petition was
27 filed on March 11, 2015 and so Defendant is required to show good cause for failing to timely file.
28 *See id.*

42. To demonstrate good cause, a petitioner "must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 504 (2003).

43. Such an impediment may be demonstrated "by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.*

44. The Defendant argues that he can show good cause for failing to timely file because he was relying on Park's representations that she had filed the Park Petition on his behalf. In support, Defendant cites to *Hathaway, supra*.

45. In *Hathaway*, the petitioner was convicted on December 11, 1998 and immediately after sentencing, told his trial counsel he wanted to pursue a direct appeal. 119 Nev. at 251, 71 P.3d at 505. His counsel told him that he would take care of it. *Id.*

46. Hathaway finally learned no petition had ever been filed when he wrote to the district court; he then filed a pro per petition on November 6, 2001, which was beyond the statutory deadline. *Id.*

47. The Supreme Court noted that a "claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment...[and the claim is not] itself procedurally defaulted." *Id.* at 252, 71 P.3d at 506.

48. It further noted that trial counsel is ineffective "if he or she fails to file a direct appeal after a defendant has requested or expressed a desire" to appeal and "prejudice is presumed" under such circumstances. *Id.* at 254, 71 P.3d at 507.

49. On that basis, the *Hathaway* court concluded that the petitioner had demonstrated sufficient facts to show that due to constitutionally ineffective assistance of counsel, he was entitled at minimum to an evidentiary hearing as to whether there was good cause to excuse his late filing. *Id.* at 255, 71 P.3d at 508.

50. Defendant argues that *Hathaway* is directly applicable to the instant case, as he relied upon Park's agreement to file the Park Petition on his behalf and her representation that it had been filed.

1 51. However, *Hathway's* holding was clearly couched in the fact that the petitioner there
2 had a Sixth Amendment right to the effective assistance of counsel on a direct appeal, a claim that
3 could excuse his late petition filing.

4 52. Here, the Defendant is not relying upon Park's ineffective representation *on appeal*
5 to show good cause for his late filing.

6 53. Moreover, Defendant has no constitutional or statutory right to counsel in his post-
7 conviction proceeding. *Brown v. McDaniel*, 130 Nev. Adv. Op. 60, 331 P.3d 867, 870 (Nev. 2014).⁵

8 54. "Where there is no right to counsel there can be no deprivation of effective
9 assistance of counsel." *McKague v. Whitley*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

10 55. Hence, Defendant here is precluded from relying upon a claim of ineffective
11 assistance of counsel to show good cause to excuse the procedural default of his Pro Per Petition.
12 *See Brown, supra.*

13 56. Defendant has not presented any other impediment external to the defense for a
14 finding of good cause.

15 57. Defendant's Pro Per Petition asserts two main claims: ineffective assistance of trial
16 counsel and ineffective assistance of counsel on direct appeal.⁶

17 58. However, each of these claims was available to the Defendant at the time the
18 remittitur issued and are thus procedurally defaulted themselves.

19 BASED UPON THE FOREGOING, the State's request to dismiss the Defendant's Pro Per
20 Petition is **GRANTED** and the writ is discharged.

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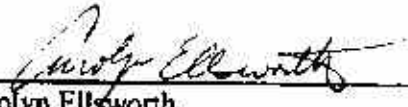
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28 ⁵ The Court also notes that the Supreme Court has rejected the federal doctrine of equitable tolling related to petitions
for a writ of habeas corpus. *See Brown*, 331 P.3d at 874.

⁶ Defendant does not assert ineffectiveness of appellate counsel as an excuse to his late filing, however.

1 The Court is nevertheless troubled by the performance of attorney Leslie Parks in this
2 matter, as that performance appears to demonstrate significant issues concerning her professional
3 conduct. A copy of this Order and relevant documents will be forwarded to Bar Counsel for review
4 and appropriate proceedings.

5 DATED this 6th day of June, 2016.

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8 Carolyn Ellsworth
9 District Court Judge
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CAROLYN ELLSWORTH
DISTRICT COURT JUDGE
DEPARTMENT V

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6TH of June, 2016 she served the foregoing Order Dismissing Appeal by faxing, mailing, or electronically serving a copy to counsel as listed below:

Matthew D. Carling, Esq.
Attorney for Defendant

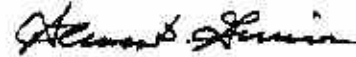
Peter I. Thunell, Esq.
Attorney for Plaintiff

Leslie Park, Esq.
Former Appellate Counsel for Defendant

Stan Hunterton, Esq.
State Bar of Nevada - Bar Counsel


Shelby Lopaze, Judicial Executive Assistant

06-14-2016


CLERK OF THE COURT

NEOJ

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAMAR HARRIS,

Petitioner,

Case No. C-11-274370-1

Dept. No. V

vs.

THE STATE OF NEVADA,

Respondent,

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on June 6, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 14, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Chaunte Pleasant

Chaunte Pleasant, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 14 day of June 2016, I placed a copy of this Notice of Entry in:

- ☒ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office - Appellate Division-

- ☒ The United States mail addressed as follows:

Lamar Harris # 71088

P.O. Box 208

Indian Springs, NV 89170-0208

Matthew Carling

1100 S. Teah St.

Las Vegas, NV 89101

Mark Peplowski

515 S. Third St.

Las Vegas, NV 89101

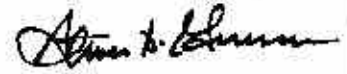
/s/ Chaunte Pleasant

Chaunte Pleasant, Deputy Clerk

000910

1 FFCL

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA


CLERK OF THE COURT

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6 -vs-

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CAROLYN ELLSWORTH
DISTRICT COURT JUDGE
DEPARTMENT V

28 000911

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30. The Court specifically notes that Park testified she had never before prepared a post-conviction petition for a writ of habeas corpus for any client.

31. When Park was asked why she would sign a petition that she did not in fact intend to file, she at first had no answer and then stated that she did not want to have to scramble to get a petition together if Defendant ended up paying his balance a few days before the filing deadline.⁴

³ Defendant's testimony as to when he contacted Park regarding where the Park Petition had been filed was that he contacted her in August of 2013, but his Pro Per Petition states December 2013. The Court attributes this discrepancy to lack of memory and passage of time and finds that December 2013 is the more likely date, as he wrote the Pro Per Petition well before the evidentiary hearing was held and that date was fresher in his mind at that time. It is also more consistent with other dates given in his testimony, such as the fact that he did not check the status of his petition throughout 2014 because he thought he was waiting for the State's response.

⁴ Although not addressed herein, Defendant's Supplemental Briefing in Support of his Pro Per Petition points out that the substance of the Park Petition is also likely legally inaccurate as well.

⁵ This is troubling, as it indicates that Park would have been willing to file the Park Petition if Defendant paid his balance, even though that petition is clearly deficient.

32. Upon realizing no petition had ever been filed, Defendant drafted a Pro Per Petition and filed it with this Court on March 11, 2015, alleging most of the same facts recited above regarding the lateness of his petition.

33. This Court entered an Order on March 19, 2015, requiring the State to file a Response within forty five days of the date of the Order and set it for hearing on May 13, 2015.

34. At the initial hearing, the Court noted there was an preliminary issue of whether Defendant could show good cause for failing to timely file a petition and thereby escape the time bar. Matthew D. Carling, Esq., was appointed to represent the Defendant and file supplemental briefing on that issue.

35. The supplemental briefing was initially heard on September 16, 2015, at which time the Honorable J. Charles Thompson, sitting as a Senior Judge, denied the request for an evidentiary hearing and the Defendant's Pro Per Petition.

36. On September 19, 2015, Defendant's appointed counsel filed a Motion for Reconsideration of the September 16, 2015 decision, which was granted at a hearing on October 14, 2015 and the matter was set down for an evidentiary hearing.

37. The evidentiary hearing was held on December 8, 2015, revealing the facts recited above.

38. Overall, the Court finds that the Defendant's testimony was more credible than Park's, as Park's responses were equivocal in nature, she stated that she lacked knowledge in response to many questions, and she conceded to many factual positions put forth by Defendant.

39. Any findings of fact that are more appropriately considered conclusions of law shall be so construed.

II. CONCLUSIONS OF LAW

40. The Defendant had until January 22, 2014 to file a post-conviction petition for a writ of habeas corpus. *See* NRS 34.726(1).

41. No such petition was ever filed in this case until Defendant's Pro Per Petition was filed on March 11, 2015 and so Defendant is required to show good cause for failing to timely file. *See id.*

42. To demonstrate good cause, a petitioner "must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 504 (2003).

43. Such an impediment may be demonstrated "by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.*

44. The Defendant argues that he can show good cause for failing to timely file because he was relying on Park's representations that she had filed the Park Petition on his behalf. In support, Defendant cites to *Hathaway, supra*.

45. In *Hathaway*, the petitioner was convicted on December 11, 1998 and immediately after sentencing, told his trial counsel he wanted to pursue a direct appeal. 119 Nev. at 251, 71 P.3d at 505. His counsel told him that he would take care of it. *Id.*

46. Hathaway finally learned no petition had ever been filed when he wrote to the district court; he then filed a pro per petition on November 6, 2001, which was beyond the statutory deadline. *Id.*

47. The Supreme Court noted that a "claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment...[and the claim is not] itself procedurally defaulted." *Id.* at 252, 71 P.3d at 506.

48. It further noted that trial counsel is ineffective "if he or she fails to file a direct appeal after a defendant has requested or expressed a desire" to appeal and "prejudice is presumed" under such circumstances. *Id.* at 254, 71 P.3d at 507.

49. On that basis, the *Hathaway* court concluded that the petitioner had demonstrated sufficient facts to show that due to constitutionally ineffective assistance of counsel, he was entitled at minimum to an evidentiary hearing as to whether there was good cause to excuse his late filing. *Id.* at 255, 71 P.3d at 508.

50. Defendant argues that *Hathaway* is directly applicable to the instant case, as he relied upon Park's agreement to file the Park Petition on his behalf and her representation that it had been filed.

1 51. However, *Hathway*'s holding was clearly couched in the fact that the petitioner there
2 had a Sixth Amendment right to the effective assistance of counsel on a direct appeal, a claim that
3 could excuse his late petition filing.

4 52. Here, the Defendant is not relying upon Park's ineffective representation *on appeal*
5 to show good cause for his late filing.

6 53. Moreover, Defendant has no constitutional or statutory right to counsel in his post-
7 conviction proceeding. *Brown v. McDaniel*, 130 Nev. Adv. Op. 60, 331 P.3d 867, 870 (Nev. 2014).⁵

8 54. "Where there is no right to counsel there can be no deprivation of effective
9 assistance of counsel." *McKague v. Whitley*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

10 55. Hence, Defendant here is precluded from relying upon a claim of ineffective
11 assistance of counsel to show good cause to excuse the procedural default of his Pro Per Petition.
12 *See Brown, supra*.

13 56. Defendant has not presented any other impediment external to the defense for a
14 finding of good cause.

15 57. Defendant's Pro Per Petition asserts two main claims: ineffective assistance of trial
16 counsel and ineffective assistance of counsel on direct appeal.⁶

17 58. However, each of these claims was available to the Defendant at the time the
18 remittitur issued and are thus procedurally defaulted themselves.

19 BASED UPON THE FOREGOING, the State's request to dismiss the Defendant's Pro Per
20 Petition is **GRANTED** and the writ is discharged.

21 //

22 //

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28 ⁵ The Court also notes that the Supreme Court has rejected the federal doctrine of equitable tolling related to petitions for a writ of habeas corpus. *See Brown*, 331 P.3d at 874.

⁶ Defendant does not assert ineffectiveness of appellate counsel as an excuse to his late filing, however.

1 The Court is nevertheless troubled by the performance of attorney Leslie Parks in this
2 matter, as that performance appears to demonstrate significant issues concerning her professional
3 conduct. A copy of this Order and relevant documents will be forwarded to Bar Counsel for review
4 and appropriate proceedings.

5 DATED this 6th day of June, 2016.

6
7 
8 Carolyn Ellsworth
District Court Judge
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CAROLYN ELLSWORTH
DISTRICT COURT JUDGE
DEPARTMENT V

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6TH of June, 2016 she served the foregoing Order Dismissing Appeal by faxing, mailing, or electronically serving a copy to counsel as listed below:

Matthew D. Carling, Esq.
Attorney for Defendant

Peter I. Thunell, Esq.
Attorney for Plaintiff

Leslie Park, Esq.
Former Appellate Counsel for Defendant

Stan Hunterton, Esq.
State Bar of Nevada – Bar Counsel


Shelby Lopaze, Judicial Executive Assistant


CLERK OF THE COURT

1 **REQT**

2 **MATTHEW D. CARLING, ESQ**

3 Nevada Bar No.: 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 (702) 419-7330 (Office)

7 (702) 446-8065 (Fax)

8 CedarLegal@gmail.com

9 *Attorneys for Petitioner,*

10 **LAMAR HARRIS**

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

13 * * * * *

14 **STATE OF NEVADA,**

Plaintiff,

Case No. C-11-274370-1

-vs-

Dept. No. V

15 **LAMAR HARRIS,**

Defendant.

16
17 **TO: COURT REPORTER - DEPARTMENT NO. 5**

18 LAMAR HARRIS, Defendant named above, requests preparation of a rough draft
19 transcript of certain portions of the proceedings before the district court, as follows:

DATE	JUDGE	PORTION	ORIGINAL PLUS ¹
12/8/15	Ellsworth, Carolyn	All	2

20
21 This notice requests a transcript of only those portions of the District Court proceedings
22 which counsel reasonably and in good faith believes are necessary to determine whether
23 appellate issues are present. Voir dire examination of jurors, opening statements and closing

¹ Original Rough Draft to be filed with the District Court. Two (2) filed copies to be served to the Clerk of the District Court. Original certificate of service to be filed with the Nevada Supreme Court. NRSAP 34.130(1)

1 arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless
2 specifically requested above.

3 I recognize that I must personally serve a copy of this form on the above named court
4 reporter and opposing counsel, and that the above named court reporter shall have twenty (20)
5 days from the receipt of this notice to prepare and submit to the District court the transcript
6 requested herein. I further certify that the defendant is indigent and therefore exempt from
7 paying a deposit.

8 DATED this 22nd day of June, 2016

10 CARLING LAW OFFICE, PC

12 s. Matthew D. Carling

13 MATTHEW D. CARLING, ESQ.

14 Nevada Bar No. 007302

15 Court-Appointed Attorney for Defendant,

16 JAMAR HARRIS

18 **CERTIFICATE OF SERVICE**

19
20 I hereby certify that, on this 22nd day of June, 2016, I sent a true and correct copy of the
21 above REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT
22 PROCEEDINGS to the following parties:

23 Steven B. Wolfson, Esq.
24 Clark County District Attorney
25 Post Conviction Unit
26 Jennifer.Garcia@clarkcountynvda.com

28 CARLING LAW OFFICE, PC

30 s. Matthew D. Carling

31 MATTHEW D. CARLING, ESQ.

32 Court-Appointed Attorney for Defendant,

33 JAMAR HARRIS

CERTIFICATE OF MAILING

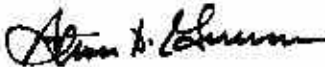
I hereby certify that on June 22, 2016, I served a copy of the REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS to Dept. 5 Court Reporter by mailing a copy via first class mail, postage thereon fully prepaid, to the following:

Court Reporter
Dept. 5
200 Lewis Avenue
Las Vegas, Nevada 89155

Lamar Harris (#71088)
Southern Desert Corrections Center
P.O. Box 208
Indian Springs, Nevada 89070

CARLING LAW OFFICE, PC

by Matthew D. Carling
MATTHEW D. CARLING, ESQ.
Court-Appointed Attorney for Defendant
LAMAR HARRIS



CLERK OF THE COURT

1 NOASC
2 MATTHEW D. CARLING, ESQ.
3 Nevada Bar No.: 007302
4 1100 S. Tenth Street
5 Las Vegas, NV 89101
6 (702) 419-7330 (Office)
7 (702) 446-8065 (Fax)
8 CedarLegal@gmail.com
9 Attorneys for Petitioner,
10 LAMAR A. HARRIS
11

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA
14 *****
15

STATE OF NEVADA,

Plaintiff,

Case No.: C274370

Dept. No.: V

vs.

LAMAR A. HARRIS,

Defendant.

16
17 NOTICE OF APPEAL
18

19 TO: THE STATE OF NEVADA

20 STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and
21 DEPARTMENT 5 OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE
22 OF NEVADA, IN AND FOR THE COUNTY OF CLARK.
23

24 NOTICE is hereby given that LAMAR A. HARRIS, presently incarcerated at the
25 Southern Desert Correctional Center, appeals to the Supreme Court of the State of Nevada from
26 the

27 ///

28 ///

29 ///

000923

1 an Order dismissing his Petition for a Writ of Habeas Corpus (Post-Conviction) entered on or
2 about June 6, 2016.

3 DATED this 6th day of June, 2016.

4
5 CARLING LAW OFFICE, PC

6
7 By: Matthew D. Carling

8 MATTHEW D. CARLING, ESQ.

9 Nevada Bar No.: 007302

10 1100 S. Tenth Street

11 Las Vegas, NV 89101

12 (702) 419-7330 (Office)

13 (702) 446-8065 (Fax)

14 CedarLegal@gmail.com

15 Attorneys for Petitioner.

16 LAMAR A. HARRIS
17

DECLARATION OF MAILING

MATTHEW D. CARLING, ESQ., hereby declares that he is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age; that on the 21st day of June, 2016, Declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Notice of Appeal in the above-mention case, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

LAMAR A. HARRIS (#71088)
SDCC
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070-0208

STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21st day of June, 2016.

CARLING LAW OFFICE, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.

Nevada Bar No. 007302

1100 S. Tenth Street

Las Vegas, NV 89101

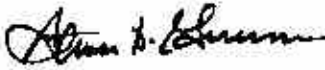
(702) 419-7330 (Office)

(702) 446-8065 (Fax)

CedarLegal@gmail.com

Attorneys for Petitioner.

LAMAR A. HARRIS


CLERK OF THE COURT

ASTA
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedartLegal@gmail.com
Attorneys for Petitioner.

**CASE APPEAL STATEMENT
(NRAP 3(d)(4))**

1. **Name of appellant filing this case appeal statement:**

Lamar A. Harris
2. **Identify the judge issuing the decision, judgment, or order appealed from:**

Judge Carolyn Hillsworth
3. **Identify all parties to the proceedings in the district court:**

Lamar A. Harris

The State of Nevada
4. **Identify all parties involved in this appeal:**

Lamar A. Harris

The State of Nevada
5. **Name, law firm, address, and telephone number of all counsel on appeal and party or parties whom they represent:**

MATTHEW D. CARLING
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330

PETER L. THUNELL
Deputy District Attorney
P.O. Box 552212
Las Vegas, NV 89101-2212

000926

Counsel for Appellant,
Lamar A. Harris

Counsel for Appellee,
State of Nevada

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: Appointed
7. Indicate whether appellant is represented by appointed or retained counsel on appeal: Appointed
8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: N/A
9. Indicate the date the proceedings commenced in the district court:

Information filed June 24, 2011.

Dated this 21st day of June, 2016.

CARLING LAW OFFICE, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.

Nevada Bar No.: 007302

Court-Appointed Attorney for Defendant.

LAMAR A. HARRIS

CERTIFICATE OF SERVICE

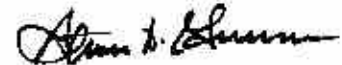
I hereby certify that, on this 21st day of June, 2016, I sent a true and correct copy of the above CASE APPEAL STATEMENT to the following parties:

Steven B. Wolfson, Esq.
Clark County District Attorney
Post Conviction Unit
1000 Green Valley Parkway, Suite 200
Clark County, NV 89002

CARLING LAW OFFICE, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.
Court-Appointed Attorney for Defendant
LAMAR A. HARRIS



CLERK OF THE COURT

1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 LAMAR ANTWAN HARRIS,

9 Defendant.

CASE NO. C274370

DEPT. NO. V

10
11
12 BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

13
14 TUESDAY, DECEMBER 8, 2015

15 ROUGH DRAFT

16 **RECORDER'S TRANSCRIPT OF HEARING: TIME BAR ON WRIT**

17
18
19 APPEARANCES:

20 For the State:

PETER THUNELL
Chief Deputy District Attorney

21
22
23 For the Defendant:

MATTHEW D. CARLING, ESQ.

24
25 RECORDED BY: CHERYL CARPENTER, COURT RECORDER

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INDEX OF WITNESSES

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None

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LAMAR HARRIS

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LIST OF EXHIBITS

STATE'S EXHIBITS

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None

DEFENDANT'S EXHIBITS

PAGE

Exhibit A

7

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 8, 2015, 8:41 A.M.

2 * * * * *

3 THE COURT: Good morning.

4 MR. THUNELL: Good morning.

5 MR. CARLING: Good morning.

6 THE MARSHAL: Please take your seats.

7 THE COURT: Thank you. And this is case number C274370, State of
8 Nevada versus Lamar Harris. And Mr. Harris is present in custody with his
9 counsel. This is a hearing concerning the time bar on the writ. And so are you
10 ready to proceed?

11 MR. CARLING: I am, Your Honor. As a preliminary matter, my client will
12 be waiving the attorney-client privilege, obviously, as to discuss what was
13 conversed between him and his attorney. And we would be calling Ms. Park.

14 THE COURT: Okay. Is that correct, Mr. Harris, you're waiving your
15 attorney-client privilege with Ms. Park?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Thank you, very much.

18 Ms. Park.

19 **LESLIE PARK,**

20 [having been called as a witness and being first duly sworn, testified as follows:

21 THE CLERK: You may be seated.

22 THE WITNESS: Thank you.

23 THE CLERK: And could you please state and spell your name for the
24 record?

25 THE WITNESS: Yes. Leslie Park, L-E-S-L-I-E, P-A-R-K.

1 THE COURT: You may proceed.

2 MR. CARLING: Thank you, Your Honor.

3 **DIRECT EXAMINATION OF LESLIE PARK**

4 BY MR. CARLING:

5 Q Ms. Park were you retained by Lamar Harris to file a post-conviction
6 petition for writ of *habeas corpus*?

7 A No.

8 Q Did you ever have any -- did you prepare a post-conviction petition
9 for writ of *habeas corpus* for Mr. Harris?

10 A I prepared a bare bones -- I had been retained to do the appeal,
11 which I did. He then was interested in doing that. I spoke with him at the
12 prison.

13 THE COURT: Interested in doing what?

14 THE WITNESS: The post-con -- the writ.

15 THE COURT: Okay.

16 THE WITNESS: I spoke with him at the prison regarding that. He wanted
17 to know what I would put in the writ. There is a fee agreement for the appeal
18 which I never was finished being paid for. What I had indicated to Mr. Harris
19 and his wife was that if he wanted to do the writ I needed to be paid for the
20 rest of the appeal and they needed to do a fee agreement for the writ and make
21 some sort of down payment for that. So I did prepare a bare bones, what I
22 would intend to put in the writ, that I sent to Mr. Harris to review.

23 MR. CARLING: May I approach the witness, Your Honor?

24 THE COURT: Yes.

25 ///

1 BY MR. CARLING:

2 Q I'm handing you what's been marked as Proposed Exhibit A. The
3 State has been provided a copy. Do you -- do you recognize that document?

4 A I do.

5 Q Is this the -- the bare bones petition that you prepared?

6 A It is.

7 Q Was it ever filed in any jurisdiction?

8 A No, because I wasn't paid to file the writ.

9 Q And on that -- on that petition for writ of *habeas corpus* that you
10 prepared, does it not state the Nevada Supreme Court at the top of the caption?

11 A It may. I -- like I said, it was a bare bones to indicate to him what I
12 would be putting in the writ. I didn't want to get caught last minute, because
13 they did indicate they were going to retain me, last minute, the day before,
14 have to start from scratch.

15 Q After you sent that -- that bare bones petition to Mr. Harris --

16 A Uh-huh.

17 Q -- did you have any discussions with him?

18 A We -- I believe that -- honestly, I don't remember if we spoke, I
19 don't think I saw him in person after that. I do think we may have spoke on the
20 phone. There were times that his wife would come in and have him on the
21 phone where we would all talk.

22 Q At any time did you indicate that you had actually filed the petition
23 at the Nevada Supreme Court?

24 A No.

25 Q Did you indicate to him at any time that the petition that you

1 prepared was filed in the District Court?

2 A No.

3 Q In fact, you never filed the petition anywhere?

4 A I never filed it, no.

5 MR. CARLING: I'll pass the witness.

6 MR. THUNELL: Just briefly, Your Honor. And, Your Honor, the State
7 would stipulate to the admission of this proposed exhibit if that's all right,
8 Your Honor?

9 THE COURT: All right. I'd like to see that because I don't have the -- I
10 just have your supplemental petition.

11 MR. CARLING: And I'll move for Exhibit A. May I approach?

12 THE COURT: You may. It will be admitted.

13 [DEFENSE EXHIBIT A ADMITTED]

14 THE COURT: Thank you.

15 **CROSS-EXAMINATION OF LESLIE PARK**

16 BY MR. THUNELL:

17 Q Ms. Park --

18 A Yes.

19 Q -- just briefly, so he owed you money for the appeal?

20 A He did.

21 Q And was that ever actually paid in full to you?

22 A No.

23 Q So to this day you're still owed money?

24 A Correct.

25 Q And you were approached about possibly doing the writ, but never,

1 it sounds like, never were paid for it?

2 A Correct. There was never a fee agreement filled out for it, nor was
3 I paid -- nor was I paid.

4 Q Did you -- did you discuss -- oh, I apologize.

5 A Nor was I paid for it, no.

6 Q I'm sorry, Ms. Park. Ms. Park, did you discuss this necessity of
7 being paid to the defendant's wife and to defendant?

8 A Yes.

9 Q And did they ever give any kind of down payment, anything along
10 those lines?

11 A No. Like I indicated, they needed to finish paying me for the appeal
12 and make a down payment and fill out a new fee agreement for the writ.

13 Q I just want to make sure that we're all crystal clear here, did you
14 ever tell him that you filed that writ or that bare bones kind of a document that
15 you wrote?

16 A No. I had told him I had filed the appeal but never the writ.

17 Q Okay. Is it fair to say that that writ that the judge is holding, the
18 kind of bare bones, that it's in no shape to actually be filed at this point? It's a
19 bit of a -- more of an outline than an actual writ, so to speak?

20 A I would say that, yes.

21 Q Okay. It would need much more information and such to actually
22 be filed as a writ?

23 A Yes.

24 Q Okay. And so that was never actually filed?

25 A No.

1 Q All right. And, Ms. Park, at any point were you approached by the
2 defendant or his wife about them wanting to, as time kind of goes on, that they
3 wanted you to, you know, quickly file this or to pass your information along to
4 some other attorney, anything along those lines?

5 A No.

6 MR. THUNELL: I'll go ahead and pass the witness, Your Honor.

7 THE COURT: Redirect.

8 **REDIRECT EXAMINATION OF LESLIE PARK**

9 BY MR. CARLING:

10 Q In response to some questions that the State asked, had you ever
11 prepared post-conviction writs of *habeas corpus* before?

12 A Prior to that? I don't know. I don't think so, but I don't know for
13 sure.

14 MR. CARLING: No other questions.

15 THE COURT: All right. So this, Exhibit A, appears to bear your written
16 signature in two places. The pages are not numbered, but on the fifth page
17 down it says executed at, and it's written in Clark County on the 6th day of the
18 month of June, 2013, and it appears -- it says attorney for petitioner, appears
19 to bear a signature; is that your handwriting?

20 THE WITNESS: It is.

21 THE COURT: Why would you have signed this document if you weren't
22 going to file it?

23 THE WITNESS: Honestly, I don't recall. I don't know. I mean, it was -- I
24 think that -- and I may be wrong, but I think the time deadline was coming near.
25 It was -- I think just to be prepared if I had to file something. Honestly, I don't

1 know why.

2 THE COURT: And how about this, certificate of mailing.

3 THE WITNESS: Just that I had mailed it to him.

4 THE COURT: It says that you mailed to the clerk of the Nevada Supreme
5 Court, to the District Attorney, and the Attorney General.

6 THE WITNESS: I think that was just the bare bones, what the back page
7 generally says. It was just the general writ outline.

8 THE COURT: All right. So you also, after the conclusion, you signed it
9 again?

10 THE WITNESS: Uh-huh.

11 THE COURT: Is that a "yes"?

12 THE WITNESS: Yes.

13 THE COURT: And, okay, and dated it again on the 6th of June, 2013; is
14 that right?

15 THE WITNESS: That would be correct.

16 THE COURT: Further questions as a result of my questions?

17 MR. CARLING: Not for Ms. Park.

18 MR. THUNELL: Just briefly, if that's all right, Your Honor?

19 BY MR. THUNELL:

20 Q Ms. Park, to the best of your recollection, do you recall having any
21 conversations after you had prepared this bare bones, kind of, document? Do
22 you recall having any conversations with the defendant or his wife concerning --
23 that you needed to be paid so that you could finish the writ to -- to file it?

24 A Yes. She was in my office and had him on the phone more -- on
25 more than one occasion. And she indicated to me she would be paying me, but

1 it didn't happen, so.

2 Q And just so I'm clear, and this was after, additionally, after you had
3 already written that and get -- provided it to the defendant to look at?

4 A Yes.

5 Q Okay. So even subsequent to that, they had been informed that it
6 had not been filed, they needed to pay for it to be filed?

7 A Yes.

8 MR. THUNELL: Okay. Thank you, Your Honor.

9 THE COURT: Question, more questions?

10 MR. CARLING: No follow-up, Your Honor.

11 THE COURT: Do you have a fee agreement with him for the appeal, a
12 written fee agreement?

13 THE WITNESS: I do.

14 THE COURT: Okay. You have that file with you?

15 THE WITNESS: I do. I saw it here earlier. I don't know why the amount
16 is not filled in, but I do have it. It specifically just states appeal.

17 THE COURT: Would counsel like to look at this or have you already seen
18 it?

19 MR. THUNELL: I haven't seen it.

20 MR. CARLING: I haven't seen it either.

21 MR. THUNELL: That's fine.

22 MR. CARLING: But I don't need to.

23 THE COURT: All right. Well, the record will reflect that the fee
24 agreement appears to be a fee agreement that would normally be done for
25 retention of a defense in initial charges because it says, I hereby retain the

1 office -- Law Office of Leslie Park, a legal corporation, to represent me on the
2 following charges, colon, in -- it's written on that blank line that was there to
3 be -- the charge is to be written, it say -- appears to say appeal, it doesn't say
4 of what, and then there is no fee amount and there is no date upon which the
5 sum is due filled in. It indicates that all fees are earned by the attorney when
6 paid by the client, and then it's dated November 28th 2011, signed apparently
7 by the defendant, Mr. Harris.

8 Do you want to take a look at it?

9 MR. THUNELL: Thank you, Your Honor.

10 MR. CARLING: May we approach?

11 THE COURT: Yes.

12 MR. CARLING: May I show my client, Your Honor?

13 THE COURT: Yes.

14 THE WITNESS: May I make one comment?

15 THE COURT: Yes.

16 THE WITNESS: That that was actually signed by his wife, Tia Harris. It
17 was not signed by him.

18 THE COURT: Okay. And you would agree that there is no waiver or
19 anything or any indication that, you know, this is for, well, I mean, it says
20 Lamar Harris at the top but it's not signed by him, did you get anything from
21 him that authorized her to sign on his behalf?

22 THE WITNESS: Other than the conversations him indicating that she
23 would be in to sign the agreement.

24 THE COURT: Okay. All right. I think I'm going to need to make a copy
25 of this and so I'll -- we'll make a copy and mark it as Exhibit -- Court's Exhibit 1

1 since I need to look at it

2 THE MARSHAL: C.O., you got the room?

3 THE COURT OFFICER: Yeah.

4 THE MARSHAL: How many copies, Your Honor?

5 THE COURT: Just one. Well, actually, do you want copies for your file
6 at all?

7 MR. CARLING: Certainly.

8 MR. THUNELL: Yeah, if we could.

9 THE COURT: Three copies. All right, anything else?

10 MR. CARLING: No.

11 THE COURT: Thank you.

12 THE WITNESS: Okay. Thank you.

13 MR. CARLING: And the defense would call Mr. Harris.

14 You can just do it right there.

15 THE COURT: Okay. You'll need to put the microphone near him. Very
16 well.

17 **LAMAR HARRIS,**

18 [having been called as a witness and being first duly sworn, testified as follows:]

19 THE CLERK: Please state and spell your first and last name for the
20 record.

21 THE WITNESS: Lamar Harris, L-A-M-A-R, H-A-R-R-I-S.

22 THE COURT: You may proceed.

23 MR. CARLING: Thank you, Your Honor.

24 ///

25 ///

1 **DIRECT EXAMINATION OF LAMAR HARRIS**

2 BY MR. CARLING:

3 Q Mr. Harris, did you retain Leslie Park to do your appeal in this
4 matter?

5 A Yes.

6 Q Did you also have discussions with Ms. Park regarding filing a
7 post-conviction writ of *habeas corpus* after the appeal was completed?

8 A Yes.

9 Q Did you receive a remittitur on your appeal approximately
10 January 22nd of 2013?

11 A Yes.

12 Q And after that date, sometime in January, 2013, did you contact
13 Ms. Park and indicate that you wanted a post-conviction writ of *habeas corpus*
14 filed?

15 A Yes.

16 Q Can you explain to the Court what the nature of that conversation
17 was?

18 A Well, my understanding was -- was she told me she was going to
19 do -- it was going to be 8,000 for the whole process and she got half the
20 money, so everything was, you know, supposed to be handled. You know, it
21 was for everything. It wasn't just, you know, one thing. She said she was
22 going to do everything. I talked to her a couple times, she said it was for the
23 whole thing. And I just took her some money right before -- right before this. I
24 just -- I used to have to have conferences at the office because they wouldn't
25 answer the phone after --

1 Q Mr. Harris, have you been incarcerated since sometime in 2011 to
2 the present time?

3 A Yes.

4 Q Did you receive from --

5 MR. CARLING: Your Honor, may I approach to get Exhibit A?

6 THE COURT: Yes.

7 BY MR. CARLING:

8 Q Mr. Harris, I'm showing you what's been previously admitted as
9 Defense Exhibit A; do you recognize that document?

10 A Yes.

11 Q Did you receive a copy of that particular document while you were
12 incarcerated?

13 A Yes.

14 Q Did you have chance to go through it and read it?

15 A Yes.

16 Q On the very last page, does it appear to be a certificate of mailing?

17 A Yes.

18 Q Now, did you have a chance to read that certificate?

19 A Yes.

20 Q Based on the information on that certificate, what was your
21 impression when you received that document?

22 A I thought she filed this and I was waiting on a response because
23 that's what -- that's what we discussed. That's what we discussed.

24 Q What's the date on that certificate of mailing?

25 A June 6th.

1 Q What year?

2 A 2013.

3 Q Now, did you have a conversation with Ms. Park after June 6th,
4 2013, regarding your post-conviction writ of *habeas corpus*?

5 A Yes.

6 Q And what was the nature of that conversation so the Court may
7 know?

8 A Because I showed somebody this right here, you know, I was just
9 showing somebody this -- this and they was like, man, I think that it's filed in
10 the wrong -- where was I at with my appeal --

11 Q Let me stop you there, Mr. Harris. Did you have any conversation
12 with Leslie Park after June 6th regarding this petition?

13 A Yeah.

14 Q And what was the nature of that conversation?

15 A I found out it was filed in the wrong court, so then I told her, I think
16 this is in the wrong court, and she said she would fix it and then send me a
17 copy.

18 Q Did she ever send you a copy after June 6th, 2013?

19 A No.

20 Q Did you ever receive any copy of a petition that was filed in District
21 Court under your District Court number?

22 A No.

23 Q After June -- after that conversation where Ms. Park, you indicated
24 Ms. Park said that she would fix it and file it in the correct court, did you have
25 any further discussions with Ms. Park regarding your petition?

1 A No.

2 Q Did you attempt to contact Ms. Park after that?

3 A Yeah. I tried to call a few times. But like they said, she -- she
4 never came to visit me in no prison. She never used to visit me none. She
5 always used to promise me she would come visit me and talk to me, but she
6 never did. And they stopped answering the call. And every time I used to call
7 the secretary used to act like I was a bug or something, like, wouldn't even
8 answer the phone call because I used to have my family try to pop up and make
9 appointments so we can have a conference so I can discuss what was going
10 on.

11 Q Did you ever meet with Ms. Park in prison prior to the petition being
12 drafted?

13 A No. I never met with her, period. We had a conversation in the
14 County. When -- when it would come down to me actually filing because Bret
15 was going to file it for me. And then we had a conversation where we had --
16 she came to visit me and then I, you know, I felt comfortable with everything
17 she said she was going to do so, so I was like, okay, well, so Bret --

18 Q Now, who is -- who is Bret?

19 A Bret Whipple.

20 Q And what was Bret Whipple going to do for you?

21 A Bret was going to file my writ. He initially put in for the appeal
22 because he was, like, you know, let him handle it. But then I just lost trial, so I
23 was like, when Ms. Parks came to visit me, I was like, I'm just going to go with
24 her. She, you know, we had an understanding, she, you know, I had a lot of
25 issues, so she understood. So I felt comfortable with the agreement. So --

1 Q Now --

2 A -- so I went with her. So he filed first for the appeal, but then she
3 filed after that.

4 Q So to make -- to make it clear, Mr. Whipple filed the notice of
5 appeal, but Leslie Park did the fast track statement and reply?

6 A And she filed for the notice too, I believe.

7 Q Now, you just indicated that when Ms. Park came and visited you,
8 where did you have that visit?

9 A In the County.

10 Q In the Clark County Detention Center?

11 A Here. Yeah, here. That's the only time I had a visit with her here.

12 Q Did she ever visit you at Southern Desert Correction Facility?

13 A No. No.

14 Q Now, when did you first -- when did you finally realize that no
15 post-conviction petition had ever been filed on your behalf?

16 A Maybe, like, I think 2014 the beginning of 2014. I thought I was
17 waiting on a response. I had, you know, I just -- I just kicked back, about
18 2014.

19 Q Now, did you just wait for a response because you trusted that she
20 would do something for you?

21 A Yeah. I thought -- I thought I was -- I thought I just, you know, I
22 was thinking she did that. She -- I was just waiting on the response because I
23 was tired of the games that, you know, trying to contact or catch her or getting
24 pushed off, you know what I mean? Like, you know, I just, like, you know, I
25 was just waiting, from that point on waiting for a response --

1 Q How much --

2 A -- from the --

3 Q I'm sorry for cutting you off, how much money did you give Ms.
4 Park when you retained her to do your post-conviction matters, whether it's an
5 appeal or a post-conviction petition?

6 A The post-convic -- I think she got about half money. I think she
7 charged like, eight, I think she got, like, four. But then she was saying she
8 wasn't sweating the money, you know, because she ain't really did nothing
9 because she -- when she got -- when she got, you know, it wasn't nothing to
10 be done. She -- she wasn't -- she was like, you know, don't worry about -- I
11 just took her a payment right before all of this and she was just like, you know,
12 don't worry about it, you know. So I thought, you know, as the time -- as we
13 fought, you know, I was going to continue to make payments.

14 Q When did you ultimately find out approximately -- maybe you've
15 asked -- asked -- answered this -- that no petition was ever filed in the correct
16 court?

17 A I didn't find out 'til maybe at least a year later.

18 Q Did you happen to contact any agency to determine whether or not
19 a petition had been filed?

20 A The Supreme Courts, I was trying to see the status of my case
21 because I thought I was waiting on a response, so I wrote the Supreme Court.

22 Q Did you ever write the District Court as well?

23 A Yeah. I wrote the District Court too.

24 Q And did you receive a response back from the District Court?

25 A Yeah. They said it wasn't nothing never filed.

1 Q Based on the response you received, what did you do?

2 A I immediately put -- tried to put whatever I could together, appeal.

3 Q So --

4 A A writ.

5 Q -- did you file your own petition for writ of *habeas corpus* in the
6 District Court?

7 A With some help, yeah.

8 Q And, Mr. Harris, you may or may not know this question, but you --
9 do you know the date that technically would have been the deadline to file a
10 post-conviction petition for writ of *habeas corpus* in District Court?

11 A I don't -- I don't -- I think maybe December.

12 Q Of which year?

13 A I think maybe 2013.

14 MR. CARLING: I'll pass -- I'll pass the witness, Your Honor.

15 THE WITNESS: If I'm not mistaken.

16 THE COURT: All right. Cross.

17 MR. THUNELL: Thank you, Your Honor.

18 **CROSS-EXAMINATION OF LAMAR HARRIS**

19 BY MR. THUNELL:

20 Q Mr. Harris, so you said that you -- that you reached out to try and
21 find out if anything had been filed, do you recall when did you that?

22 A Like, around, well, I used to call periodically. I talked to her, after
23 she did this I talked to her again, maybe, like, maybe, like, a couple months
24 later, I talked to her again. And then after that she said she was going to
25 handle everything and then after that I just, you know, it was always hard to

1 contact her.

2 Q So you think --

3 A So I figured she did it, so I just kicked back.

4 Q So you did have conversations with Ms. Park after you had received
5 that piece of paper?

6 A After -- after I received this, I did. And I told her, I said it was in
7 the wrong court. I told her because -- because, like I was saying, I was
8 showing people what she had did and she was like they didn't know I was at
9 that point in my case, so when I asked her about, like, man, I think this is in the
10 wrong court, and she said, you know, she said, oh, she will fix that, that
11 wasn't nothing, she'll fix it.

12 Q Okay. And so you had conversations with her after she you had
13 received this paper. In those conversations did she discuss with you needing to
14 be paid --

15 A No.

16 Q -- for the services?

17 A No. She told me everything was cool because, like I said, I had just
18 dropped her some money. I had -- if -- if -- around all this time when this was
19 going on, I just had my family in her office at a conference, meeting.

20 Q And how much money are you saying that you had paid her at that
21 meeting?

22 A At least another thousand. I did paid half. I paid half of the money
23 that she charged for the whole thing.

24 Q But was that up front or was that half later on?

25 A No, that -- okay, maybe it was a couple thousand to start, but she

1 Nevertheless, Park was placed on notice by the Nevada Supreme Court decision in
2 the appeal that Harris' claims of ineffectiveness against his trial counsel were not proper for
3 direct appeal, and she and Harris began plans to file a petition for writ of habeas corpus. She
4 was retained for such purpose and undertook the duties associated therewith. NRS 34.730(3)
5 specifically informed Park that the petition needed to be filed in the district court, whose
6 clerk would then file it as a new action separate and distinct from any original proceeding in
7 which a conviction was entered. However, the petition allegedly filed by Park was not only
8 filed in the Nevada Supreme Court instead (allegedly), but also only referenced NRS 34.760
9 respecting an *answer* to a petition for writ of habeas corpus; the form of the petition
10 allegedly filed with the wrong court by Park thus failed to meet the content requirements of
11 NRS 34.730 or NRS 34.735. *See*, Harris' pro se *Petition for Writ of Habeas Corpus* filed March
12 11, 2015, at Exhibit "B." Further, NRS 34.726(1) specifically informed Park that Harris'
13 petition was due within one (1) year of the *Remittitur* issuance, and Harris himself repeatedly
14 reminded Park of this throughout the one-year time limitation period. *See*, Harris' affidavit
15 attached to his pro se *Petition for Writ of Habeas Corpus* filed March 11, 2015, at Exhibit "A."

16 Park's performance was significantly deficient. During the months following the
17 issuance of the *Remittitur* and leading up to the June 2013 alleged misfiling in the Nevada
18 Supreme Court, Park clearly had not even researched the law regarding the filing of such
19 petition. As it pertains to a claim of ineffective assistance of counsel under a *Strickland*
20 analysis, "...although counsel need not be a fortune teller, he must be a reasonably
21 competent legal historian. Though he need not see into the future, he must reasonably recall
22 (or at least research) the past..." *Kennedy*, 725 F.2d at 272, *citing Cooks*, 461 F.2d at 532. Park

1 did not undertake her duty to research petitions for writ of habeas corpus sufficiently prior
2 to undertaking such task and, similar to her failures with the appeal, fell below an objective
3 standard of reasonableness prejudicially impacting Harris' rights in the process.

4 But for Park's errors, there is a reasonable probability that the outcome would have
5 been different. Harris need only present facts meeting the preponderance of the evidence
6 standard, which he has done by submission of his affidavit and the copy of the petition
7 allegedly filed by Park with the Nevada Supreme Court at Exhibits "A" and "B" of his pro
8 se petition. *Means*, 120 Nev. at 1011-3, 103 P.3d at 31-33. These facts show that Park's
9 performance fell below a standard objective reasonableness since they were contrary to the
10 procedure dictated by statute. *Id.* The issues raised by Harris' pro se *Petition for Writ of*
11 *Habeas Corpus* and further herein indicate that Park's errors deprived him of the right to
12 meritorious review of viable issues, which issues cannot be raised by separate petition or
13 otherwise in the future. A dismissal would in essence be one with prejudice to Harris ever
14 bringing such claims again due to the time bar.

15 Harris's challenge to Park's ineffectiveness overcomes the procedural time-bar under
16 NRS 34.726(1) by a showing of good cause for delay, which case law dictates can be based
17 on Park's ineffectiveness, particularly in providing a substantial reason and a "legal excuse."
18 *Dickerson*, 114 Nev. at 1088, 967 P.2d at 1134; *Hathaway*, 119 Nev. at 252, 71 P.3d at 506,
19 citing *Colley*, 105 Nev. at 236, 773 P.2d at 1230 (quoting *Estencoin*, 625 P.2d at 1042). However,
20 Harris is also required by *Hathaway* to evidence that the ineffective assistance of counsel
21 claim itself is not procedurally defaulted. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506.
22 Although Harris' ineffective assistance of counsel claim was additionally raised after the one-

1 year limitation contained in NRS 34.726(1), Harris was unaware that such claim existed
2 during that time frame given the misinformation that he was being given by Park herself.
3 Park informed him that the petition had been timely filed with this Court; however, she
4 never filed it. Harris tried repeatedly to obtain information from Park on the status, but she
5 would not take his pre-paid, non-collect phone calls nor respond to his written
6 communication. *See*, Harris' affidavit attached to his pro se *Petition for Writ of Habeas Corpus*
7 at Exhibit "A." It was not until January of 2015, after speaking with the Court that Harris
8 confirmed that Park had not filed the petition with this Court. This provides adequate
9 allegations of good cause to sufficiently explain why the ineffectiveness claim was not raised
10 within the one-year time bar contained in NRS 34.726(1). The claim was not reasonably
11 available to Harris during the statutory time period and thus constitutes good cause to
12 excuse the delay. *Hathaway*, 119 Nev. at 252-3, 71 P.3d at 506.

13 The core procedural challenge and analysis contained in *Hathaway* is strikingly similar
14 to the instant case. *Hathaway* also claimed good cause to excuse his delay in filing his
15 petition for writ of habeas corpus on the basis that his attorney affirmatively indicated that
16 he would file an appeal on his behalf and *Hathaway* believed he had done so. *See, Hathaway*,
17 119 Nev. at 254-5, 71 P.3d at 507-8. Harris reasonably believed Park was filing the petition
18 for writ of habeas corpus on his behalf, particularly after having received a copy of one she
19 allegedly filed with the Nevada Supreme Court which just needed to be re-filed with this
20 Court. Once *Hathaway* learned his attorney had not done so, he argued that he filed his
21 habeas petition within a reasonable time. *Id.* Harris learned in January of 2015 that Park had
22 not filed the petition, and he prepared and filed his own by March 11, 2015, even arguing

1 against the procedural bar based on Park's ineffectiveness. The Nevada Supreme Court
2 found in *Hathaway* that prejudice is presumed if counsel fails to file an appeal after requested
3 to do so, which is further supported by the Ninth Circuit Court of Appeals. *Id.*, citing
4 *Loveland*, 231 F.3d at 644. This holding should be extended to petitions for writs of habeas
5 corpus such as Harris' circumstances given that the time bar is also jurisdictionally-based.
6 The Ninth Circuit held that a defendant who reasonably believes his attorney is taking some
7 action on his part "most naturally will not file his own post-conviction relief petition."
8 *Loveland*, 231 F.3d at 644. Similarly, Harris did not believe he needed to take any action
9 based on the conversations he had with Park. Harris would have filed his own petition or
10 tried to re-file with the district court the one that Park sent him if he had been informed that
11 she did not intend to file it properly, but he was not afforded that opportunity.

12 The *Loveland* case required of Hathaway a showing that "(1) he actually believed his
13 counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he
14 filed his state post-conviction relief petition within a reasonable time after he should have
15 known that his counsel was not pursuing his direct appeal." *Ibid.*, 231 F.3d at 644. The trial
16 court in *Hathaway* failed to hold an evidentiary hearing and thus the matter was remanded so
17 as to allow Hathaway to present evidence towards these factors. However, Harris has
18 presented sufficient evidence herein and with his pro se *Petition for Writ of Habeas Corpus* to
19 warrant the same evidentiary hearing afforded Hathaway on his remand for determination of
20 these same *Loveland* factors. Harris has raised a claim supported by specific facts not belied
21 by the record that would have entitled him to relief. *Hathaway*, 119 Nev. at 255, 71 P.3d at
22 508.

1 Harris has averred facts sufficient to meet the *Hathaway* requirements to overcome
2 the procedural bar to his petition for writ of habeas corpus. Park failed to reasonably
3 undertake her duties as counsel with regard to researching the proper procedure for these
4 proceedings, having committed egregious failures in her representation of Harris both on
5 appeal and in post-conviction proceedings. The time-bar should thus be excused in this
6 matter and a meritorious determination rendered on the issues raised.

7 Should this court find good cause to allow Harris' petition to be heard, counsel
8 requests a short period of time to supplement the same. During review of the matter,
9 counsel noted 2 additional issues of ineffective assistance of counsel that should be briefed
10 for this Court's review.

11 CONCLUSION

12 Wherefore, based upon the foregoing facts, Petitioner prays this Court find good
13 cause to review the Defendant's petition in its entirety and grant relief.

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1 **DECLARATION AND VERIFICATION**

2 I, Matthew D. Carling, am an attorney licensed to practice law in the State of Nevada
3 who was duly appointed to represent the Petitioner, Lamar Harris, in the preparation and
4 filing of the above Petition for Writ of Habeas Corpus (Post-Conviction), and that I filed
5 the foregoing document at the specific instruction of the Petitioner, and based on the order
6 of appointment by the Court,

7 Respectfully submitted this 27th day of July, 2015,

8 CARLING LAW OFFICE, PC

9 /s/ Matthew D. Carling

10 MATTHEW D. CARLING, ESQ.

11 Nevada Bar No.: 007302

12 Court Appointed Attorney for Petitioner/ Defendant,

13 LAMAR HARRIS
14
15

16 **CERTIFICATE OF SERVICE**

17
18 I hereby certify that, on this 27th day of July, 2015, I sent a true and correct copy of
19 the above NOTICE OF APPEAL to the following parties:

20 Steven B. Wolfson, Esq.

21 Clark County District Attorney

22 Post Conviction Unit

23 jeannier.Garcia@clarkcountynvda.com
24

25 CARLING LAW OFFICE, PC

26 /s/ Matthew D. Carling

27 MATTHEW D. CARLING, ESQ.

28 Nevada Bar No.: 007302

29 Court Appointed Attorney for Petitioner/ Defendant,

30 LAMAR HARRIS
31


CLERK OF THE COURT

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Nevada Bar #001565
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAMAR ANTWAN HARRIS,
#1589576

Defendant.

CASE NO: C-11-274370-1

DEPT NO: V

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION
FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: SEPTEMBER 16, 2015
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERCK, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On June 24, 2011, the State charged LAMAR ANTWAN HARRIS (hereinafter
4 "Defendant") by way of Information as follows: COUNT 1 – Attempt Murder With Use of a
5 Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165) and COUNT 2 – Battery
6 With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS
7 200.480.2e).

8 Defendant's jury trial commenced on August 30, 2011. On September 2, 2011, the jury
9 returned a verdict of guilty as to the charge of Battery with a Deadly Weapon Resulting in
10 Substantial Bodily Harm, and not guilty as to the charge of Attempt Murder with Use of a
11 Deadly Weapon. On November 21, 2011, Defendant was sentenced to a maximum of 175
12 months and a minimum of 70 months in the Nevada Department of Corrections (NDC), with
13 128 days credit for time served. The Judgment of Conviction was entered on December 2,
14 2011.

15 Defendant appealed his conviction on December 8, 2011. On December 13, 2013, the
16 Nevada Supreme Court affirmed the conviction, finding there was sufficient evidence to
17 support the jury's verdict. Remittitur issued on January 9, 2013.

18 On March 11, 2015, Defendant filed a Proper Person Post-Conviction Petition for Writ
19 of Habeas Corpus and Motion for Appointment of Counsel and Request for Evidentiary
20 Hearing. On May 20, 2015, this court confirmed the appointment of post-conviction counsel
21 for the Defendant for the limited purpose of addressing the procedural time bar issue. On July
22 27, 2015, Defendant, through his appointed attorney, filed the instant Supplemental Petition
23 for Writ of Habeas Corpus. The State hereby responds as follows:

24 **ARGUMENT**

25 **I. DEFENDANT'S PETITION IS TIME BARRED AND SHOULD BE DISMISSED**

26 As Defendant freely concedes, his Petition is procedurally defaulted as it was filed in
27 excess of the one year time period allowed for post-conviction habeas corpus petitions.

28 NRS 34.726 provides:

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

8 (a) That the delay is not the fault of the petitioner; and
9 (b) That dismissal of the petition as untimely will
10 unduly prejudice the petitioner.

11 (Emphasis added). "[T]he statutory rules regarding procedural default are mandatory and
12 cannot be ignored when properly raised by the State." State v. Eighth Judicial Dist. Court, 121
13 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). The one-year time bar begins to run from the date
14 the judgment of conviction is filed or a remittitur from a timely direct appeal issues. Dickerson
15 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117
16 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its
17 plain meaning).

18 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
19 Court rejected a habeas petition that was filed two days late, pursuant to the "clear and
20 unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance
21 of filing a petition within the one-year mandate, absent a showing of "good cause" for the
22 delay in filing. Gonzales, 118 Nev. at 593, 590 P.3d at 902. The one-year time bar is therefore
23 strictly construed. In contrast with the short amount of time to file a notice of appeal, a prisoner
24 has a full year to file a post-conviction habeas petition, so there is no injustice in a strict
25 application of NRS 34.726(1), despite any alleged difficulties with the postal system.
26 Gonzales, 118 Nev. at 595, 53 P.3d at 903.

27 Here, Defendant filed an appeal from his Judgment of Conviction, and remittitur was
28 issued on January 9, 2013. Therefore, Defendant had until January 9, 2014, to file his Petition.
Accordingly, both the instant Supplemental Petition and the first Petition for Writ of Habeas
Corpus were filed over one year late, as the first Petition was filed on March 11, 2015, and the
Supplemental Petition on July 27, 2015. Absent a showing of good cause, Defendant's Petition
must be dismissed as time-barred pursuant to NRS 34.726(1). Defendant has not demonstrated
good cause to overcome the mandatory time bar imposed by NRS 34.726. To show good

1 cause, a petitioner must demonstrate the following: 1) "[t]hat the delay is not the fault of the
2 petitioner" and 2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed
3 as untimely. NRS 34.726(1)(a)-(b).

4 **A. Defendant Has Failed to Establish an Impediment External to the Defense.**

5 Under the first requirement, "a petitioner must show that an impediment external to the
6 defense prevented him or her from complying with the state procedural default rules."
7 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Pellegrini v. State, 117
8 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944,
9 946 (1994); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).
10 "An impediment external to the defense may be demonstrated by a showing 'that the factual
11 or legal basis for a claim was not reasonably available to counsel, or that some interference by
12 officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478,
13 488, 106 S.Ct. 2639 (1986) (citations and quotations omitted)). Clearly, any delay in filing
14 must not be the fault of the defense. NRS 34.726(1)(a).

15 As Defendant correctly notes, the quality of his post-conviction counsel's
16 representation cannot serve as good cause to excuse procedural default. The Nevada Supreme
17 Court has made clear that the ineffective assistance of post-conviction counsel in a noncapital
18 case may not constitute "good cause" to excuse procedural bars, because "there is no
19 constitutional or statutory right to the assistance of counsel in noncapital post-conviction
20 proceedings, and '[w]here there is no right to counsel there can be no deprivation of effective
21 assistance of counsel.'" Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014)
22 (citing McKague v. Warden, 112 Nev. 159, 163-165, 912 P.2d 255, 258 (1996)). Here, as
23 Defendant correctly asserts, he did not have a statutory right to post-conviction counsel.
24 Accordingly, he had no right to effective post-conviction counsel. While Defendant may have
25 the option to pursue habeas corpus relief, that does not change the fact that he must do so
26 within one year absent a showing of good cause, and that the actions of post-conviction counsel
27 simply cannot form the basis for such a showing. Though Defendant has artfully attempted to
28 avoid this rule, it is plain that he seeks to demonstrate good cause by citing the performance

1 and actions of post-conviction counsel, which under Brown, is insufficient. Furthermore,
2 defense counsel's actions cannot be considered an impediment external to the defense, and
3 therefore do not constitute good cause.

4 Moreover, his petition was filed on March 11, 2015, over one year after the statutory
5 period for filing had run on January 9, 2014. Defendant indicates that he was plainly capable
6 of apprising himself of the status of his case in the interim, as he did in January of 2015, when
7 he wrote a letter to the Clerk of this Court inquiring as to whether a petition had been filed on
8 his behalf. Defendant indicates communication with his post-conviction counsel ceased in
9 January of 2014, which would have been the time the one year filing period concluded. Yet,
10 Defendant waited a full year to inquire about the status of a post-conviction petition for writ
11 of habeas corpus, and more than a full year to file the instant Petition.

12 Also, Defendant is required to show that his ineffective assistance of counsel claim
13 itself is not time barred and here it was. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,
14 506 (2003). His assertion that he did not know such a claim existed is without merit since he
15 was aware of the procedural time bar issues regarding the habeas petitions. See Supplemental
16 Petition, 22. Accordingly, Defendant has failed to demonstrate good cause pursuant to NRS.
17 34.726, and his instant Petition is therefore procedurally barred.

18 Lastly, the Defendant argues in both his Petition and the Supplemental Petition that in
19 the Hathaway case, the defendant reasonably believed that his attorney was going to file an
20 appeal on his behalf, the attorney failed to do so and his reasonable belief was enough to
21 constitute good cause to overcome the time bar issue. Here, the Defendant makes the same
22 argument, that he did not file a petition because he believed Ms. Park was going to file a
23 Petition for Writ of Habeas Corpus on his behalf. Defendant claims that Ms. Park's failure to
24 do so was good cause to overcome the procedural time bar. However, here the Defendant's
25 claim has no merit. The Hathaway case involved an attorney who failed to file a *direct appeal*,
26 and one does have the right to the effective assistance of counsel on *direct appeal* (emphasis
27 added). Pa. v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990 (1987) (holding that the right to
28

1 appointed counsel extends to the first appeal of right, and no further). As such, Defendant's
2 reliance upon Hathaway is misplaced because under Brown he does not have a right to counsel.

3 **B. Defendant Has Failed to Demonstrate Actual Prejudice.**

4 Because none of Defendant's claims were likely to succeed even in the event his post-
5 conviction petition had been timely filed, Defendant has also failed to demonstrate that he will
6 suffer prejudice should this Court dismiss the instant Petition.

7 Once a petitioner has established cause, he must show actual prejudice resulting from
8 the errors of which he complains, i.e., "a petitioner must show that errors in the proceedings
9 underlying the judgment worked to the petitioner's actual and substantial disadvantage." State
10 v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 94-95 (2012) (citing Hogan v. Warden, 109 Nev.
11 952, 959-60, 860 P.2d 710, 716 (1993)). Defendant carries the affirmative burden of
12 establishing prejudice." Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994).

13 Claims of ineffective assistance of counsel are analyzed under the two-pronged test
14 articulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2063-64 (1984),
15 wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that
16 the deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. at 2064. Nevada
17 adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may
18 consider the two test elements in any order and need not consider both prongs if the defendant
19 makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d
20 1102, 1107 (1997).

21 With regard to the first prong, a defendant is not entitled to errorless counsel. Rather,
22 "[d]eficient' assistance of counsel is representation that falls below an objective standard of
23 reasonableness," Kirksey, 112 Nev. at 987, 923 P.2d at 1107. What appears by hindsight to
24 be a wrong or poorly advised decision involving tactics or strategy is not sufficient to meet the
25 defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's
26 representation is highly deferential, and a defendant must overcome the presumption that a
27 challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166,
28 968 P.2d 750, 754 (1998). In order to meet the second "prejudice" prong of the test, "the

1 defendant must show a reasonable probability that, but for counsel's errors, the result of the
2 trial would have been different." Kirksey, 112 Nev. at 988, 825 P.2d at 1107. And the
3 Defendant must show it was not his own fault that produced the prejudice.

4 Here, even if Defendant had a right to counsel in his post-conviction proceeding and
5 his attorney was deficient in her performance, it still was not enough to establish prejudice. In
6 the Supplemental petition, the defense relies heavily on the prejudice argument from the first
7 proper person petition. Defendant claims Ms. Park was ineffective for relying upon
8 Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995), in challenging the sufficiency of
9 the evidence. However, even if Ms. Park cited inapplicable authority, Defendant has not
10 demonstrated that this mistake prejudiced him in any way. In affirming Defendant's
11 conviction, the Nevada Supreme Court noted that Heglemeier was inapplicable, but found that
12 regardless, "sufficient evidence supports the verdict." See Order of Affirmance, 01/15/13, p.
13 1. Thus, counsel's reliance on Heglemeier caused no prejudice, and Defendant's claims of
14 ineffective assistance of appellate counsel are frivolous. Accordingly, Defendant has failed to
15 demonstrate that this Court's dismissal of his untimely petition will result in prejudice pursuant
16 to NRS 34.726.

17 Also, Defendant complains that trial counsel was ineffective for failing to attempt to
18 remove a member of the jury. See Supplemental Petition, p. 19. A prospective juror should
19 be removed for cause only if the prospective juror's views would prevent or substantially
20 impair the performance of his duties as a juror. Preciado v. State, 130 Nev. ___, ___, 318 P.3d
21 178 (2014) (citing Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005)). That a
22 prospective juror is familiar with a witness does not require excusal of the prospective juror
23 where the juror unequivocally states that he or she can remain impartial. Id. at ___, 318 P.3d
24 at 179. Here, as Defendant points out, Prospective Juror 602 informed the court that he
25 attended high school with one of the State's witnesses, Stacy Monroe. Reporter's Transcript
26 ("RT") Jury Trial, 04/16/12, p. 7. During voir dire, the prospective juror described Mr. Monroe
27 as "an acquaintance, at best" and explained he had not had contact with Mr. Monroe for over
28 20 years. Id. at p. 126. The court inquired as to whether the prospective juror could remain

1 fair and impartial despite his familiarity with the witness, and he responded that he could "for
2 sure" remain fair to both sides. Id. at p. 126-127. Accordingly, Defendant's trial counsel was
3 not required to pursue excusal of the juror, and cannot be deemed ineffective for not doing so.
4 Thus, Defendant's claim would not have been likely to succeed, and does not demonstrate
5 prejudice.

6 Furthermore, Defendant claims that but for Ms. Park's alleged errors the outcome of
7 his case would have been different. However, he fails to offer argument, but rather merely
8 cites her alleged errors. Such naked allegations are insufficient to establish a reasonable
9 probability that the result would have been different. Hargrove v. State, 100 Nev. 498, 502-
10 03, 686 P.2d 222, 225 (1984).

11 **CONCLUSION**

12 Based on the aforementioned, this Court should deny Defendant's Supplemental
13 Petition for Writ of Habeas Corpus.

14 DATED this 12th day of August, 2015.

15 Respectfully submitted,

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

19 BY

20 JONATHAN E. VANBOSKERCK
21 Deputy District Attorney
22 Nevada Bar #006528
23
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28

CERTIFICATE OF SERVICE

I certify that on the 12th day of August, 2015, I e-mailed a copy of the foregoing State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), to:

MATTHEW D. CARLING, Esq.
cedarlegal@gmail.com

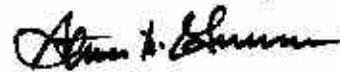
BY



R. JOHNSON

Secretary for the District Attorney's Office

KE/JEV/rj/M-1



CLERK OF THE COURT

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10 LAMAR HARRIS

11
12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**
14

LAMAR HARRIS,

Petitioner,

Case No.: C274370

Dept. No.: XII

-vs-

STATE OF NEVADA,

Respondent.

15
16 **PETITIONER'S REPLY ON SUPPLEMENTAL PETITION**
17 **FOR WRIT OF HABEAS CORPUS**
18 **(POST-CONVICTION)**
19

20 COMES NOW Defendant Lamar Harris ("**Harris**"), by and through counsel
21 Matthew D. Carling, and hereby submits the following reply to the *State's Response to*
22 *Defendant's Supplemental Petition for W'rit of Habeas Corpus (Post-Conviction)*, filed August 12, 2015
23 (the "**Response**"), which is supported by the following memorandum of points and
24 authorities:

25 *///*

26 *///*

000865

ARGUMENT

I. COUNSEL TIMELY DRAFTED AND FILED THE PETITION ON HARRIS' BEHALF; HOWEVER, HER MISTAKE IN FILING IT IN THE INCORRECT COURT AND THEN LEADING HARRIS TO BELIEVE SHE HAD CORRECTED THE ERROR WAS SUFFICIENT TO MEET THE "GOOD CAUSE" TO ALLOW HARRIS' PETITION TO BE HEARD.

"Generally, 'good cause' means a 'substantial reason; one that affords a legal excuse.'"

Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), *citing Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (*quoting State v. Estencoin*, 63 Haw. 264, 625 P.2d 1040, 1042). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Id.*, *citing Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); *Passanisi v. Director Dep't Prisons*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

In *Brun v. McDaniel*, the Nevada Supreme Court analyzed the concept of whether claims of ineffectiveness of post-conviction counsel could provide sufficient "good cause" to excuse the procedural bar in non-capital cases, ultimately finding that it did not. *Ibid.*, 130 Nev. ____, 331 P.3d 867 (2014). At the heart of this determination, the Court provided the following:

Nevada's post-conviction statutes contemplate the filing of one post-conviction petition to challenge a conviction or sentence. This is reflected in the plain language of the statutes themselves. For example, instruction number five to the habeas corpus petition form found in NRS 34.735 directs petitioners to include in the petition "all grounds or claims for relief" regarding the conviction or sentence and warns petitioners that failure to do so could preclude them from filing future petitions [footnote omitted], and

1 NRS 34.810 provides for dismissal of claims that could have been or were
2 raised in a prior post-conviction proceeding, NRS 34.810(1)(b), (2). It is also
3 reflected in the legislative history of the statutes, which were amended in 1991
4 to provide for a single post-conviction remedy, effective January 1, 1993. *See*
5 *Pellegrini v. State*, 117 Nev. 860, 870-73, 876-77, 34 P.3d 519, 526-28, 530
6 (2001)(setting forth the history of Nevada's post-conviction remedies). The
7 purpose of the single post-conviction remedy and the statutory procedural
8 bars is "to ensure that petitioners would be limited to one time through the
9 post-conviction system." *Id.* at 876-77, 34 P.3d at 530. As this court made
10 clear in *Pellegrini*, "Nevada's lawmakers never intended for petitioners to have
11 multiple opportunities to obtain post-conviction relief absent extraordinary
12 circumstances." *Id.* at 876, 34 P.3d at 530. The rule advanced on Brown's
13 behalf would circumvent the Legislature's "one time through the system"
14 intent, as every petitioner who is appointed post-conviction counsel would
15 then have an opportunity to litigate a second petition. The filing of successive
16 (and most likely untimely) petitions would overload the court system,
17 significantly increase the cost of post-conviction proceedings, and undermine
18 the finality of the judgment of conviction, precisely what the Legislature was
19 attempting to avoid in creating the single post-conviction remedy in NRS
20 Chapter 34. [footnote omitted] *See id;* *see also State v. Eighth Judicial Dist. Court*,
21 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005)("Habeas corpus petitions that
22 are filed many years after conviction are an unreasonable burden on the
23 criminal justice system. The necessity for a workable system dictates that there
24 must exist a time when criminal conviction is final." (internal quotations
25 omitted)).

26
27 *Id.* at 872-73.

28 The rule advanced on Brown's behalf was adoption of the rule set forth for federal
29 habeas corpus proceedings by the case of *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272
30 (2012). *Martinez* pertained to a second successive petition for writ of habeas corpus filed in
31 federal court on claims that his counsel in his first petition for writ of habeas corpus had
32 failed to raise specific ineffectiveness claims in those initial proceedings. In *Martinez*, the
33 federal court had adopted an equitable analysis that allowed the federal court to hear the

1 merits on a procedurally defaulted claim in state court where a petitioner was represented by
2 no counsel or allegedly ineffective post-conviction counsel in the initial-review collateral
3 proceedings. However, *Brown* declined to adopt *Martinez* because *Martinez*'s holdings applied
4 to claims where the petitioner did not have counsel in the initial-review collateral proceeding.
5 *Brown* at 873, citing *Martinez*, 132 S.Ct. at 1319-1320. The *Brown* court determined that
6 adopting *Martinez* in its entirety would undermine the mandatory procedural default
7 contained in NRS 34.810 requiring appointment in all initial-review post-conviction
8 proceedings in contravention to NRS 34.750(1), also declining to adopt only a portion of
9 *Martinez*'s holdings with respect to ineffectiveness claims against post-conviction counsel
10 given the Supreme Court's refusal to recognize a constitutional right to counsel in initial-
11 review post-conviction proceedings. Ultimately *Brown* found that *Martinez* could not be
12 reconciled with Nevada's statutory provisions, stating that "Nevada's statutory procedural
13 bars are designed to streamline the post-conviction review process and ensure the finality of
14 judgments of conviction while leaving open a safety valve for defaulted violations of state
15 law and constitutional rights in very limited circumstances." *Brown* at 874 (footnote omitted).
16 "Whether or how a rule similar to that adopted in *Martinez* should be adopted in state post-
17 conviction proceedings is a matter of policy and lies in the hands of the Legislature." *Id.*

18 In *Brown* there was a stacking of ineffectiveness claims. *Brown* and *Martinez* addressed
19 issues where a claim of ineffectiveness was raised due to the failure to raise other
20 ineffectiveness claims against an attorney in initial habeas corpus proceedings. The analysis
21 of *Brown* clearly indicates that this is disallowed likely because the secondary claims are going
22 to be time-barred.

1 Excusing the time-bar does not require that Harris meet the "ineffectiveness of
2 counsel" requirement for habeas proceedings, rather he must simply meet the "good cause"
3 criteria. Whether Harris is entitled to effective counsel in post-conviction proceedings or not
4 is irrelevant. Even if Harris was not entitled to the effectiveness of his retained counsel in
5 filing the habeas corpus petition, the facts surrounding why the default occurred still provide
6 "good cause" to excuse the default. Harris was sent a copy of the timely filed petition, then
7 informed that it was filed in the wrong court. Harris followed up with his retained counsel to
8 ensure it would be filed in the correct court, and was assured it had been. He later found out
9 that this had not occurred, so he filed his own seeking relief from the time-bar on these
10 grounds. A reasonable person would have anticipated that the attorney they hired did their
11 job by a simple re-filing of a document already prepared in the correct court prior to the
12 deadline, particularly when they are told that the re-filing did occur.

13 Harris is sufficiently differentiated from *Brown* nonetheless because he is not
14 attempting to stack petitions for habeas relief, but rather asking for reinstatement of his right
15 to have his *first* petition heard. This is actually in line with the holdings in *Brown*. Although
16 *Brown* found that claims of ineffectiveness of post-conviction counsel did not provide
17 sufficient "good cause" to excuse the procedural bar in non-capital cases, it did so on the
18 basis that allowing Brown to do so would contravene the concept of a single post-conviction
19 petition to challenge a conviction or sentence since he was raising ineffectiveness for failing
20 to raise ineffectiveness claims. *Brown* at 872; NRS 34.735; NRS 34.810(1)(b), (2); *Pelligri* at
21 870-73, 876-77.

1 Harris is not raising a *Brown* ineffectiveness stacking herein, but rather argued how
2 “an impediment external to the defense prevented him ... from complying with the state
3 procedural default rules.” *Hathaway* at 252, citing *Pellegrini* at 886-87; *Lozada* at 353; *Passanisi*
4 at 66. This impediment is sufficient to meet the “good cause” standard required to “afford[
5] a legal excuse.” *Id.* at 252, citing *Colley* at 236 (quoting *Estencoin* at 1042). While Harris
6 evidenced how his legal counsel’s failures or ineffectiveness¹ impacted the default in his
7 Supplemental Petition, the *Strickland* requirement and the right to effectiveness of that
8 counsel is irrelevant to the ultimate determination of “good cause” which has an entirely
9 different analysis for this Court to undertake—that of an external impediment that
10 prevented Harris from complying with the state procedural default rules.

11 Harris did not comply because his counsel told him she had done so already, and he
12 has provided the copy of the petition which she allegedly re-filed and mailed to him. It is
13 signed by his counsel. There was nothing to indicate to Harris that the re-filing had not gone
14 as he was informed it had. Harris faults his retained post-conviction counsel for never filing
15 the petition at all—although she prepared it, filed it with the wrong court, told Harris she
16 was filing it in the correct one before the deadline, and failed to ever do so. Harris diligently
17 retained counsel to represent his interests and she did so up until she failed to file it in the
18 correct court. While it was clearly “ineffective assistance”, this Court is not required to make
19 that finding in order to provide Harris relief from the procedural bar. It is only required to

¹ Because Harris was arguing the “external impediment” was his counsel’s misinformation and failures, Harris believes it is assistive to at least look to the standard analysis of ineffectiveness, although a finding of ineffectiveness is not required by this Court to provide relief to the procedural bar.

1 find "an impediment external to the defense prevented him ... from complying with the
2 state procedural default rules." *Hathaway* at 252, *citing Pellegrini* at 886-87; *Lozada* at 353;
3 *Passanisi* at 66. This impediment is sufficient to meet the "good cause" standard required to
4 "afford[] a legal excuse." *Id.* at 252, *citing Colley* at 236 (*quoting Estencoin* at 1042).

5 Excusing the procedural bar herein will additionally uphold *Brown's* analysis by
6 ensuring that Harris is "limited to one time through the post-conviction system." *Ibid.* at
7 872-73, *citing Pellegrini* at 876-77. Harris would not be provided multiple opportunities to
8 obtain post-conviction relief. *Id.*, *citing Pellegrini* at 876. Harris would not be circumventing
9 the Legislature's "one time through the system" intent. *Id.* Excusing the procedural bar
10 herein would only afford Harris his one time through the system, which was precisely the
11 Legislature's intent on adopting the single post-conviction remedy in NRS Chapter 34.
12 Further, Harris' pro se petition was filed within a reasonable time after he learned of his
13 retained counsel's failures so as to not create an unreasonable burden on the criminal justice
14 system. *Eighth Judicial Dist. Court* at 231. Providing Harris relief will uphold Nevada's
15 statutory process by allowing him the one "safety valve" to which all others are entitled for
16 raising state law and constitutional rights. *Brown* at 874 (footnote omitted). This is not a
17 matter of legislation to provide this relief, but rather an analysis of the proper standard for
18 finding "good cause" to excuse the procedural bar on the particular facts contained in
19 Harris' case.

20 The State's Response mistakenly argues that Harris cannot obtain relief from the
21 procedural bar on the basis of his counsel's failures because he was not entitled to the
22 effectiveness of counsel; however, it has confused the requirements for habeas relief with the

1 requirements to excuse a procedural bar to habeas relief. Harris' burden on obtaining relief
2 from the bar is not the same as obtaining habeas relief, nor should this Court feel inclined to
3 raise it to that level. This Court can still find that Harris' counsel was the external
4 impediment to his having missed the deadline without determining that Harris was entitled
5 to effectiveness of post-conviction counsel. Technically, she was never his post-conviction
6 counsel anyway having never filed the petition in the correct court. The important facts in
7 this matter are that Harris took diligent steps to meet the deadline and that something
8 external beyond his control—his counsel's failures—are the only reason that it did not get
9 filed timely. This provides a proper legal excuse for Harris, and the merits of his petition
10 should be heard.

11 **II. THE PROCEDURAL BAR ISSUE WAS BIFURCATED FROM**
12 **THE MERITORIOUS ISSUES CONTAINED IN THE *PRO***
13 ***PER* PETITION AND HARRIS HAS RESERVED THE**
14 **RIGHT TO FILE A SUPPLEMENTAL BRIEF ON THOSE**
15 **ISSUES ONCE A DETERMINATION IS RENDERED ON**
16 **THE PROCEDURAL BAR ISSUE.**
17

18 The State's Response mistakenly indicates that Harris has relied entirely on the issues
19 contained in his pro per petition; however, this misstates this Court's procedural posture in
20 this case. At the hearing held May 20, 2015, this Court indicated that it initially desired that
21 counsel only determine at this point if there was a sufficient basis for Harris to get around
22 the time bar. If he could, then counsel would be authorized to work on supplementing the
23 writ. Even according to this Court's *Minutes* from the May 20, 2015, hearing, the purpose of
24 the hearing that has been scheduled for September 16, 2015 at 9:00 a.m. is specifically to
25 address only the time bar issue. Should this Court determine that Harris can overcome the

1 time bar and obtain relief from it on the basis of his arguments contained in his initial
2 supplement and herein, then Harris will be authorized to file a supplement to the issues
3 contained in his pro per petition. The State's arguments are thus premature in attempting to
4 fast-forward to the conclusion contrary to the procedure dictated by this Court and prior to
5 Harris being provided an opportunity to make his arguments with appointed counsel.

6 **CONCLUSION**

7 WHEREFORE, based upon the foregoing, Harris respectfully requests this Court
8 excuse the time bar contained in NRS 34.726(1) and allow Harris to proceed towards
9 supplementing his pro per petition on file herein.

10 Respectfully submitted this 9th day of September, 2015.

11 CARLING LAW OFFICE, PC
12

13 /s/ Matthew D. Carling
14

15 MATTHEW D. CARLING, ESQ.
16

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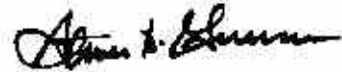
Court Appointed Attorney for Petitioner,

LAMAR HARRIS

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Steven B. Wolfson, Esq.
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Post Conviction Unit
jeanifer.garcia@clarkcountynvda.com

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9 *Court-Appointed Attorney for Defendant,*

10 **LAMAR A. HARRIS**

11
12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 *****

15 STATE OF NEVADA,

Plaintiff,

Case No.: C274370

Dept. No.: V

vs.

LAMAR A. HARRIS,

Defendant.

16
17 TO: COURT REPORTER - DEPARTMENT NO. 5

18 LAMAR HARRIS, Defendant named above, requests preparation of a rough draft
19 transcript of certain portions of the proceedings before the district court, as follows:

DATE	JUDGE	PORTION	ORIGINAL PLUS ¹
09/16/15	Thompson, Charles	All	2

20 This notice requests a transcript of only those portions of the District Court proceedings
21 which counsel reasonably and in good faith believes are necessary to determine whether
22 appellate issues are present. Voir dire examination of jurors, opening statements and closing
23

¹ Original Rough Draft to be filed with the District Court, two certified copies to be served on Mr. Carling, and original certificate of service to be filed with the Nevada Supreme Court. NRAP 3C(3)(E).

000875

1 arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless
2 specifically requested above.

3 I recognize that I must personally serve a copy of this form on the above named court
4 reporter and opposing counsel, and that the above named court reporter shall have twenty (20)
5 days from the receipt of this notice to prepare and submit to the district court the transcript
6 requested herein. I further certify that the defendant is indigent and therefore exempt from
7 paying a deposit.

8 DATED this 17th day of September, 2015.
9

10 CARLING LAW OFFICE, PC
11

12 /s/ Matthew D. Carling
13

14 MATTHEW D. CARLING, ESQ.
15

16 Nevada Bar No.: 007302
17

18 1100 S. Tenth Street
19

20 Las Vegas, NV 89101
21

22 (702) 419-7330 (Office)
23

24 (702) 446-8065 (Fax)
25

26 CedarLegal@gmail.com
27

28 *Court-Appointed Attorney for Defendant.*
29

30 LAMAR A. HARRIS
31

32 **CERTIFICATE OF SERVICE**

I hereby certify that, on this 17th day of September, 2015, I sent a true and correct copy of
the above REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT
PROCEEDINGS to the following parties:

Steven B. Wolfson, Esq.

Clark County District Attorney

Post Conviction Unit

Jennifer.Garcia@clarkcountynvda.com

1 I hereby certify that on September 17, 2015, I served a copy of the REQUEST FOR
2 ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS to Dept. 5 Court
3 Reporter by mailing a copy *via* first class mail, postage thereon fully prepaid, to the following:

Court Reporter
Dept. 5
200 Lewis Avenue
Las Vegas, Nevada 89101

Lamar A. Harris (#71088)
SDCC
P.O. Box 208
Indian Springs, Nevada 89070-0208

4 CARLING LAW OFFICE, PC
5
6

7 /s/ Matthew D. Carling
8 MATTHEW D. CARLING, ESQ.
9 *Court-Appointed Attorney for Defendant,*
10 LAMAR A. HARRIS


CLERK OF THE COURT

MOT
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Court-Appointed Attorney for Defendant,
Lamar A. Harris

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff,

vs.

LAMAR A. HARRIS,

Defendant.

Case No.: C-11-274370-1

Dept. No.: V

EVIDENTIARY HEARING REQUESTED

**NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF DENIAL OF
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

COMES NOW, the Defendant, LAMAR A. HARRIS, by and through his attorney of record, MATTHEW D. CARLING, ESQ., of the Carling Law Office, PC, and moves this Honorable Court to reconsider the denial of his Petition for Writ of Habeas Corpus (Post-Conviction).

///

///

///

1 This motion is made and based on the pleadings and papers on file herein, the attached
2 Affidavit of Matthew D. Carling, Esq., in support thereof, and any oral arguments as may be
3 presented at the hearing in this matter.

4 DATED this 21st day of September, 2015.

5 CARLING LAW OFFICE, PC

6 /s/ Matthew D. Carling

7 MATTHEW D. CARLING, ESQ.

8 *Court-Appointed Attorney for Defendant*

9 **NOTICE OF MOTION**

10 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff.

11 YOU WILL PLEASE TAKE NOTICE that counsel for the Defendant will bring the above
12 and foregoing Motion to Reconsider on for hearing before the above-entitled Court in Department
13 V at the Regional Justice Center located at 200 Lewis Avenue, Las Vegas, Nevada, on the:

14 10-14-15 at 9:00am.

15 DATED this 21st day of September, 2015.

16 CARLING LAW OFFICE, PC

17 /s/ Matthew D. Carling

18 MATTHEW D. CARLING, ESQ.

19 *Court-Appointed Attorney for Defendant*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I.**

4
5 **LAW**

6 **A. Leave of Court**

7
8 DCR 13(7) provides that a Motion for Reconsideration may be made with Leave of the
9 Court. See Arnold v. Kip, 168 P.3d 1050, 1054 (Nev. 2007); EJDRCR 2.24(a); and District Court
10 Rules of Nevada 13(7). Petitioner requests leave the instant motion.

11 **B. Timeliness of Motion**

12
13 EJDRCR 2.24(b) provides for a party seeking reconsideration must file such Motion within 10
14 days after service of written notice of the order or judgment unless the time is shortened by or
15 enlarged by order.

16 **C. Jurisdiction**

17
18 In Gibbs v. Giles, 607 P.2d 118 (Nev. 1980), the Court held the District Court has authority
19 to grant a Motion for Rehearing if re-argument is warranted. Id. at 119. Furthermore, the District
20 Court retains jurisdiction "until an Order is appealed." Id. 119. Therefore, as no appeal has been
21 filed, under Gibbs, this Court may entertain the Instant Motion.

22 **II.**

23 **LAW**

24 The Nevada Supreme Court noted in Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002) that
25 "[t]his court has long recognized a petitioner's right to a post-conviction evidentiary hearing when
26 the petitioner asserts claims supported by specific factual allegations not belied by the record that, if
27 true, would entitle him to relief." Mann, at 1230 citing Hargrove v. State, 100 Nev. 498, 686 P.2d 222
28 (1984). The Court determined that, "[a] claim is not 'belied by the record' just because a factual
29 dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. A

1 claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time
2 the claim was made." *Id.*

3 **III.**

4 **ARGUMENT**

5 **A. THIS COURT SHOULD RECONSIDER THE DENIAL OF THE**
6 **DEFENDANT'S POST-CONVECTION PETITION AS THE**
7 **DEFENDANT HAS RAISED A LEGITIMATE DISPUTE THAT IS**
8 **NOT BELIED BY THE RECORD.**
9

10 Pursuant to NRS 34.470(1), if a petitioner can demonstrate the imprisonment is unlawful,
11 the petitioner is entitled to discharge. A petitioner is entitled to discharge "[w]here the court finds
12 there has been a specific denial of the petitioner's constitutional rights with respect to the
13 petitioner's conviction or sentence in a criminal case." NRS 34.500(9). The statute governing
14 judicial determination of the need for an evidentiary hearing or dismissal of petition or granting of
15 writ states that, "[t]he judge or justice, upon review of the return, answer and all supporting
16 documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner
17 must not be discharged or committed to the custody of a person other than the respondent unless
18 an evidentiary hearing is held." NRS 34.770(1). Subsection (3) states that, "[i]f the judge or justice
19 determines that an evidentiary hearing is required, the judge or justice shall grant the writ and shall
20 set a date for the hearing."

21 In the instant matter, this Court heard argument regarding the Defendant's post-conviction
22 petition. Senior Judge Charles Thompson denied the Petition indicating it was time-barred.
23 However, Counsel believes that reconsideration is warranted in this matter. On May 13, 2015, the
24 court granted the Defendant's motion to appoint counsel for the limited issue of determining if his
25 post-conviction petition can "get around the time bar." *See* Court Minutes, 05/13/15. On May 20,
26 2015, the court appointed counsel to determine if there is sufficient basis for Deft. to get around

1 the time bar. The court minutes also reflect that the court noted that "there may be a need for
2 evidentiary hearing." *See* Court Minutes, 05/20/15.

3 In his Supplemental Petition and Reply, the Defendant raised the issue of trial counsel's
4 mishandling of the Defendant's post-conviction matter. Specifically, the Defendant noted that he
5 requested that his attorney file a post-conviction writ of habeas corpus. Trial counsel informed the
6 Defendant that she did; however, she filed the post-conviction petition in the wrong court. The
7 Defendant raised the issue of communication between himself and his trial attorney. Additionally,
8 the Defendant noted that he received confirmation that trial counsel remedied the misfiling of his
9 post-conviction petition.

10 In his Reply, the Defendant noted that his attorney's mistake amounted to "an
11 impediment external to the defense prevented him ... from complying with the state
12 procedural default rules". *See* Reply, p. 6, lines 1-1. Defendant further argued that this
13 external impediment is sufficient to meet the "good cause" standard required to afford a
14 legal excuse. *See* Reply, p. 6, lines 4-5. As argued in Defendant's Reply, Harris did not
15 comply with the proper filing because his counsel told him she had done so already, and he
16 has provided the copy of the signed petition which she allegedly re-filed and mailed to him.
17 There was nothing to indicate to Harris that the re-filing had not gone as he was informed it
18 had. Harris faults his post-conviction counsel for never filing the petition at all—although
19 she prepared it, filed it with the wrong court, told Harris she was filing it in the correct one
20 before the deadline, and failed to ever do so. This information is not belied by the record, yet
21 remains outside the record. As such, an evidentiary hearing is necessary to supplement the record
22 prior to a decision by this court. *See Mann v. State*, 118 Nev. 351, 46 P.3d 1228 (2002) (holding that

1 it is improper for the district court to resolve a factual dispute created by affidavits without
2 conducting an evidentiary hearing).

3 IV.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, the Defendant prays that this Court reconsider his Petition for Writ of
6 Habeas Corpus and grant an evidentiary hearing so that the record may be supplemented.

7 DATED this 21st day of September, 2015.

8 CARLING LAW OFFICE, PC
9

10 /s/ Matthew D. Carling
11

12 MATTHEW D. CARLING, ESQ.
13

14 *Court-Appointed Attorney for Defendant*
15

1 **CERTIFICATE OF SERVICE**

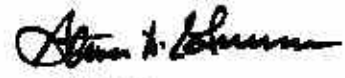
2
3 I hereby certify that, on this 21st day of August, 2015, I sent a true and correct copy of the
4 above **MOTION TO CONSOLIDATE CASES** to the following parties:

5 Steven B. Wolfson, Esq.
6 Clark County District Attorney
7 Post Conviction Unit
8 Jennifer.Garcia@clarkcountynvda.com
9

10 Lamar A. Harris (#71088)
11 SDCC
12 P.O. Box 208
13 Indian Springs, Nevada 89070-0208
14

15 CARLING LAW OFFICE, PC

16 /s/ Matthew D. Carling
17 MATTHEW D. CARLING, ESQ.
18 *Court-Appointed Attorney for Defendant*
19


CLERK OF THE COURT

1 RTRAN

2
3
4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
6

7 STATE OF NEVADA,

8 Plaintiff,

CASE NO. C274370-1

9 vs.

DEPT. V

10 LAMAR ANTWAN HARRIS,

TRANSCRIPT OF PROCEEDINGS

11 Defendant.
12

13 BEFORE THE HONORABLE, CHARLES THOMPSON, SENIOR DISTRICT COURT
14 JUDGE

15 WEDNESDAY, SEPTEMBER 16, 2015

16 **HEARING: TIME BAR ON WRIT**
17

18
19 APPEARANCES:

20 For the State:

21 TALEEN R. PANDUKHT, ESQ.
22 Chief Deputy District Attorney

23 For the Defendant:

24 MATTHEW D. CARLING, ESQ.

25 RECORDED BY: LARA CORCORAN, COURT RECORDER

1 LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 16, 2015, at 9:10 A.M.

2
3 THE COURT: State of Nevada versus Lamar Harris.

4 The record will reflect the presence -- or the absence of the Defendant
5 who's in custody in the Department of Corrections. I don't have anybody from the
6 State on this.

7 THE CLERK: Counsel, your name?

8 MR. CARLING: Matthew Carling for the Defendant who is not present, in
9 custody.

10 THE COURT: Mr. Carling.

11 MR. CARLING: Your Honor, I was appointed on a limited role to supplement
12 and brief this Court on --

13 THE COURT: I've read the supplemental and I've read the State's response.

14 MR. CARLING: Okay. I did file a reply on this. And I think the argument is
15 that counsel's behavior or performance was an impediment, and so there is good
16 cause for the Court to entertain his -- the merits of his petition even though it was
17 filed after the one year and that all is briefed in the reply, I'll submit.

18 MS. PANDUKHT: I'll submit it its time barred.

19 THE COURT: I agree with the State that the writ is time barred. The
20 Defendant has failed to establish an impediment external to the defense in addition
21 to which I looked at the petition. The petition itself was without merit. The basic
22 claim is that certain jurors should have been excused and there's just no merit for
23 that. So, I'm going to deny the writ and ask the State to prepare an appropriate
24 order.

25 MS. PANDUKHT: Yes, Your Honor.

1 THE COURT: With findings.

2 MS. PANDUKHT: Yes.

3 MR. CARLING: Thank you.

4 [Proceedings concluded at 9:12 a.m.]

5 * * * * *

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20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to the best of my ability.

23 Cynthia Georgilas
24 CYNTHIA GEORGILAS
25 Court Recorder/Transcriber
Eighth Judicial District Court Dept. XIII


CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

LAMAR ANTWAN HARRIS,
#1589576

Defendant.

CASE NO: C-11-274370-1

DEPT NO: V

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION OF
DENIAL OF HIS POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: OCTOBER 14, 2015
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District
Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's
Motion for Reconsideration of Denial of His Post-Conviction Petition for Writ of Habeas
Corpus.

This response is made and based upon all the papers and pleadings on file herein, the
attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On June 24, 2011, the State charged LAMAR ANTWAN HARRIS (hereinafter
4 "Defendant") by way of Information as follows: COUNT 1 – Attempt Murder With Use of a
5 Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165) and COUNT 2 – Battery
6 With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS
7 200.480.2e).

8 Defendant's jury trial commenced on August 30, 2011. On September 2, 2011, the jury
9 returned a verdict of guilty as to the charge of Battery with a Deadly Weapon Resulting in
10 Substantial Bodily Harm, and not guilty as to the charge of Attempt Murder with Use of a
11 Deadly Weapon. On November 21, 2011, Defendant was sentenced to a maximum of 175
12 months and a minimum of 70 months in the Nevada Department of Corrections (NDC), with
13 182 days credit for time served. The Judgment of Conviction was entered on December 2,
14 2011.

15 Defendant appealed his conviction on December 8, 2011. On December 13, 2013, the
16 Nevada Supreme Court affirmed the conviction, finding there was sufficient evidence to
17 support the jury's verdict. Remittitur issued on January 9, 2013.

18 On March 11, 2015, Defendant filed a Proper Person Post-Conviction Petition for Writ
19 of Habeas Corpus and Motion for Appointment of Counsel and Request for Evidentiary
20 Hearing. The State filed its Response on May 8, 2015, and on May 20, 2015, this Court
21 confirmed the appointment of post-conviction counsel for Defendant for the limited purpose
22 of addressing the procedural time bar issue. On July 27, 2015, Defendant, through his
23 appointed attorney, filed a Supplemental Petition for Writ of Habeas Corpus. On August 12,
24 2015, the State filed its Response to Defendant's Supplemental Petition, and on September 9,
25 2015, Defendant filed a Reply to the State's Response, reiterating the same claims raised in
26 his Supplemental Petition. On September 16, 2015, this Court denied Defendant's Petition for
27 Writ of Habeas Corpus, finding it to be procedurally barred. On September 19, 2015,
28

1 Defendant filed this instant Motion for Reconsideration of Denial of his Post-Conviction
2 Petition for Writ of Habeas Corpus. The State responds as follows:

3 **ARGUMENT**

4 **I. DEFENDANT'S MOTION SHOULD NOT BE GRANTED AS IT IS AN**
5 **ATTEMPT AT "JUDGE SHOPPING."**

6 District Court Rule 19 states: "[w]hen an application or petition for any writ or order
7 shall have been made to a district judge and is pending or has been denied by such judge, the
8 same application or motion shall not again be made to the same or another district judge, except
9 upon the consent in writing of the judge to whom the application or motion was first made."
10 See also Eighth Judicial District Court Rule 7.12 which states: "[w]hen an application or a
11 petition for any writ or order shall have been made to a judge and is pending or has been denied
12 by such judge, the same application, petition or motion may not again be made to the same or
13 another district judge, except in accordance with any applicable statute and upon the consent
14 in writing of the judge to whom the application, petition or motion was first made."

15 These rules prevent "judge shopping" and preclude litigants from attempting to have
16 an unfavorable determination by one judge overruled by another. Moore v. City of Las Vegas,
17 92 Nev. 402, 551 P.2d 244 (1976). In Moore, the Nevada Supreme Court held that if a second
18 motion for rehearing raises no new issues of law, and makes no reference to new or additional
19 facts, it should not be granted. In that case, under such circumstances the motion was
20 superfluous and, in the court's view, it was an abuse of discretion for the district court to
21 entertain it. Id. Only in very rare instances in which new issues of fact or law are raised
22 supporting a ruling contrary to the ruling already reached should a motion for rehearing be
23 granted. Id. at 405, 551 P.2d at 244.

24 Moreover, the Nevada Supreme Court has repeatedly noted that the law does not favor
25 multiple applications for the same relief. Whitehead v. Nevada Com'n. on Judicial Discipline,
26 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years
27 that a party will not be allowed to file successive petitions for rehearing ... The obvious reason
28 for this rule is that successive motions for rehearing tend to unduly prolong litigation");

1 Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute
2 as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many
3 years after conviction are an unreasonable burden on the criminal justice system. The
4 necessity for a workable system dictates that there must exist a time when a criminal conviction
5 is final."). The less than favorable view of successive applications for the same relief explains
6 why there is no right to appeal the denial of a motion for reconsideration. See, Phelps v. State,
7 111 Nev. 1021, 1022, 900 P.2d 344, 346 (1995). It also justifies why a motion for
8 reconsideration does not toll the time for filing a notice of appeal. See In re Duong, 118 Nev.
9 920, 923, 59 P.3d 1210, 1212 (2002).

10 Like in Moore, Defendant is attempting to "judge shop," as it was a Senior Judge who
11 denied his Petition. Defendant's motion was already denied, and his instant Motion for
12 Reconsideration raises no new references to additional facts that have not already been
13 addressed by this Court. This is another attempt by Defendant to raise yet another motion
14 arguing the same claims. Because Defendant fails to raise new facts, Defendant's Motion
15 should not be granted.

16 **II. DEFENDANT HAS NOT DEMONSTRATED THAT THE COURT**
17 **MISAPPREHENDED ANY ISSUE OF FACT OR LAW.**

18 To the extent that Defendant now alleges that this Court misapprehended an issue of
19 fact or law with respect to his Petition, this claim is without merit. Defendant has not alleged
20 any new grounds for reconsideration but has merely re-raised the same baseless arguments
21 that he presented to this Court in his Supplemental Petition and Reply. As Defendant has
22 failed to demonstrate how this Court misapprehended an issue of law or fact, there is no basis
23 for reconsideration of this Court's prior ruling, and Defendant's Motion must be denied.

24 In this Motion for Reconsideration, Defendant is reiterating prior arguments from his
25 Supplemental Petition and Reply. In those Petitions, he raised the issue of trial counsel's
26 alleged mishandling of his post-conviction petition. Supplemental Petition, p. 16-17; Reply,
27 p. 5-6. Defendant once again in this Motion claims that his post-conviction attorney's mistake
28 amounted to "an impediment external to the defense," which prevented him from complying

1 with procedural default rules. Motion for Reconsideration, 5. The State incorporates by
2 reference the arguments made in its Response to Defendant's Supplemental Petition for Writ
3 of Habeas Corpus, 4-6. Both in his Supplemental Petition, Reply, and in this instant Motion,
4 Defendant fails to show the good cause required to overcome the procedural time bar.

5 **III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING.**

6 To the extent Defendant requests an evidentiary hearing, the request should be denied.
7 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
8 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
9 by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge
10 or justice, upon review of the return, answer and all supporting documents which are filed,
11 shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a]
12 defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual
13 allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d
14 222, 225 (1984).

15 In the instant case, Defendant has not presented allegations which, if true, would entitle
16 him to relief. Defendant's Petition is plainly subject to the time bar imposed by NRS 34.726.
17 Further, Defendant has wholly failed to demonstrate good cause to overcome that time bar, as
18 his only grounds for good cause have repeatedly been found insufficient by the Nevada
19 Supreme Court. Moreover, Defendant's substantive claims fail, and Defendant has therefore
20 failed to demonstrate that he is entitled to relief. Accordingly, no evidentiary hearing is
21 necessary.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 **CONCLUSION**

2 Based on the aforementioned, the State respectfully requests that Defendant's Motion
3 for Reconsideration of Denial of His Post-Conviction Petition for Writ of Habeas Corpus be
4 DENIED.

5 DATED this 2nd day of October, 2015.

6 Respectfully submitted,

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

10 BY

11 JONATHAN E. VANBOSKERCK
12 Chief Deputy District Attorney
13 Nevada Bar #006528

14 **CERTIFICATE OF SERVICE**

15 I certify that on the 2nd day of October, 2015, I e-mailed a copy of the foregoing State's
16 Response to Defendant's Motion for Reconsideration of Denial of His Post-Conviction
17 Petition for Writ of Habeas Corpus, to:

18 MATTHEW D. CARLING, Esq.
19 cedarlegal@gmail.com

20 BY

21 R. JOHNSON
22 Secretary for the District Attorney's Office
23
24
25
26
27

28 KE/JEV/tj/GANG

1 CONCLUSION

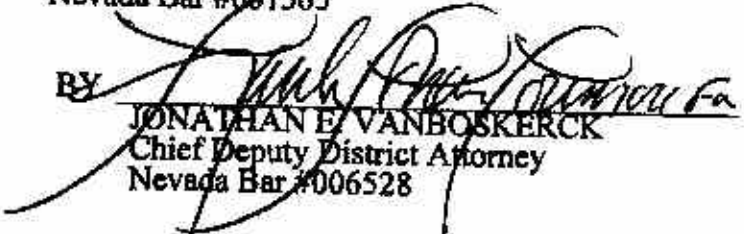
2 Based on the aforementioned, the State respectfully requests that Defendant's Motion
3 for Reconsideration of Denial of His Post-Conviction Petition for Writ of Habeas Corpus be
4 DENIED.

5 DATED this 2nd day of October, 2015.

6 Respectfully submitted,

7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #001365

10 BY

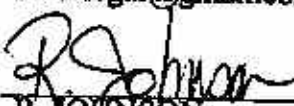

11 JONATHAN E. VANBOSKERCK
12 Chief Deputy District Attorney
13 Nevada Bar #006528

14 CERTIFICATE OF SERVICE

15 I certify that on the 2nd day of October, 2015, I e-mailed a copy of the foregoing State's
16 Response to Defendant's Motion for Reconsideration of Denial of His Post-Conviction
17 Petition for Writ of Habeas Corpus, to:

18 MATTHEW D. CARLING, Esq.
19 cedarlegal@gmail.com

20 BY


21 R. JOHNSON
22 Secretary for the District Attorney's Office
23
24
25
26
27

28 KE/JEV/rj/GANG


CLERK OF THE COURT

1 **RPLY**

2 MATTHEW D. CARLING, ESQ.

3 Nevada Bar No.: 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 (702) 419-7330 (Office)

7 (702) 446-8065 (Fax)

8 CedarLegal@gmail.com

9 *Court-Appointed Attorney for Defendant,*

10 Lamar A. Harris

11
12
13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**
15
16

STATE OF NEVADA,

Plaintiff,

vs.

LAMAR A. HARRIS,

Defendant.

Case No.: C-11-274370-1

Dept. No.: V

EVIDENTIARY HEARING REQUESTED

17
18
19 **REPLY TO STATE'S RESPONSE TO MOTION FOR RECONSIDERATION OF**
20 **DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**
21

22 DATE OF HEARING: October 14, 2015

23 TIME OF HEARING: 9:00 AM

24
25 COMES NOW, the Defendant, LAMAR A. HARRIS, by and through his attorney of
26 record, MATTHEW D. CARLING, ESQ., of the Carling Law Office, PC, and submits his Reply to
27 the State's Response to the Defendant's Motion for Reconsideration of Denial of his Petition for
28 Writ of Habeas Corpus (Post-Conviction).

29 ///

30 ///

31 ///

1 This Reply is made and based on the pleadings and papers on file herein, the attached
2 Affidavit of Matthew D. Carling, Esq., in support thereof, and any oral arguments as may be
3 presented at the hearing in this matter.

4 DATED this 12th day of October, 2015.

5 CARLING LAW OFFICE, PC
6

7 /s/ Matthew D. Carling

8 MATTHEW D. CARLING, ESQ.

9 Court-Appointed Attorney for Defendant
10

11 **MEMORANDUM OF POINTS AND AUTHORITIES**
12

13 **I.**
14

15 **ARGUMENT**

16 **A. THE DEFENDANT IS NOT "JUDGE SHOPPING."**
17

18 The Defendant takes issue with the State's allegation of "judge shopping." To the contrary,
19 the Defendant did nothing of the sort and merely showed up to Court on the prescribed day to find
20 that a Senior Judge was sitting in for the regular judge. It was apparent to counsel from the lack of
21 discussion by the visiting judge that he perhaps didn't even read the Defendant's Reply to the State's
22 Response to his Petition for Writ of Habeas Corpus. The visiting judge failed to even articulate any
23 reasoning pertaining to the Defendant's argument that "an impediment external to the defense
24 prevented him ... from complying with the state procedural default rules". See Reply, p. 6,
25 lines 1-1. The visiting judge's comments focused solely on the time issue.

26 The State cites District Court Rule 19 and EJD CR 7.12 in support of its argument of
27 "judge shopping." However, it appears that the Petition for Writ of Habeas Corpus was
28 initially made to the Honorable Carolyn Ellsworth, not Senior Judge Charles Thompson.
29 This Court does not need written permission from a visiting judge to hear argument for a

1 Petition that was original before the very same Department. Here, the Defendant is
2 rearticulating a very important issue regarding factual disputes that was not addressed that
3 should be addressed on the record before a decision is made.

4 **B. THE COURT SHOULD HAVE CONDUCTED AN**
5 **EVIDENTIARY HEARING.**
6

7 The Petition and Reply introduced issues that were not belied by the record, yet remained
8 outside the record. In *Mann v. State*, 118 Nev. 351, 46 P.3d 1228 (2002), the Nevada Supreme
9 Court held that factual disputes such as those presented here should be addressed in an evidentiary
10 hearing before the District Court can make a determination. As presented in the Reply and the
11 instant Motion for Reconsideration, there are many significant factual issues that should have been
12 addressed in an evidentiary hearing prior to this Court's decision. Again, this Court even
13 acknowledged that an evidentiary hearing may be warranted to investigate the factual disputes
14 articulated in the Defendant's Petition for Writ of Habeas Corpus. The visiting judge
15 misapprehended the factual disputes presented that went to the heart of the timeliness argument.
16 As such, this Court should reconsider the quick denial of the Defendant's Petition and schedule
17 this matter for an evidentiary hearing.

18 **IV.**

19 **PRAYER FOR RELIEF**

20 WHEREFORE, the Defendant prays that this Court reconsider his Petition for Writ of
21 Habeas Corpus and grant an evidentiary hearing so that the record may be supplemented.

22 DATED this 12th day of October, 2015.

23 CARLING LAW OFFICE, PC
24

25 /s/ Matthew D. Carling
26

27 MATTHEW D. CARLING, FSQ.
28

Court-Appointed Attorney for Defendant

1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that, on this 12th day of October, 2015, I sent a true and correct copy of the
4 above **REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION FOR**
5 **RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS**
6 **(POST-CONVICTION)** to the following parties:

7 Steven B. Wolfson, Esq.
8 Clark County District Attorney
9 Post Conviction Unit
10 Jennifer.Garcia@clarkcountynvda.com

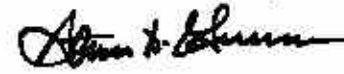
11
12 Lamar A. Harris (#71088)
13 SDCC
14 P.O. Box 208
15 Indian Springs, Nevada 89070-0208

16
17 CARLING LAW OFFICE, PC

18
19 /s/ Matthew D. Carling
20 MATTHEW D. CARLING, ESQ.
21 *Court-Appointed Attorney for Defendant*

1 OPI
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 DANIELLE PIEPER
6 Chief Deputy District Attorney
7 Nevada Bar #008610
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

Electronically Filed
11/05/2015 07:30:45 AM


CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAMAR ANTWAN HARRIS,
#1589575

Defendant.

CASE NO: C-11-274370-1

DEPT NO: V

ORDER FOR PRODUCTION OF INMATE
LAMAR ANTWAN HARRIS, BAC #71088

DATE OF HEARING: DECEMBER 8, 2015
TIME OF HEARING: 8:30 A.M.

TO: BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center;

TO: JOE LOMBARDO, Sheriff of Clark County, Nevada


Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through DANIELLE PIEPER, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce LAMAR ANTWAN HARRIS, in Case Number C-11-274370-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said LAMAR ANTWAN HARRIS is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing on DECEMBER 8, 2015, at the hour of 8:30

1 o'clock A.M. and continuing until completion of ^{the matter concerning} ~~the prosecution's case against~~ ^E the said
2 Defendant.

3 IT IS FURTHER ORDERED that JOE LOMBARDO, Sheriff of Clark County,
4 Nevada, shall accept and retain custody of the said LAMAR ANTWAN HARRIS in the Clark
5 County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark
6 County, or until the further Order of this Court; or in the alternative shall make all
7 arrangements for the transportation of the said LAMAR ANTWAN HARRIS to and from the
8 Nevada State Prison facility which are necessary to insure the LAMAR ANTWAN HARRIS's
9 appearance in Clark County pending completion of said matter, or until further Order of this
10 Court.

11 DATED this 2nd day of ^{Nov} ~~October~~, 2015.

12
13 
14 DISTRICT JUDGE
(SC)

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

17
18 BY  for

19 DANIELLE PIEPER
20 Chief Deputy District Attorney
Nevada Bar #008610

21
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27
28 rj/M-1

1 **The writ is properly used here.**

2 The writ is properly used in this case to challenge a conviction on constitutional
3 grounds. The extraordinary remedy of habeas corpus is appropriate to test the legality of
4 a conviction which is challenged on constitutional grounds. *Shum v. Fogliani*, 82 Nev.
5 156, 413 P.2d 495 (1966), overruled on other grounds *Rahn v. warden, nev. State prison*,
6 88 Nev. 429, 498 P.2d 1344 (1972).

7
8 Defendant Lamar Harris' Appeal was a proper challenge of the validity of his
9 conviction before the District Court, therefore, the instant writ is appropriate and
10 necessary. Even if that were not the case, the writ can and should be heard before the
11 Nevada Supreme Court. *Lyons v. State*, 105 Nev. 317, 775 P.2d 219 (1989) (despite
12 defendant's failure to challenge the validity of his guilty plea before the district court, he
13 was permitted to appeal from his judgement of conviction because the court was no less
14 able to consider the validity of the underpinnings of the plea that the district court and
15 because no basis for further prosecution under the original charges existed).

16
17
18 **Defendant Harris had a right to effective assistance of trial counsel**

19 A defendant has a right to effective assistance of trial counsel under *Strickland v.*
20 *Washington*, 466 U.S. 668, 686-87, 80 L. Ed. 674, 104 S. Ct. 2052 (1984); see also *Kirksey v.*
21 *State*, 112 Nev. 980, 987, 923 P. 2d 1102, 1107 (1996).

22 A claim the that counsel provided constitutionally inadequate representation is subject to
23 the two-part test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668,
24 104 S. Ct. 2052, 80 L Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of trial
25 or appellate counsel, a defendant must demonstrate (1) that counsel's performance was deficient
26 and (2) that counsel's deficient performance prejudiced the defense. *Id.* At 687.
27
28

000800

1 Habeas corpus petitioner must prove the disputed factual allegations underlying an
2 ineffective-assistance claim by a preponderance of the evidence; to the extent that this conflicts
3 with the "strong and convincing" language of *Davis v. State*, 107 Nev. 600, 817 P. 2d 1169
4 (1991) and its predecessors, they are expressly overruled. *Means v. State*, 120 Nev. 1001, 103
5 P.3d 25 (2004).

6
7 To establish prejudice resulting from trial counsel's inaction or omission "The defendant
8 carries the affirmative burden of establishing prejudice." *Riley v. State*, 110 Nev. 638, 646, 878
9 P.2d 272, 278 (1994).

10
11 **A. Trial counsel erred when he did not move to excuse the juror who had known a**
12 **witness**

13 The standard of review when choosing a jury is that it is a fair and impartial jury.
14 *United States Constitution, Sixth amendment section 2.3.* It was made clear that juror
15 602, Clint Small, knew witness for the State, Stacey Monroe. The juror had went to
16 high school with the witness and spoke of him with adoration. "He was a year ahead
17 of me." "He was a pretty prominent football star at Western High School" (T 7, 19-
18 21) Defense counsel failed to even question the juror on the subject, nor did defense
19 counsel move to excuse the juror for cause. Juror 602 clearly saw this witness as a
20 credible person based on prior dealings with the witness, not based on his testimony.
21 The juror indicated his positive attitude toward this witness prior to any testimony
22 given by witness Stacey Monroe.
23
24

25 This was a direct violation of Lamar Harris' Sixth Amendment right to have a fair
26 and impartial jury. Prior counsel was ineffective for not moving to excuse for cause.
27
28

000801

1 WHEREFORE, The petitioner prays that the Court grant relief to which he may be
2 entitled in this proceeding including but not limited to the following:

- 3 (1) Issue a writ of habeas corpus to have him brought before it, to the end that he may be
4 discharged from unconstitutional restraint;
- 5 (2) Grant him an evidentiary hearing at which he may present evidence in support of
6 these claims, and allow him a reasonable period of time subsequent to any hearing
7 this Court determines to conduct, in which to brief the issues of fact and law raised by
8 this petition or such hearing.
- 9 (3) Grant such other relief as law and justice require.

10 EXECUTED at El Centro, California on the 6 day of the month of June of the year 2013

11 Attorney for Petitioner: [Signature]

12 LESLIE A. PARK
13 Nevada Bar No. 8870
14 630 South Seventh Street
15 Las Vegas, Nevada 89101
16 Phone: (702)382-3847
17 Fax: (702)382-2828
18 Attorney for Petitioner
19 Lamar Harris
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III.

CONCLUSION

The foregoing shows that trial counsel provided constitutionally inadequate representation in the instant case.

Therefore, Defendant LAMAR HARRIS respectfully asks this Court for relief.

DATED this 6th day of June, 2013.


LESLIE PARK, ESQ.
Nevada Bar No. 8870
630 South Seventh Street
Las Vegas, Nevada 89101
Phone: (702) 382-3847
Fax: (702) 382-2828
Les law60@hotmail.com
Attorney for Defendant-Petitioner
LAMAR HARRIS

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CERTIFICATE OF MAILING

I, the undersigned, an employee of LESLIE PARK, ESQ. and not a party to the above
entitled action, certify that on June 6, 2013, I have mailed the foregoing POST-

CONVICTION PETITION FOR WRIT OF HABEAS CORPUS, by placing fully prepaid first
class postage and depositing said document with the U.S. Post Office, to DEFENDANT

LAMAR HARRIS and:

CLERK OF THE NEVADA SUPREME COURT
201 S. Carson # 300
Carson City, Nevada 89710

STEVE WOLFSON
DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas, Nevada 89155

ATTORNEY GENERAL OF NEVADA
Capital Complex
Carson City, Nevada 89710

000804

C

Exhibit

C

C

000825

DEPARTMENT 5
CASE SUMMARY
CASE NO. C-11-274370-1

State of Nevada
 vs
 Lamar Harris

§ Location: Department 5
 § Judicial Officer: Ellsworth, Carolyn
 § Filed on: 06/24/2011
 § Case Number History:
 § Cross-Reference Case Number: C274370
 § Defendant's Scope ID #: 1589576
 § 0844955
 § 1181875
 § Lower Court Case Number: 11F07785
 § Supreme Court No.: 59817

CASE INFORMATION

Offense	Deg	Date	Case Type:	Felony/Gross Misdemeanor
1. ATT. MURDER WITH A DEADLY WEAPON	F	04/25/2011	Case Flags:	Custody Status - Nevada Department of Corrections
2. BATTERY WDW W/SUBSTANTIAL BODILY HARM	F	04/25/2011		

Statistical Closures
 07/05/2012 Jury Trial - Conviction - Criminal

Warrants
 Material Witness Warrant - Kasper, Tamara (Judicial Officer: Glass, Jackie)
 08/31/2011 4:44 PM Returned - Served
 08/31/2011 11:31 AM Active
 Fine: \$0 Bond: \$0

Arrest Warrant - Thomas, Michael (Judicial Officer: Glass, Jackie)
 08/29/2011 4:46 PM Returned - Served
 08/26/2011 8:15 AM Active
 Fine: \$0 Bond: \$0

DATE	CASE ASSIGNMENT
------	-----------------

Current Case Assignment	
Case Number	C-11-274370-1
Court	Department 5
Date Assigned	10/15/2011
Judicial Officer	Ellsworth, Carolyn

PARTY INFORMATION

Defendant	Harris, Lamar Antwan	Lead Attorneys
		Park, Leslie A. Retained 702-382-3847(W)
Plaintiff	State of Nevada	Wolfson, Steven B 702-671-2700(W)


DATE	EVENTS & ORDERS OF THE COURT	INDEX
------	------------------------------	-------

06/23/2011	Bail Set \$90,000.	
------------	-----------------------	--


06/24/2011	<input type="checkbox"/> Information Information	
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0008^6


DEPARTMENT 5
CASE SUMMARY
CASE NO. C-11-274370-1


06/24/2011  Criminal Bindover


06/24/2011 Case Reassigned to Department 5
Case reassigned from Judge Kenneth Cory

06/30/2011  Initial Arraignment (9:00 AM) (Judicial Officer: De La Garza, Melisa)

07/11/2011  Notice of Witnesses and/or Expert Witnesses
Notice of Witnesses and/or Expert Witnesses


07/14/2011  Order to Release Medical Records
Filed By: Plaintiff State of Nevada
Order Releasing Medical Records


07/14/2011  Ex Parte Motion
Filed By: Plaintiff State of Nevada
Ex Parte Motion for Release of Medical Records


07/18/2011  Request (9:00 AM) (Judicial Officer: Bonaventura, Joseph T.)
DA Setting Slip - Status Check Trial Setting


07/20/2011 **CANCELED** Calendar Call (9:00 AM) (Judicial Officer: Glass, Jackie)
*Vacated - per Judge
Reset*


07/25/2011 **CANCELED** Jury Trial (1:30 PM) (Judicial Officer: Glass, Jackie)
*Vacated
Reset*


07/27/2011  Reporters Transcript
Filed By: Plaintiff State of Nevada
Transcript of Preliminary Hearing Taken on Wednesday June 22, 2011


08/15/2011  Notice of Witnesses and/or Expert Witnesses
Supplemental Notice of Expert Witnesses [NRS 174.234]


08/15/2011  Notice of Expert Witnesses
Filed By: Defendant Harris, Lamar Antwan
Notice Of Expert Witnesses

08/19/2011  Motion
Notice of Motion and Motion to Admit Prior Testimony

08/22/2011  Notice of Witnesses and/or Expert Witnesses
Notice of Witnesses and/or Notice of Rebuttal Expert Witness

08/22/2011  Notice of Witnesses
Party: Defendant Harris, Lamar Antwan

08/24/2011  Calendar Call (9:00 AM) (Judicial Officer: Gates, Lee A.)
Calendar Call - Set By Court - Must Go To Trial By 8/29/11 - Overflow Eligible

08/25/2011  Opposition to Motion

000807

DEPARTMENT 5
CASE SUMMARY
CASE NO. C-11-274370-1

Filed By: Defendant Harris, Lamar Amwen
Defendant's Opposition to State's Motion to Admit Prior Testimony

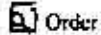
08/26/2011



Ex Parte

Filed By: Plaintiff State of Nevada
Ex Parte Application For Order Requiring Material Witness to Post Bail

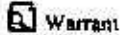
08/26/2011



Order

Filed By: Plaintiff State of Nevada
Order Requiring material Witness To Post Bail Or Be Committed To Custody

08/26/2011



Warrant

Filed by: Plaintiff State of Nevada
Warrant Of Arrest

08/29/2011



Motion (9:00 AM) (Judicial Officer: Bonaventure, Joseph)

08/29/2011-08/30/2011

Notice of Motion and Motion to Admit Prior Testimony

08/29/2011



Bench Warrant Return

08/29/2011



Warrant

Warrant of Arrest

08/29/2011



Ex Parte

Ex Parte Application for Order Requiring Material Witness to Post Bail

08/29/2011



Order

Order Requiring Material Witness to Post Bail or be Committed to Custody

08/30/2011



Jury Trial (1:00 PM) (Judicial Officer: Brennan, James)

08/30/2011-09/02/2011

08/30/2011



Bench Warrant Return

08/30/2011



Jury List

08/31/2011



Hearing (9:00 AM) (Judicial Officer: Bonaventure, Joseph)

Hearing at the State's Request: Michael Thomas - material witness bench warrant return.

09/01/2011

CANCELED Jury Trial (9:15 AM) (Judicial Officer: Glass, Jackie)

Vacated - On In Error

09/01/2011



Instructions to the Jury

Instructions to the Jury (Instruction No. 1) Members of the Jury

09/01/2011



Proposed Jury Instructions Not Used At Trial

09/02/2011

CANCELED Jury Trial (8:15 AM) (Judicial Officer: Glass, Jackie)

Vacated - On In Error

09/02/2011



Amended Jury List

000808

DEPARTMENT 5
CASE SUMMARY
CASE NO. C-11-274370-1

09/02/2011	<input checked="" type="checkbox"/> Verdict														
09/02/2011	Plea (Judicial Officer: Ellsworth, Carolyn) 1. ATT. MURDER WITH A DEADLY WEAPON Not Guilty 2. BATTERY WDW W/SUBSTANTIAL BODILY HARM Not Guilty														
09/07/2011	Bench Warrant Return (9:00 AM) (Judicial Officer: Bonaventure, Joseph T.) Events: 08/29/2011 Bench Warrant Return														
11/07/2011	<input checked="" type="checkbox"/> Sentencing (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) 11/07/2011, 11/21/2011														
11/21/2011	Disposition (Judicial Officer: Ellsworth, Carolyn) 1. ATT. MURDER WITH A DEADLY WEAPON Not Guilty 2. BATTERY WDW W/SUBSTANTIAL BODILY HARM Guilty														
11/21/2011	Sentence (Judicial Officer: Ellsworth, Carolyn) 2. BATTERY WDW W/SUBSTANTIAL BODILY HARM Adult Adjudication Sentenced to Nevada Dept. of Corrections Term: Minimum: 70 Months, Maximum: 175 Months Credit for Time Served: 182 Days Fee Totals: <table border="0" style="margin-left: 40px;"> <tr> <td>Administrative</td> <td></td> </tr> <tr> <td>Assessment Fee ---</td> <td style="text-align: right;">25.00</td> </tr> <tr> <td>Crim fee sch</td> <td></td> </tr> <tr> <td>DNA Analysis Fee</td> <td></td> </tr> <tr> <td>--- Crim fee sch -</td> <td style="text-align: right;">150.00</td> </tr> <tr> <td>\$150</td> <td></td> </tr> <tr> <td>Fee Totals \$</td> <td style="text-align: right;">175.00</td> </tr> </table>	Administrative		Assessment Fee ---	25.00	Crim fee sch		DNA Analysis Fee		--- Crim fee sch -	150.00	\$150		Fee Totals \$	175.00
Administrative															
Assessment Fee ---	25.00														
Crim fee sch															
DNA Analysis Fee															
--- Crim fee sch -	150.00														
\$150															
Fee Totals \$	175.00														
12/02/2011	<input checked="" type="checkbox"/> Judgment of Conviction														
12/08/2011	<input checked="" type="checkbox"/> Notice of Appeal (criminal) Party: Defendant Harris, Lamar Antwan														
12/08/2011	<input checked="" type="checkbox"/> Substitution of Attorney Filed by: Defendant Harris, Lamar Antwan														
12/28/2011	<input checked="" type="checkbox"/> Affidavit Affidavit Of Financial Condition														
12/28/2011	<input checked="" type="checkbox"/> Ex Parte Motion Filed By: Defendant Harris, Lamar Antwan Ex Parte Motion for Authorization of Payment of Fees for Trial Transcript														
01/19/2012	<input checked="" type="checkbox"/> Request Filed by: Defendant Harris, Lamar Antwan Request for Rough Draft Transcript														
03/20/2012	<input checked="" type="checkbox"/> Ex Parte Order Ex Parte Order Granting Payment of Fees for Trial Transcript														

000809

DEPARTMENT 5
CASE SUMMARY
CASE NO. C-11-274370-1

04/16/2012	<input checked="" type="checkbox"/> Transcript of Proceedings Party: Plaintiff State of Nevada <i>Transcript of Proceedings Trial - Day 1 - August 30, 2011</i>
04/16/2012	<input checked="" type="checkbox"/> Transcript of Proceedings Party: Plaintiff State of Nevada <i>Transcript of Proceedings Jury Trial - Day 2 - August 31, 2011</i>
04/16/2012	<input checked="" type="checkbox"/> Transcript of Proceedings Party: Plaintiff State of Nevada <i>Transcript of Proceedings Jury Trial - Day 3 - September 1, 2011</i>
04/16/2012	<input checked="" type="checkbox"/> Transcript of Proceedings Party: Plaintiff State of Nevada <i>Transcript of Proceedings Jury Trial - Day 4 - September 2, 2011</i>
07/05/2012	<input checked="" type="checkbox"/> Criminal Order to Statistically Close Case Filed By: Plaintiff State of Nevada
01/15/2013	<input checked="" type="checkbox"/> NV Supreme Court Clerks Certificate/Judgment - Affirmed <i>Nevada Supreme Court Clerk's Certificate Judgment - Affirmed</i>

DATE

FINANCIAL INFORMATION

Defendant Harris, Lamar Antwan
Total Charges
Total Payments and Credits
Balance Due as of 1/6/2015

185.00
185.00
0.00

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Exhibit

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Nevada Supreme Court Docket Sheet

Docket: 59817 HARRIS (LAMAR) VS. STATE

Page 1

LAMAR ANTWAN HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 59817

Consolidated with:

Counsel

Leslie A. Park, Las Vegas, NV, as counsel for Appellant, Lamar Antwan Harris

Attorney General/Carson City, Carson City, NV \ Catherine Cortez Masio, as counsel for Respondent, The State of Nevada

Clark County District Attorney, Las Vegas, NV \ Steven S. Owens, as counsel for Respondent, The State of Nevada

Case Information

Panel: NNP12

Panel Members: Saitta/Pickering/Hardesty

Disqualifications:

Case Status: Remittitur Issued/Case Closed

Category: Criminal Appeal

Type: Fast Track

Subtype: Direct

Submitted:

Date Submitted:

Oral Argument:

Sett. Notice Issued:

Sett. Judge:

Sett. Status:

Related Supreme Court Cases:

District Court Case Information

Case Number: C274370

Case Title: STATE VS. LAMAR ANTWAN HARRIS

Judicial District: Eighth

Division:

County: Clark Co.

Sitting Judge: Carolyn Ellsworth

Replaced By:

Notice of Appeal Filed: 12/08/11 Appeal

Judgment Appealed From Filed: 12/02/11

Docket Entries

Date	Docket Entries	
12/13/11	Appeal Filing fee waived. Criminal.	
12/13/11	Filed Notice of Appeal/Fast Track. Filed certified copy of notice of appeal. (Fast Track Notice issued to counsel for appellant.)	11-38112
12/13/11	Issued Notice to Request Rough Draft Transcripts. Due date: 10 days.	11-38114
12/29/11	Filed Substitution of Attorneys (Leslie Park substituted as attorney of record for appellant Lamar Harris in the place and stead of Bret Whipple).	11-40077
12/29/11	Filed Motion to Extend Time for Filing Request for Transcripts; Fast Track and Appendix.	11-40078
01/09/12	Filed Order Granting Motion in Part. Appellant; Request for Rough Draft Transcript due: 10 days, Fast Track Statement and Appendix due: 50 days.	12-00699

Wednesday, December 31, 2014 11:26 AM

000812
D

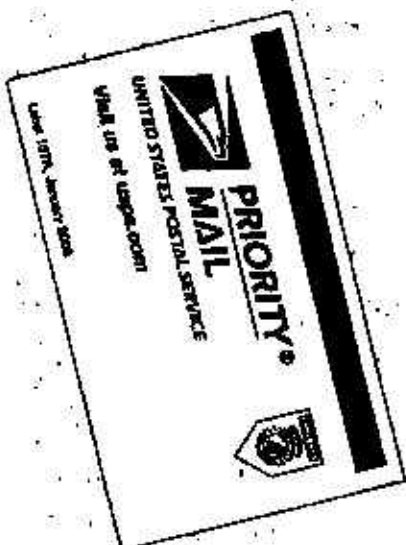
Nevada Supreme Court Docket Sheet

Docket: 59817 HARRIS (LAMAR) VS. STATE

Page 2

01/24/12	Filed Request for Rough Draft Transcript(s). Transcripts requested: 9/01/11 and 9/02/11. Court Reporter: Lara Corcoran. Filed in district court on: 1/19/12.	12-02422
03/07/12	Filed Order. Appellant: Fast Track Statement and Appendix due: 10 days.	12-07433
03/13/12	Filed Motion to Extend Time for Filing Fast Track and Appendix.	12-08076
03/19/12	Filed Order Granting Motion In Part. Appellant: Fast Track Statement and Appendix due: 30 days.	12-08554
03/19/12	Filed Order Re: Transcripts. Court Recorder Lara Corcoran: Certificate of Delivery due: 14 days. Fn1[A copy of the transcript request form is attached.]	12-08557
03/28/12	Filed Affidavit & Motion for Extension (Court Reporter Lara Corcoran).	12-09871
03/29/12	Filed Order Granting Motion. Ms. Corcoran: 20 days to file the requested transcripts in the district court, deliver the transcripts to counsel, and file a certificate acknowledging the date of delivery. Fast track statement and appendix due: 40 days.	12-10006
04/20/12	Filed Notice from Court Reporter, Lara Corcoran stating that the requested transcripts were delivered. Dates of transcripts: August 30, 2011 thru September 2, 2011.	12-12782
05/16/12	Filed Order. Fast track statement and appendix due: 10 days.	12-15637
06/19/12	Filed Order. Appellant: Fast Track Statement and Appendix due: 10 days.	12-19182
07/03/12	Filed Appendix to Fast Track Statement Vols. 1 thru 3 - CD-ROM included.	12-20854
07/03/12	Issued Notice of Deficient Brief - Margins need to be 1" on all four sides. Corrected brief due: 10 days	12-20857
07/03/12	Issued Notice of Deficient Certificate of Compliance. Due date: 5 days.	12-20859
07/18/12	Filed Fast Track Statement.	12-22746
07/18/12	Issued Second Notice of Deficient Certificate of Compliance. Due date: 5 days.	12-22748
07/25/12	Filed Amended Certificate of Compliance for Fast Track Statement.	12-23513
08/07/12	Filed Motion to Extend Time to File Fast Track Response - First Request.	12-24821
08/10/12	Filed Order Granting Motion. Appellant shall have 10 days from the date of this order to serve respondent with a copy of the appendix. Respondent: Fast Track Response due: 30 days.	12-25207
09/10/12	Filed Fast Track Response.	12-28474
09/10/12	Filed Respondent's Appendix.	12-28475
10/01/12	Fast Track Briefing Completed. No Reply Brief Filed.	
12/13/12	Filed Order of Affirmance. "ORDER the judgment of conviction AFFIRMED." NNP12-NS/KP/JH	12-39391
01/09/13	Issued Remittitur.	13-00868
01/09/13	Remittitur Issued/Case Closed.	
01/22/13	Filed Remittitur. Received by District Court Clerk on January 15, 2013.	13-00868

Lamar Harris #710888
S.D.C.
P.O. Box 208
Indian Springs, Nv.
89070



"LEGAL MAIL"
CONFIDENTIAL

Regional Justice Center
Clerk of The Court
200 Lewis Avenue
Las Vegas, Nv. 89155



1 PPOW

FILED

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA 2015 MAR 19 P 3:05

5 Lamar Harris,
6 Petitioner,

7 vs.

8 STATE OF NEVADA,
9 Respondent,

[Signature]
CLERK OF THE COURT

Case No: C-11-274370-1
Dept No: 5

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

11 Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on
12 March 11, 2015. The Court has reviewed the petition and has determined that a response would assist
13 the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and
14 good cause appearing therefore,

15 IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order,
16 answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS
17 34.360 to 34.830, inclusive.


18 IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

19
20 Calendar on the 13TH day of May, 20 15, at the hour of

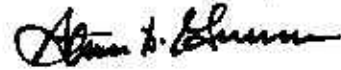
21
22 9 o'clock for further proceedings.

23
24
25 *[Signature]*
26 District Court Judge

27 RECEIVED
28 MAR 19 2015
CLERK OF THE COURT

C-11-274370-1
DPWH
Order for Petition for Writ of Habeas Corpus
4442008


DISTRICT COURT
CLARK COUNTY, NEVADA



CLERK OF THE COURT

STATE OF NEVADA

VS

LAMAR HARRIS

CASE NO.: C-11-274370-1

DEPARTMENT 5

NOTICE OF HEARING

Please be advised that the above-entitled matter has been scheduled for Motion Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing, to be heard by the Honorable Carolyn Ellsworth, at the Regional Justice Center, 200 Lewis Ave, Las Vegas, Nevada 89101, on the 13th day of May, 2015, at the hour of 9:00 AM, in Department 5.

YOUR PRESENCE IS NECESSARY.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Diana Matson
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this: 19th day of March, 2015

☒ I mailed, via first-class, postage fully prepaid, the foregoing Clerk of the Court, Notice of Hearing to:

Lamar Harris #71088
P O Box 208 SDCC
Indian Springs, NV 89070

☒ I placed a copy of the foregoing Notice of Hearing in the appropriate attorney folder located in the Clerk of the Court's Office:

Steven B Wolfson
Leslie A Park

/s/ Diana Matson
Diana Matson, Deputy Clerk of the Court



CLERK OF THE COURT

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #006163
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 LAMAR ANTWAN HARRIS,
14 #1589576

15 Defendant.

CASE NO: C-11-274370-1

DEPT NO: V

16 ORDER GRANTING DEFENDANT'S PRO PER MOTION
17 TO WITHDRAW COUNSEL

18 ORDER DENYING DEFENDANT'S PRO PER MOTION
19 TO PRODUCE FILE

20 DATE OF HEARING: FEBRUARY 23, 2015
21 TIME OF HEARING: 9:00 A.M.

22 THIS MATTER having come on for hearing before the above entitled Court on the
23 23rd day of February, 2015, the Defendant not being present, IN PROPER PERSON, the
24 Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through PAMELA
25 WECKERLY, Chief Deputy District Attorney, without argument, based on the pleadings and
26 good cause appearing therefor,

27 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Withdraw Counsel,
28 shall be, and it is GRANTED.

//

1 As to Defendant's Pro Per Motion To Produce File, Court FINDS no showing
2 Defendant has requested or demanded his file so the motion is premature and ORDERED,
3 DENIED WITHOUT PREJUDICE.

4 DATED this 9th day of April, 2015.

5
6 
7 DISTRICT JUDGE

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

10 BY  For

11 PAMELA WECKERLY
12 Chief Deputy District Attorney
13 Nevada Bar #006163
14
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28

CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 2015, I mailed a copy of the foregoing Order

to:

LAMAR ANTWAN HARRIS #71088
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070

BY



R. JOHNSON

Secretary for the District Attorney's Office

11F07785X/jr for rj/M-1


CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAMAR ANTWAN HARRIS,
#1589576

Defendant.

CASE NO: C-11-274370-1

DEPT NO: V

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL
AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: MAY 13, 2015
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney,
and hereby submits the attached Points and Authorities in Response to Defendant's Petition
for Writ of Habeas Corpus (Post-Conviction) And Motion for Appointment of Counsel And
Request For Evidentiary Hearing.

This Response is made and based upon all the papers and pleadings on file herein, the
attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On June 24, 2011, the State charged Lamar Harris (hereinafter "Defendant") by way of
4 Information as follows: COUNT 1 – Attempt Murder With Use of a Deadly Weapon (Felony
5 – NRS 200.010, 200.030, 193.330, 193.165), and COUNT 2 – Battery With Use of a Deadly
6 Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.480.2e).

7 Defendant's jury trial commenced on August 30, 2011. On September 2, 2011, the jury
8 returned a verdict of guilty as to the charge of Battery With a Deadly Weapon Resulting in
9 Substantial Bodily Harm, and not guilty as to the charge of Attempt Murder With Use of a
10 Deadly Weapon. On November 21, 2011, Defendant was sentenced to a maximum of 175
11 months and a minimum of 70 months in the Nevada Department of Corrections, with 128 days
12 credit for time served. The Judgment of Conviction was entered on December 2, 2011.

13 Defendant appealed his conviction on December 8, 2011. On December 13, 2013, the
14 Nevada Supreme Court affirmed the conviction, finding there was sufficient evidence to
15 support the jury's verdict. Remittitur issued on January 9, 2013.

16 On March 11, 2015, Defendant filed the instant Petition for Writ of Habeas Corpus
17 (Post-Conviction) (hereinafter "Petition") and Motion for Appointment of Counsel and
18 Request for Evidentiary Hearing. The State hereby responds as follows.

19 **ARGUMENT**

20 **I. DEFENDANT'S PETITION IS TIME BARRED AND SHOULD BE**
21 **DISMISSED**

22 As Defendant freely concedes, his Petition is procedurally defaulted as it was filed in
23 excess of the one year time period allowed for post-conviction habeas corpus petitions. NRS
24 34.726 provides:

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

4 (Emphasis added). “[T]he statutory rules regarding procedural default are mandatory and
5 cannot be ignored when properly raised by the State.” State v. Eighth Judicial Dist. Court, 121
6 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). The one-year time bar begins to run from the date
7 the judgment of conviction is filed or a remittitur from a timely direct appeal issues. Dickerson
8 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117
9 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its
10 plain meaning).

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

20 Here, Defendant filed an appeal from his Judgment of Conviction, and remittitur issued
21 on January 9, 2013. Therefore, Defendant had until January 9, 2014 to file his Petition.
22 Accordingly, the instant Petition was filed over one year late. Absent a showing of good cause,
23 Defendant’s Petition must be dismissed as time-barred pursuant to NRS 34.726(1).

24
25 **A. Defendant Has Failed to Establish Good Cause to Overcome the Time Bar.**

26 Defendant has not demonstrated good cause to overcome the mandatory time bar
27 imposed by NRS 34.726. To show good cause, a petitioner must demonstrate the following:
28 (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner will be “unduly

1 prejudice[d]" if the petition is dismissed as untimely. Under the first requirement, "a petitioner
2 must show that an impediment external to the defense prevented him or her from complying
3 with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,
4 506 (2003) (citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada
5 v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep't Prisons,
6 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). "An impediment external to the defense may be
7 demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably
8 available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986) (citations and
9 quotations omitted)). Clearly, any delay in filing must not be the fault of the petitioner. NRS
10 34.726(1)(a).
11

12 As Defendant correctly notes, the quality of his post-conviction counsel's
13 representation cannot serve as good cause to excuse procedural default. The Nevada Supreme
14 Court has made clear that the ineffective assistance of post-conviction counsel in a noncapital
15 case may not constitute "good cause" to excuse procedural bars, because "there is no
16 constitutional or statutory right to the assistance of counsel in noncapital post-conviction
17 proceedings, and '[w]here there is no right to counsel there can be no deprivation of effective
18 assistance of counsel.'" Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014)
19 (citing McKague v. Warden, 112 Nev. 159, 163-165, 912 P.2d 255, 258 (1996). Here, as
20 Defendant correctly asserts, he did not have a statutory right to post-conviction counsel.
21 Accordingly, he had no right to effective post-conviction counsel. However, Defendant alleges
22 that good cause exists in that counsel's conduct caused Defendant to be "denied his statutory
23 right to habeas corpus pursuant to NRS 34.726." See Petition, p. 12. While Defendant may
24 have the option to pursue habeas corpus relief, that does not change the fact that he must do
25 so within one year absent a showing of good cause, and that the actions of post-conviction
26 counsel simply cannot form the basis for such a showing. Though Defendant has artfully
27 attempted to avoid this rule, it is plain that he seeks to demonstrate good cause by citing the
28 performance and actions of post-conviction counsel, which under Brown, is insufficient.

1 Furthermore, defense counsels actions cannot be considered an impediment external to the
2 defense, and therefore do not constitute good cause.

3 Moreover, the instant Petition was filed on March 11, 2015, over one year after the
4 statutory period for filing had run on January 9, 2014. Defendant indicates that he was plainly
5 capable of apprising himself of the status of his case in the interim, as he did in January of
6 2015 when he wrote a letter to the Clerk of this Court inquiring as to whether a petition had in
7 fact been filed on his behalf. Defendant indicates communication with his post-conviction
8 counsel ceased in January of 2014, which would have been the time the one year filing period
9 concluded. Yet, Defendant waited a fully ear to inquire about the status of a post-conviction
10 petition for writ of habeas corpus, and more than a full year to file the instant Petition.
11 Accordingly, defendant has failed to demonstrate good cause pursuant to NRS. 34.726, and
12 his Petition is therefore procedurally barred.

13 **B. Defendant Has Failed to Demonstrate Prejudice.**

14 Because none of Defendant's claims were likely to succeed even in the event his post-
15 conviction petition had been timely filed, Defendant has also failed to demonstrate that he will
16 suffer prejudice should this Court dismiss the instant Petition.

17 Once a petitioner has established cause, he must show actual prejudice resulting from
18 the errors of which he complains, i.e., "a petitioner must show that errors in the proceedings
19 underlying the judgment worked to the petitioner's actual and substantial disadvantage." State
20 v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 94-95 (2012) (citing Hogan v. Warden, 109 Nev.
21 952, 959-60, 860 P.2d 710, 716 (1993)).

22 Defendant raises two allegations of ineffective assistance of trial and appellate counsel,
23 both of which are meritless. Claims of ineffective assistance of counsel are analyzed under the
24 two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 (1984), wherein
25 the defendant must show: (1) that counsel's performance was deficient, and (2) that the
26 deficient performance prejudiced the defense. Id. at 687, 2064. Nevada adopted this standard
27 in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test
28 elements in any order and need not consider both prongs if the defendant makes an insufficient

1 showing on either one.” Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

2 With regard to the first prong, a defendant is not entitled to errorless counsel. Rather,
3 “[d]eficient” assistance of counsel is representation that falls below an objective standard of
4 reasonableness.” Kirksey, 112 Nev. at 987, 923 P.2d at 1107. What appears by hindsight to
5 be a wrong or poorly advised decision involving tactics or strategy is not sufficient to meet the
6 defendant’s heavy burden of proving ineffective counsel. “Judicial review of a lawyer’s
7 representation is highly deferential, and a defendant must overcome the presumption that a
8 challenged action might be considered sound strategy.” State v. LaPena, 114 Nev. 1159, 1166,
9 968 P.2d 750, 754 (1998). In order to meet the second “prejudice” prong of the test, “the
10 defendant must show a reasonable probability that, but for counsel’s errors, the result of the
11 trial would have been different.” Kirksey, 112 Nev. at 988, 825 P.2d at 1107.

12 Defendant first claims trial counsel was ineffective for failing to use a peremptory
13 challenge to excuse a juror who indicated he was familiar with one of the State’s witnesses in
14 that the juror had attended high school with the witness over 20 years earlier. A prospective
15 juror should be removed for cause only if the prospective juror’s views would prevent or
16 substantially impair the performance of his duties as a juror. Preciado v. State, 130 Nev. ___,
17 ___, 318 P.3d 178 (2014) (citing Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125
18 (2005)). That a prospective juror is familiar with a witness does not require excusal of the
19 prospective juror where the juror unequivocally states that he or she can remain impartial. Id.
20 at ___, 318 P.3d at 179. Here, as Defendant points out, Prospective Juror 602 informed the
21 court that he attended high school with one of the State’s witnesses, Stacy Monroe. Reporter’s
22 Transcript (“RT”) Jury Trial, 04/16/12, p. 7. During voir dire, the prospective juror described
23 Mr. Monroe as “an acquaintance, at best” and explained he had not had contact with Mr.
24 Monroe for over 20 years. Id. at p. 126. The court inquired as to whether the prospective juror
25 could remain fair and impartial despite his familiarity with the witness, and he responded that
26 he could “for sure” remain fair to both sides. Id. at p. 126-127. Accordingly, Defendant’s trial
27 counsel was not required to pursue excusal of the juror, and cannot be deemed ineffective for
28 not doing so. Thus, Defendant’s claim would not have been likely to succeed, and does not

1 demonstrate prejudice.

2 Defendant next claims appellate counsel was ineffective for including certain
3 arguments in Defendant's direct appeal. First, Defendant argues appellate counsel erred in
4 arguing the ineffective assistance of trial counsel. Even if appellate counsel can be deemed
5 ineffective for raising a claim of ineffective assistance of trial counsel on direct appeal, when
6 such a claim is cognizable only in habeas corpus proceedings, Defendant suffered no
7 prejudice. In affirming Defendant's conviction, the Nevada Supreme Court merely stated that
8 the claim was not appropriate for direct appeal, and declined to address the claim. See Order
9 of Affirmance, 01/15/13, p. 2. There is no indication that inclusion of the claim influenced the
10 court's reasoning with respect to affirmation of Defendant's conviction in any way. Thus,
11 counsel's inclusion of the claim was harmless and caused no prejudice.

12 Defendant next argues appellate counsel was ineffective for arguing on direct appeal
13 that there was insufficient evidence to support Defendant's conviction in that, pursuant to
14 Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995), there was no corroboration between
15 the evidence and witness testimony. Defendant alleges such an argument was inappropriate
16 because Heglemeier applies only to cases involving accomplice testimony, which was not
17 present in the instant matter. However, even if appellate counsel cited inapplicable authority,
18 Defendant has not demonstrated that this mistake prejudiced him in any way. In affirming
19 Defendant's conviction, the Nevada Supreme Court noted that Heiglemeier was inapplicable,
20 but found that regardless, "sufficient evidence supports the verdict." See Order of Affirmance,
21 01/15/13, p. 1. Thus, counsel's inclusion of the claim caused no prejudice, and Defendant's
22 claims of ineffective assistance of appellate counsel are frivolous. Accordingly, Defendant has
23 failed to demonstrate that this Court's dismissal of his untimely petition will result in prejudice
24 pursuant to NRS 34.726.

25 II. DEFENDANT IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

26 In Coleman v. Thompson, 501 U.S. 722, 752 (1991), the United States Supreme Court
27 ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings.
28 In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court

1 similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in
2 post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel
3 provision as being coextensive with the Sixth Amendment to the United States Constitution."

4 NRS 34.750 provides, in pertinent part:

5 "[a] petition may allege that the Defendant is unable to pay the
6 costs of the proceedings or employ counsel. If the court is satisfied
7 that the allegation of indigency is true and the petition is not
8 dismissed summarily, the court may appoint counsel at the time
9 the court orders the filing of an answer and a return. In making its
determination, the court may consider whether:
(a) The issues are difficult;
(b) The Defendant is unable to comprehend the proceedings; or
(c) Counsel is necessary to proceed with discovery."

10 Under these provisions, it is clear that the court has discretion in determining whether
11 to appoint counsel. McKague specifically held that with the exception of cases in which
12 appointment of counsel is mandated by statute, one does not have "[a]ny constitutional or
13 statutory right to counsel at all" in post-conviction proceedings. Id. at 164. The Nevada
14 Supreme Court has observed that a petitioner "must show that the requested review is not
15 frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State
16 Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

17 In the instant matter, Defendant has not met his burden and is therefore not entitled to
18 appointment of an attorney. As explained above, Defendant's Petition is clearly time-barred
19 without good cause, and Defendant has failed to demonstrate that dismissal of the Petition
20 would result in prejudice. Therefore, Defendant has not established that the requested review
21 is not frivolous, and accordingly, should not be appointed counsel.

22 **III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

23 To the extent Defendant requests an evidentiary hearing, the request should be denied.
24 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
25 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
26 by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge
27 or justice, upon review of the return, answer and all supporting documents which are filed,
28 shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a]

defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

In the instant case, Defendant has not presented allegations which, if true, would entitle him to relief. As explained above, Defendant's Petition is plainly subject to the time bar imposed by NRS 34.726. Further, Defendant has wholly failed to demonstrate good cause to overcome that time bar, as his only grounds for good cause have repeatedly been found insufficient by the Nevada Supreme Court. Moreover, as explained, Defendant's substantive claims fail and Defendant has therefore failed to demonstrate that he is entitled to relief. Accordingly, no evidentiary hearing is necessary.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), and deny Defendant's Motion to Appoint Counsel and Request for Evidentiary Hearing.

DATED this 8th day of May, 2015.

Respectfully submitted,

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

BY

~~JONATHAN VANBOSKERCK~~
Chief Deputy District Attorney
Nevada Bar #006528

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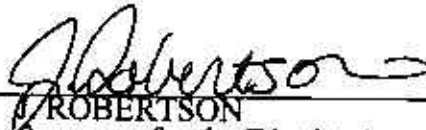
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CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 8th day of May, 2015, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

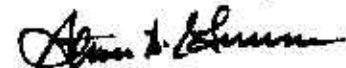
LAMAR ANTWAN HARRIS #71088
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070

BY



J. ROBERTSON
Secretary for the District Attorney's Office

11F07785X/IV/jr for rj/M-1



CLERK OF THE COURT

ORDER

MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Court-Appointed Attorney for Defendant,
LAMAR ANTWAN HARRIS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff,

Case No.: C-11-274370-1

Dept. No.: V

vs.

LAMAR ANTWAN HARRIS,

Defendant.


ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that MATTHEW D. CARLING, ESQ., be appointed as counsel to represent Defendant, Lamar Antwan Harris, for the limited issue of whether his Petition for Writ of Habeas Corpus is time-barred, effective May 20, 2015, and that counsel be paid by the Nevada State Public Defender's Office as set forth in NRS 7.155.

DATED and DONE this 24th day of June, 2015.


DISTRICT COURT JUDGE

Respectfully Submitted:


MATTHEW D. CARLING, ESQ.
Court-Appointed Attorney for Defendant,
LAMAR ANTWAN HARRIS

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111059



CLERK OF THE COURT

1 SUPP

2 Matthew D. Carling, Esq.

3 Nevada Bar No. 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 Telephone: (702) 419-7330

7 Facsimile: (702) 446-8065

8 CedarLegal@gmail.com

9 Court Appointed Attorney for Petitioner/Defendant.

10 LAMAR HARRIS

11
12
13 DISTRICT COURT
14 CLARK COUNTY, NEVADA
15

LAMAR HARRIS,

Petitioner,

Case No.: C-11-274370-1

Dept. No.: V

-vs-

EVIDENTIARY HEARING
REQUESTED

STATE OF NEVADA,

Respondent.

16
17 **SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS**
18 **(POST-CONVICTION)**
19

20 COMES NOW Defendant Lamar Harris ("Harris"), by and through counsel
21 Matthew D. Carling and, pursuant to NRS. Ann. § 34.724, hereby submits this *Supplemental*
22 *Petition for Writ of Habeas Corpus* (the "**Petition**"), which is supported by the following:

23 1. Name of Institution and county in which Petitioner is presently
24 imprisoned or where and who Petitioner is presently retrained of his liberty: Nevada
25 Dept. of Corrections, S.D.C.C., Clark County, Nevada.

26 2. Name and location of court which entered the judgment of conviction
27 under attack: Eighth Judicial District Court.

000831

- 1 3. **Date of Judgment of Conviction:** December 2, 2011.
- 2 4. **Case Number:** C274370.
- 3 5. **(a) Length of Sentence:** 7 to 175 months.
- 4 **(b) If sentence is death, state any date upon which execution is**
- 5 **scheduled:** N/A
- 6 6. **Is Petitioner presently serving a sentence for a conviction other than the**
- 7 **conviction under attack in this motion? If "Yes", list the crime, case number and**
- 8 **sentence being served at this time:** No.
- 9 7. **Nature of offense involved in conviction being challenged:** Battery, with
- 10 **Deadly Weapon, Causing Substantial Bodily Harm.**
- 11 8. **What was Petitioner's Plea?** Not guilty.
- 12 9. **If Petitioner entered a guilty plea to one count of an indictment or**
- 13 **information, and a not guilty plea to another count of an indictment or information,**
- 14 **or if a guilty plea was negotiated, give details:** N/A.
- 15 10. **If Petitioner was found guilty after a plea of not guilty, the finding was**
- 16 **made by:** Jury.
- 17 11. **Did the Petitioner testify at trial?** No.
- 18 12. **Did Petitioner appeal from his judgment of conviction?** Yes.
- 19 13. **If Petitioner appealed, answer the following:**
- 20 **(1) Name of the Court:** Nevada Supreme Court.
- 21 **(2) Case number or citation:** 59817
- 22 **(3) Result:** Order of Affirmance.

1 (4) Date of Decision: 12/13/12 (Remittitur issued 1/9/13)

2 14. If Petitioner did not appeal, explain briefly why he did not: N/A

3 15. Other than a direct appeal from the judgment of conviction and
4 sentence, has Petitioner previously file any petitions, applications or motion with
5 respect to this judgment in any court, state or federal? N/A

6 16. If your answer to No. 15 was "Yes", give the following information:

7 (1) Name of the Court: N/A

8 (2) Nature of Proceedings: N/A

9 (3) Grounds raised: N/A

10 (4) Did Petitioner receive an evidentiary hearing on his petition,
11 application or motion? N/A

12 17. Has any ground being raised in this petition been previously presented
13 to this or any other court by way of petition for habeas corpus, motion or application
14 or any other post-conviction proceeding? If so, identify: N/A

15 (a) Which of the grounds are the same: N/A

16 (b) The proceedings in which these grounds were raised: N/A

17 (c) Briefly explain why you are again raising these grounds: N/A

18 18. If any of the grounds listed in Nos. 23(a) *et seq.* or listed on any
19 additional pages you have attached, were not previously presented in any other
20 court, state or federal, list briefly what grounds were not so presented, and give your
21 reasons for not presenting them: N/A

1 ordered that the July 25, 2011 trial setting be continued and a new trial date be rescheduled
2 for August. On August 24, 2011, at a calendar call, the State requested another trial
3 continuance. The Court denied the State's request.

4 The trial began on August 30, 2011. During jury selection, it became apparent that
5 one of the jurors had a conflict with the case. Prospective Juror 602, Ed Small mentioned he
6 might know Stacy Monroe, one of the witnesses. 8/30/11 Tr. at p. 125. He went to high
7 school with Monroe was a year ahead. *Id.* Monroe was a pretty prominent football star at
8 Western High School. *Id.* Small had not seen him in over 20 years. *Id.* at p. 126. Small
9 claimed his prior history with Monroe would not affect whatever determination he made
10 about what weight or value to give his testimony. Harris' trial counsel, Mr. Gill passes for
11 cause, then waived their third peremptory challenge. *Id.* at p. 127. Towards the end of the
12 second day of trial on August 31, 2011, another juror came forward claiming to know one of
13 the witnesses. Juror No. 7 claimed to know Tammy Kasper, who used to date one of their
14 family members. *Id.* at pp. 195-6. Juror No. 7 stated it would not affect their deliberation,
15 and both parties including Harris' counsel indicated they did not see any prejudice. *Id.* at p.
16 197.

17 At the onset of trial, the State made an oral motion to be able to ask witnesses—
18 specifically Darnella, Kasper and Thomas—as to why they do not want to testify at the trial,
19 indicating that they would not specifically mention Harris' affiliation with the Gerson Park
20 Kingsman gang, but arguing it was relevant to witness bias. 8/30/11 Tr. at pp. 148-154. The
21 trial court faulted the State for not bringing a motion in limine to have prior bad acts
22 presented so as to allow briefing of the issue. Gill objected to the use of any reference to

1 Harris being in a gang, stating it was irrelevant to the proceedings and citing *State v. Evans*,
2 117 Nev. 609, 28 P.3d 498, in support. The State requested that Darnella be allowed to
3 testify to threats she received from blocked phone calls, and the trial court authorized it on
4 the basis of relevancy, 8/30/11 Tr. at p. 154. Gill asked whether it should be allowed even if
5 they cannot be traced to Harris, but failed to cite the constitutional standard requiring the
6 state to produce "substantial, credible evidence" linking Harris to any threat by intimidation
7 or otherwise. *Id.* Thus, the trial court indicated that Gill's cross-examination could "handle
8 that." *Id.*

9 In the State's presentation of its case, Darnella testified that she was afraid of what
10 would happen to her if she testified. 8/31/11 Tr. at p. 57. Detective Mike Fletcher testified
11 that Darnella told him she was afraid of what might happen on the streets if she testified.
12 9/1/11 Tr. at p. 50. Detective Fletcher testified that Thomas told the detective over the
13 phone he was afraid to come to court and, in fact, did not show up at court for the
14 preliminary hearing. *Id.* at p. 61. Fletcher testified that Thomas told him before that he is
15 afraid of the boy that stabbed him and what he might do. *Id.* at p. 62.

16 In the State's closing arguments, the prosecutor indicated to the jury that, when the
17 witnesses were on stand, they were evasive and backpedaling. 9/2/11 Tr. at p. 97. The
18 prosecutor specifically stated that Ms. Lay said she got threatening calls, and that people do
19 not want to be labeled as a snitch. *Id.* at p. 95. The prosecutor indicated that Darnella talked
20 about threats that made her nervous to testify. *Id.* at p. 97. The prosecutor further argued
21 that there was a lot of consistency with the witnesses, with them coming in and nobody
22 wanting to say they saw Harris stabbing the victim. *Id.* at p. 129. He mentioned a second

1 time to the jury that Darnella was also afraid to testify, just like Ms. Kasper. *Id.* at p. 130. She
2 was concerned about retaliation. *Id.* She was getting blocked number phone calls threatening
3 her. *Id.* This happened in the neighborhood Darnella has grown up in, people do know
4 where she lives. *Id.*

5 On September 2, 2011, the jury returned with a verdict of guilty for Battery with use
6 of Deadly Weapon Resulting in Substantial Bodily Harm. The jury found that there was not
7 enough evidence to convict Harris of Attempt Murder with the use of a Deadly Weapon.
8 Harris was held without bail and sentencing was scheduled for November 7, 2011. On
9 November 7, 2011, Harris was sentenced to a term of 70 months to 175 months in the
10 NDOC. Harris was issued 182 days as credit for time served.

11 The *Judgment and Conviction* was filed on December 2, 2011. Harris retained attorney
12 Leslie A. Park to represent him in his direct appeal proceedings after he was convicted of
13 Battery with use of Deadly Weapon Resulting in Substantial Bodily Harm during a jury trial
14 on September 2, 2011. Harris' *Notice of Appeal* was timely filed on December 8, 2011.

15 On appeal, Harris challenged that the jury's verdict was unsupported by sufficient
16 evidence, relying upon *Heglemeier v. State*, 111 Nev. 1244, 903 P.2d 799 (1995) and *Austin v.*
17 *State*, 87 Nev. 578, 491 P.2d 724 (1971) for the claim that his conviction should be reversed
18 since there was "no corroboration between the evidence of the stab wounds on [the victim's]
19 face and use of a deadly weapon." *See, Harris v. State*, 2012 WL 6554399, *1 (Nev. 2012; Case
20 No. 59817). The Court found that Harris misinterpreted *Heglemeier* and *Austin* since "those
21 cases require corroboration only for cases involving accomplice testimony" and the State had
22 presented no accomplice testimony in Harris' case. *Id.* The State instead had presented

1 several witnesses who saw Harris stab the victim, finding it was for the jury to determine
2 weight and credibility. *Id.* It denied this claim on the basis that sufficient evidence existed in
3 the record to support the jury's determination. *Id.*

4 Harris additionally attempted to challenge in the appeal that trial counsel was
5 ineffective for failing to remove a member of the jury for cause using a preemptory
6 challenge; however, the merits of this claim were not addressed since it was the
7 inappropriate venue for such a challenge. *Harris* at *1, citing *Johnson v. State*, 117 Nev. 153,
8 160-1, 17 P.3d 1008, 1013 (2001). The Nevada Supreme Court issued its *Order of Affirmance*
9 on December 13, 2012. On January 22, 2013, the Court then issued its *Remittitur*.

10 Harris additionally retained Ms. Park for the purpose of preparing and filing his
11 petition for writ of habeas corpus. On June 6, 2013, Ms. Park allegedly filed a *Petition for Writ*
12 *of Habeas Corpus* with the Nevada Supreme Court, a copy of which is attached to Harris' pro
13 se *Petition for Writ of Habeas Corpus*, dated March 11, 2015, at Exhibit "B." In December of
14 2013, Harris contacted Ms. Park to advise her that his *Petition for Writ of Habeas Corpus*
15 was filed with the incorrect court and should have been filed with the district court. Harris
16 was told by Ms. Park that she would re-file the petition in the district court. *See, Affidavit of*
17 *Lamar Harris* attached to the pro se *Petition for Writ of Habeas Corpus*, dated March 11, 2015 at
18 Exhibit "A." In January of 2014, Harris again contacted Ms. Park during the one-year time
19 limitation in regards to the filing of his petition for writ of habeas corpus. *Id.* Ms. Park
20 reassured him the petition had been filed in the district court. *Id.*

21 From January to November of 2014, Harris had not been contacted further by Ms.
22 Park, and she had refused to take his pre-paid, non-collect calls or respond to his written

1 correspondence. *See, Affidavit of Lamar Harris* attached to the pro se *Petition for Writ of Habeas*
2 *Corpus*, dated March 11, 2015 at Exhibit "A." Further, he had not received a copy of the
3 petition she claimed she had re-filed in the district court. *Id.* In January of 2015, Harris took
4 it upon himself to write a letter to the Clerk of the Court for the sole purpose of inquiring
5 into the status of his petition. *Id.* On January 6, 2015, the Clerk of the Court printed out a
6 case summary, which reflected the fact that Harris' petition had never been filed. *See, Harris'*
7 *pro se Petition for Writ of Habeas Corpus*, dated March 11, 2015 at Exhibit "C." The Nevada
8 Supreme Court Docket Sheet printed on December 31, 2014, verified that no petition had
9 been filed by Ms. Park as she had lead Harris to believe. *See, Harris' pro se Petition for Writ of*
10 *Habeas Corpus*, dated March 11, 2015 at Exhibit "D."

11 On March 11, 2015, Harris filed his *pro se Petition for Writ of Habeas Corpus (Post-*
12 *Conviction)* alleging ineffective assistance of counsel in the untimely filing of such petition,
13 together with other challenges to trial counsel's ineffectiveness.

14 STATEMENT OF THE FACTS

15 On or about April 25, 2011, Michael Thomas ("**Thomas**") was hanging out at the
16 Seven Seas Bar and Restaurant when he noticed an altercation that involved a family friend,
17 Darnella Lay ("**Darnella**"). Tr. 8/31/11 at p. 8. Thomas went to help Darnella Lay and
18 ended up getting into a fight. During the fight, Thomas sustained two (2) stab wounds; one
19 (1) in the chest and one (1) in the cheek. Tr. 8/31/11 at p.13.

20 Detective Mike Fletcher ("**Fletcher**") was dispatched to the Seven Seas Bar. Fletcher
21 conducted the investigation and learned that Harris was a suspect in the incident that
22 occurred. Tr. 9/01/11 at p. 26. Fletcher stated that he put together a series of photo line-
23

1 ups using a photo of the defendant. Fletcher showed the photo line-ups to Monroe, Kasper,
2 Thomas, Lay and a few other individuals. Fletcher stated that Kasper identified Harris. Tr.
3 9/01/11 at p. 33, 34, 45.

4 Thomas knew Darnella's father, Kevin Lay, and Thomas saw Darnella at the Seven
5 Seas the night of August 25, 2011. Tr. 8/31/11 at p. 182. Thomas was on the dance floor
6 when the altercation began. Thomas remembers nothing about the fight. From his
7 understanding, he received his injuries from slipping and falling on glass. Tr. 8/31/11 at p.
8 183. Thomas does not know who stabbed him. Tr. 8/31/11 at p. 189.

9 Darnella does not know Thomas. Darnella stated that she knows a man by the name
10 of Mike, who she saw on the night of April 25, 2011 at the Seven Seas. Tr. 8/31/11 at p. 25.
11 Mike is her father's friend. Tr. 8/31/11 at p. 26. Darnella left her purse with Tammy
12 Kasper while she was out on the dance floor. After she was done dancing, Darnella went to
13 get her purse. Tr. 8/31/11 at p. 28. As Darnella grabbed her purse, she got into an
14 altercation with Harris. Harris pushed Darnella, causing her to fall over a barstool. Tr.
15 8/31/11 at p. 29. Darnella stood back up and swung at Harris and struck him in the face.
16 Tr. 8/31/11 at p. 32. Darnella was escorted out of the bar by security, but went back inside
17 to retrieve her purse, then a female whom she believed was Harris' girlfriend threw a glass at
18 her. Tr. 8/31/11 at p. 35. Darnella asked the female to meet her outside. Darnella stated
19 that she remembers a fight occurring outside of the bar and that she was hit in the face by a
20 man during that fight, which caused her to fall down. Tr. 8/31/11 at p. 38, 39. Darnella
21 was not positive whom she was fighting with and that she never saw a weapon. Tr. 8/31/11
22 at p. 40.

1 Tammy Kasper ("**Kasper**") works at the Seven Seas Bar. Kasper was not working
2 the night of April 25, 2011, but was at the bar drinking. Tr. 8/31/11 at p. 89. Kasper was
3 inside the bar when the fight occurred outside. Kasper stated that the fight was over when
4 she stepped outside. Tr. 8/31/11 at p. 96.

5 Jocelyn Boston ("**Boston**") was at the bar on April 25, 2011. Boston knows Harris
6 and saw him at the bar that night. Tr. 8/31/11 at p. 167. Boston observed that Harris
7 looked like he was getting jumped. Boston also observed a bar fight begin, and she left the
8 bar. Tr. 8/31/11 at p. 171. Boston did not observe anything that had occurred outside of
9 the bar. Tr. 8/31/11 at p. 172.

10 Stacey Monroe ("**Monroe**") works at the Seven Seas bar. Monroe was not working
11 on the night of April 25, 2011, but was at the bar hanging out. Tr. 9/01/11 at p.4. Monroe
12 observed a fight occur inside the bar and a bottle was thrown over his head. Tr. 9/01/11 at
13 p. 5, 6. Monroe observed a male reach for his waistband, but did not see a weapon. Tr.
14 9/01/11 at p. 20. Everyone was ushered out of the bar. Monroe stated that when he
15 stepped outside the bar, he observed Thomas was bleeding badly from his chest and mouth.
16 Tr. 9/01/11 at p. 11. The jury returned with a verdict of guilty for Battery with use of
17 Deadly Weapon Resulting in Substantial Bodily Harm. Tr. 9/02/2011 at p. 3.

18 ARGUMENT

19 20 **I. THE PETITIONER CAN SHOW "GOOD CAUSE" TO EXCUSE** 21 **THE PROCEDURAL DEFAULT AND THEREFORE THE** 22 **WRIT OF HABEAS CORPUS SHOULD NOT BE TIME** 23 **BARRED BY NRS 34.726**

24
25 NRS 34.726 limits the time that is necessary to file a petition for writ of habeas
26 corpus and states the following: in regards to "good cause:"

1 1. Unless there is good cause shown for delay, a petition that challenges the
2 validity of a judgment or sentence must be filed within 1 year after entry of
3 the judgment of conviction, or if an appeal has been taken from the
4 judgment, within 1 year after the appellate court of competent jurisdiction
5 pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of
6 Article 6 of the Nevada Constitution issues its remittitur. For the
7 purposes of this subsection, good cause for delay exists if the petitioner
8 demonstrates to the satisfaction of the court:

9 (a) that the delay is not the fault of the petitioner, and

10 (b) that dismissal of the petition as untimely will unduly prejudice the
11 petitioner.
12

13 In *Dickerson v. State*, the Court found NRS 34.726 to mean that “the one-year period
14 for filing a post-conviction habeas corpus petition begins to run from the issuance of the
15 remittitur from a *timely* direct appeal ... from the judgment of conviction or from the entry
16 of the judgment of conviction if no direct appeal is taken.” *Ibid.*, 114 Nev. 1084, 1087, 967
17 P.2d 1132, 1133-34 (1998). “The purpose of the remittitur, aside from returning the record
18 on appeal to the district court, is twofold: it divests this court of jurisdiction over the appeal
19 and returns jurisdiction to the district court, and it formally informs the district court of this
20 court’s final resolution of the appeal.” *Id.*, 114 Nev. at 1087, 967 P.2d at 1134, citing *Buffington*
21 *v. State*, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (“[j]urisdiction in an appeal is vested
22 solely in the supreme court until the remittitur issues to the district court”); *Trench v. Strong*, 4
23 Nev. 87, 91 (1868) (the object of a remittitur “is to fully notify the lower court of the
24 judgment of the appellate tribunal”). “While we hold that the one-year time period in NRS
25 34.726(1) runs from the issuance of a remittitur from a timely direct appeal to this court, we
26 also stress, however, that this holding does not affect a petitioner’s ability to overcome the
27 procedural time-bar by a showing of good cause for the delay.” *Id.*, 114 Nev. at 1088, 967
28 P.2d at 1134.

1 “Generally, ‘good cause’ means a ‘substantial reason; one that affords a legal excuse.’”
2 *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), *citing Colley v. State*, 105 Nev.
3 235, 236, 773 P.2d 1229, 1230 (1989)(*quoting State v. Estencoin*, 63 Haw. 264, 625 P.2d 1040,
4 1042). “In order to demonstrate good cause, a petitioner must show that an impediment
5 external to the defense prevented him or her from complying with the state procedural
6 default rules.” *Id.* *citing Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001);
7 *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); *Passanisi v. Director Dep’t Prisons*,
8 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

9 To establish “good cause” under NRS 34.726(1), “[a] claim of ineffective assistance
10 of counsel may ... excuse a procedural default if counsel was so ineffective as to violate the
11 Sixth Amendment.” *Hathaway*, 119 Nev. at 252, 71 P.3d at 506, *citing Edwards v. Carpenter*, 529
12 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000)(*citing Carrier*, 477 U.S. at 488-89, 106
13 S.Ct. 2639); *see also Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997). Sixth
14 Amendment rights pertain to retained counsel as well as court-appointed counsel. *See, e.g.,*
15 *Ryan v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 419, 426, 168 P.3d 703, 708
16 (discussing the right to retain counsel of their choice under the Sixth Amendment). In *Means*
17 *v. State* the Nevada Supreme Court has held as follows with regard to claims of ineffective
18 assistance of counsel in post-conviction habeas petitions:

19 In a post-conviction habeas petition, we evaluate claims of ineffective
20 assistance of counsel under the test established in *Strickland v. Washington*. In
21 that 1984 decision, the United States Supreme Court created a fair, workable
22 and, as it turns out, durable standard that replaced Nevada’s traditional “farce
23 and sham” test. *Strickland* dictates that our evaluation begins with the “strong
24 presumption that counsel’s conduct falls within the wide range of reasonable
25 professional assistance.” The Court further explained that the “defendant
26 must overcome the presumption that, under the circumstances, the challenged

1 action 'might be considered sound trial strategy.'" Within the context of this
2 strong presumption, the petitioner must demonstrate that his counsel's
3 performance was deficient, falling below an objective standard of
4 reasonableness, and that counsel's deficient performance prejudiced the
5 defense. To establish prejudice based on counsel's deficient performance, a
6 petitioner must show that, but for counsel's errors, there is a reasonable
7 probability that the outcome would have been different. A court may evaluate
8 the questions of deficient performance and prejudice in either order and need
9 not consider both issues if the defendant fails to make a sufficient showing on
10 one. Yet the claim that ineffective assistance of counsel prejudiced the
11 petitioner is distinct from its factual nucleus. In *Strickland*, the Court did not
12 set forth the specific burden that the petitioner carries in proving the factual
13 allegations that form the basis of an ineffective-assistance-of-counsel claim.
14 Neither has this court clarified that burden of proof.

15
16 Some Nevada authority signals that the petitioner must prove the factual
17 allegations underlying an ineffective-assistance-of-counsel claim by clear and
18 convincing evidence. In *Davis v. State*, we indicated, consistent with previous
19 decisions, that "strong and convincing proof" was necessary to overcome
20 the presumption that defense counsel fully discharged his duties. However,
21 many federal courts have applied the preponderance standard to the
22 underlying facts alleged in the petition. In *Alcala v. Woodford*, the Ninth Circuit
23 Court of Appeals echoed other federal cases in stating that a habeas petitioner
24 must prove the factual allegations underlying claims of ineffective assistance
25 by a preponderance of the evidence. Similarly, the Fifth Circuit Court of
26 Appeals noted in *James v. Cain*, that "[a] petitioner who seeks to overturn his
27 conviction on grounds of ineffective assistance of counsel must prove his
28 entitlement to relief by a preponderance of the evidence."

29
30 Choosing consistency with federal authority, we now hold that a habeas
31 corpus petitioner must prove the disputed factual allegations underlying his
32 ineffective-assistance claim by a preponderance of the evidence. To the extent
33 that our decision today conflicts with the "strong and convincing" language of
34 *Davis* and its predecessors, we expressly overrule those cases. Therefore,
35 when a petitioner alleges ineffective assistance of counsel, he must establish
36 the factual allegations which form the basis for his claim of ineffective
37 assistance by a preponderance of the evidence. Next, as stated in *Strickland*,
38 the petitioner must establish that those facts show counsel's performance fell
39 below a standard of objective reasonableness, and finally the petitioner must
40 establish prejudice by showing a reasonable probability that, but for counsel's
41 deficient performance, the outcome would have been different.

1 *Ibid.*, 120 Nev. 1001, 1011-3, 103 P.3d 25, 31-33 (2004)(footnotes omitted). As it pertains to
2 a claim of ineffective assistance of counsel under a *Strickland* analysis, "...although counsel
3 need not be a fortune teller, he must be a reasonably competent legal historian. Though he
4 need not see into the future, he must reasonably recall (or at least research) the past...."
5 *Kennedy v. Maggio*, 725 F.2d 269, 272 (5th Cir. 1984), citing *Cooker v. United States*, 461 F.2d 530,
6 532 (5th Cir.1972).

7 However, under the *Hathaway* analysis, "in order to constitute adequate cause, the
8 ineffective assistance of counsel claim itself must not be procedurally defaulted." *Ibid.*, 119
9 Nev. at 252, 71 P.3d at 506.

10 In other words, a petitioner must demonstrate cause for raising the ineffective
11 assistance of counsel claim in an untimely fashion. In terms of a procedural
12 time-bar, an adequate allegation of good cause would sufficiently explain why
13 a petition was filed beyond the statutory time period. Thus, a claim or
14 allegation that was reasonably available to the petitioner during the statutory
15 time period would not constitute good cause to excuse the delay.

16
17 *Hathaway*, 119 Nev. at 252-3, 71 P.3d at 506. The core procedural challenge and analysis in

18 *Hathaway* was set forth as follows:

19 In the instant case, Hathaway claimed that he had good cause to excuse his
20 delay because he requested that his attorney file an appeal, his attorney had
21 affirmatively indicated that he would file an appeal, he believed that his
22 attorney had filed an appeal on his behalf, and he filed his habeas corpus
23 petition within a reasonable time after learning that his attorney had not filed
24 an appeal. [footnote omitted] Trial counsel is ineffective if he or she fails to
25 file a direct appeal after a defendant has requested or expressed a desire for a
26 direct appeal; counsel's performance is deficient and prejudice is presumed
27 under these facts. [footnote omitted] In *Loveland*, the Ninth Circuit Court of
28 Appeals recognized that, "[i]f a defendant reasonably believes that his counsel
29 is pursuing his direct appeal he most naturally will not file his own post-
30 conviction relief petition." [231 F.3d at 644]. The court in *Loveland* held that a
31 petitioner's reliance upon his counsel to file a direct appeal is sufficient cause
32 to excuse a procedural default if the petitioner demonstrates: "(1) he actually
33 believed his counsel was pursuing his direct appeal, (2) his belief was

1 objectively reasonable, and (3) he filed his state post-conviction relief petition
2 within a reasonable time after he should have known that his counsel was not
3 pursuing his direct appeal.” [Id.] We conclude that the test set forth in *Loveland*
4 is a reasonable test for evaluating an allegation of good cause based upon a
5 petitioner’s mistaken belief that counsel had filed a direct appeal. Thus, a
6 petitioner can establish good cause for the delay under NRS 34.726(1) if the
7 petitioner establishes that the petitioner reasonably believed that counsel had
8 filed an appeal and that the petitioner filed a habeas corpus petition within a
9 reasonable time after learning that a direct appeal had not been filed.

10
11 *Hathaway*, 119 Nev. at 254-5, 71 P.3d at 507-8. The *Hathaway* court faulted the trial court for
12 failing to hold an evidentiary hearing when Hathaway had raised a claim supported by
13 specific facts not belied by the record that would have entitled him to relief. *Id.*, 119 Nev. at
14 255, 71 P.3d at 508. Without an evidentiary hearing, the appellate court was unable to
15 establish whether Hathaway believed his counsel had filed a direct appeal, whether his belief
16 was objectively reasonable, and whether he had filed his pro se petition for writ of habeas
17 corpus within a reasonable time after learning of such failure of counsel. *Id.* *Hathaway* was
18 remanded for an evidentiary hearing on Hathaway’s “good cause” claim.

19 Harris’ *Judgment and Conviction* was filed on December 2, 2011. Harris retained
20 attorney Leslie A. Park to represent him in his direct appeal proceedings after he was
21 convicted of Battery with use of Deadly Weapon Resulting in Substantial Bodily Harm
22 during a jury trial on September 2, 2011. Harris’ *Notice of Appeal* was timely filed on
23 December 8, 2011. The Nevada Supreme Court issued its *Order of Affirmance* on December
24 13, 2012. On January 22, 2013, the Nevada Supreme Court issued its *Remittitur*.

25 Harris additionally retained Ms. Park for the purpose of preparing and filing his
26 petition for writ of habeas corpus. On June 6, 2013, Ms. Park allegedly filed a *Petition for Writ*
27 *of Habeas Corpus* with the Nevada Supreme Court, a copy of which is attached to Harris’ pro

1 se *Petition for Writ of Habeas Corpus*, dated March 11, 2015, at Exhibit "B." In December of
2 2013, Harris contacted Ms. Park to advise her that his *Petition for Writ of Habeas Corpus*
3 was filed with the incorrect court and should have been filed with the district court. Harris
4 was told by Ms. Park that she would re-file the petition in the district court. See, *Affidavit of*
5 *Lamar Harris* attached to the pro se *Petition for Writ of Habeas Corpus*, dated March 11, 2015 at
6 Exhibit "A." In January of 2014, Harris again contacted Ms. Park during the one-year time
7 limitation in regards to the filing of his petition for writ of habeas corpus. *Id.* Ms. Park
8 reassured him the petition had been filed in the district court. *Id.*

9 From January to November of 2014, Harris had not been contacted further by Ms.
10 Park, and she had refused to take his pre-paid non-collect calls or respond to his written
11 correspondence. See, *Affidavit of Lamar Harris* attached to the pro se *Petition for Writ of Habeas*
12 *Corpus*, dated March 11, 2015 at Exhibit "A." Further, he had not received a copy of the
13 petition she claimed she had re-filed in the district court. *Id.* In January of 2015, Harris took
14 it upon himself to write a letter to the Clerk of the Court for the sole purpose of inquiring
15 into the status of his petition. *Id.* On January 6, 2015, the Clerk of the Court printed out a
16 case summary, which reflected the fact that Harris' petition had never been filed. See, Harris'
17 pro se *Petition for Writ of Habeas Corpus*, dated March 11, 2015 at Exhibit "C." The Nevada
18 Supreme Court Docket Sheet printed on December 31, 2014, verified that no petition had
19 been filed by Ms. Park as she had lead Harris to believe. See, Harris' pro se *Petition for Writ of*
20 *Habeas Corpus*, dated March 11, 2015 at Exhibit "D." On March 11, 2015, Harris filed his pro
21 se *Petition for Writ of Habeas Corpus (Post-Conviction)* alleging ineffective assistance of counsel in

1 the untimely filing of such petition, together with other challenges to trial counsel's
2 ineffectiveness.

3 NRS 34.726 limited Harris to one-year following the Nevada Supreme Court's
4 issuance of the *Remittitur* on January 22, 2013, for the filing of his pro se *Petition for Writ of*
5 *Habeas Corpus* unless good cause could be shown for the delay. Because Harris' pro se
6 petition was filed March 11, 2015, outside the one-year time limitation of NRS 34.726,
7 Harris will demonstrate that the delay was not his fault, but rather is faulted to his then-
8 counsel Ms. Park, and that dismissal will unduly prejudice him because his claims will never
9 be able to be heard on their merits. NRS 34.726(1)(a) and (b).

10 Harris' good cause challenge under NRS 34.726(1) relating to Park's ineffectiveness
11 provides a substantial reason, and one that affords a legal excuse. *Hathaway*, 119 Nev. at 252,
12 71 P.3d at 506, *citing Colley*, 105 Nev. at 236, 773 P.2d at 1230 (*quoting Estencoin*, 625 P.2d at
13 1042). Ms. Park's failures first in allegedly filing Harris' petition for writ of habeas corpus in
14 the wrong court (it never appeared on the Nevada Supreme Court docket), then failing to
15 file it in the correct court, and then informing Harris she had done so, demonstrate good
16 cause by evidencing an impediment external to Harris that prevented him from complying
17 with the time limitations of NRS 34.726. *Id.*, *citing Pellegrini*, 117 Nev. at 886-87, 34 P.3d at
18 537 (2001); *Lozada*, 110 Nev. at 353, 871 P.2d at 946; *Passanisi*, 105 Nev. at 66, 769 P.2d at
19 74.

20 Park was so ineffective as to violate the Sixth Amendment right to the effective
21 assistance of counsel. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506, *citing Edwards*, 529 U.S. at
22 451, 120 S.Ct. 1587 (*citing Carrier*, 477 U.S. at 488-89, 106 S.Ct. 2639); *see also Crump*, 113 Nev.

1 at 304, 934 P.2d at 253. Park's actions and omissions evidence ineffective assistance of
2 counsel under the test established in *Strickland v. Washington*. See, *Means*, 120 Nev. at 1011-3,
3 103 P.3d at 31-33. Although *Strickland* dictates that the evaluation begin with a strong
4 presumption that Park's counsel falls within the range of reasonable professional assistance,
5 under these circumstances the challenged actions cannot be considered sound trial strategy
6 since they deliberately deprived Harris of the ability to be heard on his viable claims under
7 post-conviction proceedings. Park's performance was deficient, falling below an objective
8 standard of reasonableness to Harris' prejudice.

9 On appeal, Park challenged that the jury's verdict was unsupported by sufficient
10 evidence, relying upon *Heglemeier v. State*, 111 Nev. 1244, 903 P.2d 799 (1995) and *Austin v.*
11 *State*, 87 Nev. 578, 491 P.2d 724 (1971); however, she had misinterpreted *Heglemeier* and
12 *Austin* since those cases were easily differentiated as applying only to cases involving
13 accomplice testimony, which this case was not. The record contained several written and
14 recorded accounts of individuals who saw Harris stab the victim, although those same
15 witnesses testified that they had not seen the crime occur, inconsistencies which Park never
16 addressed on Harris' behalf. Harris additionally attempted to challenge in the appeal that trial
17 counsel was ineffective for failing to remove a member of the jury for cause using a
18 preemptory challenge; however, the merits of this claim were not addressed since it was the
19 inappropriate venue for such a challenge. *Harris* at *1, citing *Johnson v. State*, 117 Nev. 153,
20 160-1, 17 P.3d 1008, 1013 (2001). In essence, Park's entire appeal drafted and filed on
21 Harris' behalf was deficient through her misinterpretation of the law or her failure to
22 adequately research the issues raised.

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **LAMAR HARRIS,**

 Appellant.

4 vs.

5 **THE STATE OF NEVADA**

 Respondent.

Supreme Court No.: 70679

District Court Case No.: C274370-1

Electronically Filed
Aug 19 2016 10:00 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

6
7 **APPELLANT'S APPENDIX – VOLUME IV – PAGES 0750-0973**

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Harris, Lamar

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writ of habeas corpus was filed in the wrong court, as it should have been filed in the district court. Ms. Park advised Petitioner that she would re-file the petition in the district court. (Exhibit A)

In January 2014, Petitioner made contact with Ms. Park about the petition for writ of habeas corpus/post-conviction petition. Again, Ms. Park reassured the Petitioner that the post-conviction petition had been filed. By July 2014, Petitioner had no contact with Ms. Park and he had not received a filed copy of the petition for post-conviction that was supposed to be filed in district court. (Exhibit A)

Between July 2014, and November 2014, Petitioner and Ms. Park had no form of communication and he had yet to receive his filed copy of the petition for post-conviction.

In early January 2015, Petitioner wrote directly to the Clerk of Court inquiring into the status of his petition for writ of habeas corpus/post-

conviction and whether or not Ms. Park actually filed the petition.

On January 6, 2015, the Clerk of Court printed a "Case Summary" to which it reveals Ms. Park did not file a petition for writ of habeas corpus/post-conviction in the district court as she was hired to do in a timely manner.

(Exhibit C)

Here, the Petitioner does not assert he was denied the right to counsel in the habeas corpus proceedings, as no right exists. Crump v. Warden, 934 P.2d 247 (Nev. 1997). However, he asserts he was denied his statutory right to habeas corpus pursuant to NRS 34.726, in a timely manner and can demonstrate his retained counsel's (Ms. Park) egregious misconduct, negligence and the failure to protect his rights to habeas corpus proceedings in failing to file a timely petition for post-conviction is an "Objective factor" that is "external" to the Petitioner that "cannot fairly be attributed to him." Coleman v. Thompson, 501 U.S. 722, 731-32 (1991).

In Hathaway, the court relied upon the Ninth Circuit of Loveland v. Hatcher, 231 F.3d 1640 (9th Cir. 2000), wherein, the court held:

"[I]f a defendant reasonably believes that his counsel is pursuing his direct appeal he most naturally will not file his own post-conviction relief petition."

Id. 71 F.3d at 507

Here, despite Hathaway being in the context of a direct appeal, the principle theory is applicable to the extent of what Petitioner reasonably believes that Ms. Park is pursuing his post-conviction petition, thus, most naturally he will not file his own post-conviction petition.

Furthermore, as the Nevada Supreme Court has yet to address this theory or logic in the post-conviction setting, the Ninth Circuit has addressed the issue on several occasions in accordance with the equitable tolling doctrine based upon extraordinary circumstance beyond

a prisoner's control to make it impossible to file a petition on time. See Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003); Ford v. Hubbard, 330 F.3d 1086, 1106 (9th Cir. 2003).

In Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000), the court concluded that "A petitioner need not allege a constitutional violation in order to establish cause for a procedural default." Id. 1134.

In Manning, he was not arguing he was denied his right to counsel because his lawyer was conflicted; he argued that because his lawyer interfered with his statutory right to file a timely petition, he was denied access to habeas corpus proceedings. The court concluded that his attorney's actions of misconduct, even though not constitutionally defective, ultimately prevented him from obtaining state post-conviction relief. Id. 224 F.3d at 1135.

In Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003), the petitioner argued that the deadline for filing his petition should be subject to equitable tolling because

the delay in filing resulted from an "extraordinary circumstance" beyond his control, specifically his attorney's misconduct. The court reasoned that upon the unique facts of the case, when an attorney was retained to prepare and file a petition, and failed to do so, the petitioner was entitled to equitable tolling of the filing deadline.

Spitsyn, nearly a full year before his filing deadline, he retained private counsel to file a petition for writ of habeas corpus. After a period of inactivity on the case, Spitsyn contacted the Bar Association and filed grievances against his retained attorney. Retained counsel never filed the petition and the filing deadline passed.

Spitsyn, some 226 days after the filing deadline had run, he finally filed his petition in proper person. The district court dismissed the petition as untimely. *Id.* 345 F.3d at 799.

In *Brambles v. Duncan*, 330 F.3d 1197 (9th Cir. 2003), the court held that the one-year statute of limitations for filing

a habeas petition may be equitably tolled if "extraordinary circumstance beyond a prisoner's control make it impossible to file a petition on time." Id. at 1202.

In Spitsyn, the court concluded that the misconduct of his retained attorney was sufficiently egregious to justify equitable tolling of the one-year limitation, because the attorney was hired nearly a full year in advance of the deadline, but yet, the attorney completely failed to prepare and file the petition. Id. 345 F.3d at 801. See also Ford v. Hubbard, 330 F.3d 1086 (9th Cir. 2003) ("there are instances in which an attorney's failure to take necessary steps to protect his client's interest is so egregious and atypical that the court may deem equitable tolling appropriate").

In Spitsyn, the court held that retained counsel's conduct was so deficient as to surpass mere negligence to constitute an "extraordinary circumstance" beyond his control and that Spitsyn exercised reasonable diligence

in pursuing habeas corpus relief when he discovered no petition had been filed. Id. 345 F.3d at 802.

Extraordinary Circumstances

Here, Petitioner was under extraordinary circumstance to constitute good cause for the untimely delay in filing the instant petition based on Ms. Park's sufficiently egregious negligence and misconduct in failing to protect Petitioner's interest in filing a timely petition to exercise his statutory right to post-conviction relief under NES 34.726.

Although Ms. Park's negligence and misconduct is not constitutionally defective, the fact-setting, similar to Spitsyn, supra and Manning, supra, to justify good cause for the untimely filing. Therefore, the task before this Court is to determine whether retained counsel's actions, or lack thereof, was an extraordinary circumstance to constitute an impediment and objective factors external to Petitioner that

"cannot fairly be attributed to him" Manning, 224 F.3d 1135; and is sufficient cause to excuse the procedural default of NRS 34.726.

Furthermore, to determine if Petitioner reasonably believed Ms. Park was pursuing his post-conviction petition and if he exercised reasonable diligence in filing the instant petition when he discovered Ms. Park had not filed his petition. Hathaway, 71 P.3d 503.

Here, Petitioner retained counsel for the direct appeal and the post-conviction proceedings over a year in advance of the deadline to file. (Exhibit A)

As Petitioner received a copy of the petition indicating it was mailed to the Nevada Supreme Court on June 6, 2013, Petitioner reasonably believed counsel had filed the petition. (Exhibit B)

However, unbeknown to Petitioner, not only did retained counsel not file a petition with the Nevada Supreme Court, but she used the fraudulent document to convince him that the

petition had been filed. Without a shadow of a doubt, Ms. Park's conduct was not only sufficiently egregious and atypical, but intentionally designed to strip Petitioner of his statutory right under NRS 34.726, to seek timely post-conviction relief. (Exhibit D)

When Petitioner advised Ms. Park that she filed the petition in the wrong court and that she should re-file in the district court, there was approximately six (6) months remaining on the 1 year limitation to file a timely petition. Ms. Park reassured him the petition would be filed. As he received a copy of ^{the} petition allegedly filed in the Nevada Supreme Court, he believed he would also receive a copy of the petition Ms. Park reassured him she would file in the district court. Unfortunately, he never received a copy because no petition was filed.

After his last conversation with counsel in January 2014, before the 1 year limitations had expired and he was assured the petition would be filed on time, all

Communication between Petitioner and retained counsel ceased to exist. However, he still maintained the belief the petition had been filed and pending resolution.

Frustrated from the lack of communication and waiting approximately one (1) year after the January 22, 2014 filing period had expired, on January 14, 2015, Petitioner received the "Case Summary" printed January 6, 2015, indicating the petition for writ of habeas corpus/post-conviction had never been filed in the district court. (Exhibit C)

In *Spitsyn*, 345 F.3d 796, after the court concluded that the conduct of his attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period, the court addressed the question of whether *Spitsyn* exercised reasonable diligence in pursuing the matter in attempting to file, after the extraordinary circumstances began, to determine if the causation between the extraordinary circumstances and filed petition is

unbroken. Id. at 802.

Here, in early January of 2015, when it was confirmed by the Nevada Supreme Court Docket Sheet printed December 31, 2014, that no petition for writ of habeas corpus had been filed, as Ms. Park left Petitioner to believe, (Exhibit D) he immediately made contact with the district court, only to discover on January 16, 2015, no petition had been filed (Exhibit C.)

Petitioner, upon discovering no petition had been filed, he exercised reasonable diligence in pursuing and filing the instant petition, therefore, the causation between the extraordinary circumstances and instant petition is unbroken. See Hathaway, 71 P.3d 503, (a petitioner can demonstrate good cause for the delay under NRS 34.726(1) if the petitioner filed a habeas corpus petition within a reasonable time of learning of the violation.)

Under the totality of the circumstances, retained counsel's actions, or lack thereof, were far outside the range

of representation that reasonably could be expected by Petitioner that may be considered "extraordinary"

Retained counsel (Ms. Park), did absolutely nothing to protect Petitioner's statutory right and interest to habeas corpus/post-conviction review. Such representation, or lack thereof, in accepting payment in full and not fulfilling her contractual obligation is so egregious and atypical that the court must consider it to be "extraordinary circumstances beyond Petitioner's control and made it impossible to file a petition on time. Thus, such misconduct is an "objective factor" that is "external" to the Petitioner that "cannot fairly be attributed to him." Manning, 224 F.3d 1135.

Wherefore, counsel's misconduct was an impediment which prevented Petitioner from complying with the procedural rule of NRS 34.726(1), to establish good cause and extraordinary circumstances to overcome the application of the procedural default rule of untimeliness.

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III. Actual Prejudice

NRS 34.726(1)(b), provides;

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

"[A]ctual prejudice" requires a showing 'not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the proceedings with error of constitutional dimensions.' *Hogan v. Warden*, 860 P.2d 710, 716 (Nev. 1993).

Here, Petitioner's actual prejudice of being denied the statutory right to seek post-conviction relief in a timely manner, stems directly from retained counsel's negligence and egregious misconduct in failing to file a timely petition. See *Manning*, 224 F.3d at 1135, (concluding that his attorney's actions, even though not constitutionally defective, prevented him from obtaining state post-conviction relief.).

In Mazzan v. State, 921 P.2d 920 (Nev. 1996), the court held that the court may excuse the failure to show cause where the prejudice from the failure to consider the claims amounts to a "fundamental miscarriage of justice." Id. at 922.

Here, as Petitioner has demonstrated the existence of extraordinary circumstances beyond his control that made it impossible to file a timely petition and to deny him the statutory right to seek post-conviction review, good cause exists to overcome the application of the procedural default rule of undue delay. Also, the dismissal of the petition as untimely, would only further promote the denial of Petitioner the statutory right to the habeas corpus proceedings, in which to hear his claims, would amount to a fundamental miscarriage of justice. Bennett, 81 P.3d 1.

Wherefore, with good cause appearing, the instant petition for writ of habeas corpus/post-conviction is properly before this Court for appropriate review.

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Ground One

Trial Counsel Was Ineffective
In Failing To Move To Excuse
Juror 602, Based Upon The
Juror Knowing The State's
Witness, In Violation Of The
Sixth And Fourteenth Amendment

The Nevada Supreme Court reviews claims of ineffective assistance of counsel under the "reasonably effective assistance" test under Strickland v. Washington, U.S. , 104 Sct 2052 (1984); adopted in Warden v. Lyons, 683 P.2d 504 (Nev. 1984).

Under Strickland, two components must be satisfied: (1) deficient performance, and (2) prejudice to the defense. Id.

Deficient Performance

Here, trial counsel was ineffective in failing to move to excuse Juror 602 for cause based upon personally knowing witness, Stacey Monroe.

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During jury selection, prospective juror 602 indicated that he knew one of the State's witnesses, Stacey Monroe, from high school. During the voir dire between juror 602 and the prosecutor, it was revealed juror 602 went to high school with Mr. Monroe and that Mr. Monroe was a prominent football star at Western High School, but he had not seen Monroe in over 20 years.

Juror 602 indicated his knowing Monroe would not affect his ability to listen to his [Monroe] testimony or effect what weight or value he would give to the testimony. Finally, juror 602 indicated that he could be fair to both sides.

In Ford v. State, 132 P.3d 574 (Nev. 2006), the Court concluded the the purpose of peremptory challenges is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias. Id. 581.

Here, trial counsel was ineffective in failing to challenge juror 602 for cause and use the third peremptory challenge to excuse juror 602 for bias.

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It would appear paradoxical for trial counsel, aware of the potential bias that juror 602 could have harbored, had by-passed on the opportunity to challenge juror 602 by waiving the third peremptory challenge. Without question, the third peremptory would have served a better purpose as a challenge for cause to excuse juror 602, instead of being waived.

During voir dire, juror 602 expressed a fascination with Mr. Monroe by reflecting upon Mr. Monroe being a prominent football star at Western High School, and being an acquaintance to Mr. Monroe. This fascination by juror 602 should have alerted counsel, that although juror 602 indicated him knowing Mr. Monroe would not affect what weight or value he would give to Mr. Monroe's testimony, to the potential bias, even if he could not prove any bias. Ford, 132 P.3d at 581.

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In Williams v Taylor, U.S., 120 S.Ct. 1479 (2000), the U.S. Supreme Court addressed a claim of juror bias and held:

"[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."

Id at

Here, trial counsel, despite juror 602's partiality towards Mr. Monroe, failed to address this juror with a single question on the issue of partiality or bias, and failed to move to excuse juror 602 from the jury pool, to at least, avoid the impression of impropriety. Without question, counsel's failure to use the peremptory challenge to challenge juror 602 for cause, has ultimately allowed a potentially bias or partial juror to sit on Petitioner's trial only to enhance the likelihood of a conviction.

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Prejudicial Effect

The prejudicial effect is irreparable to create unfair prejudice. Trial counsel's failure to challenge juror 602 for cause and move to have the juror excused, cannot be deemed a sound "tactical decision", when trial counsel elected to waive the third peremptory challenge instead of using it to excuse juror 602. In the least, counsel should have questioned juror 602 and lodged an objection to preserve the issue for appellate review. See *State v. Chastain*, 947 P.2d 57 (Mont. 1997) (counsel was ineffective for failing to explore and make additional inquiries concerning juror bias).

Trial counsel's actions, or lack thereof, amounts to deficient performance which "fell below an objectiveness of reasonableness" under the standards of *Strickland*, 104 S.Ct 2052, to create a prejudicial effect that completely undermines the reliability, confidence and outcome of the trial guaranteed

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by the Sixth and Fourteenth Amendment to the U.S. Constitution.

The mere fact that juror 602, a juror whom was potentially partial to Mr. Maurice's testimony, thus, bias to Petitioner, is enough, to question the reliability of the jury's verdict.

When considering the totality of counsel's failure to move to excuse juror 602 for cause and waive a valid peremptory challenge, extends a "reasonable probability" into an "actual probability" that, but for counsel's errors, the results of the trial would have been extremely different. Strickland, Supra; Wiggins v. Smith, 123 S.Ct 2527 (2003); Dawson v. State, 825 P.2d 593 (Nev. 1992).

As the conviction is a result of a violation to the Sixth and Fourteenth Amendment to the U.S. Constitution, such conviction must be set aside.

Relief is warranted

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Ground Two

Appellate Counsel Was Ineffective
In Raising Claims Of Ineffective
Assistance Of Counsel On Direct
Appeal And Insufficient Evidence
Based On Lack Of Corroboration
Where There Was No Accomplice
Testimony, In Violation Of The
Sixth And Fourteenth Amendment

The right to effective assistance of counsel extends to the direct appeal, *Evitts v Lucey*, 105 S.Ct 830 (1985); *Cuzdey v State*, 747 P.2d 233 (Nev. 1987). A claim of ineffective assistance of counsel on appeal is examined under the *Strickland*, 104 S.Ct 1052, standard.

Here, appellate counsel was ineffective in raising a claim of ineffective assistance of counsel on direct appeal and a claim of "corroboration", where no accomplice testimony existed.

I. Ineffective Assistance Of Counsel:

On direct appeal, appellate counsel raised the inappropriate claim of;

Defense Counsel Erred When He
Did Not Move To Excuse The
Juror Who Had Known A Witness

Appellate counsel, in presenting this argument, asserted "Defense Counsel did not question the juror on the subject, nor did Defense Counsel move to excuse the juror."

In Pelligrini v. State, 34 P.3d 519, 534 (Nev. 2001), the Court specifically held that ineffective assistance of counsel claims are inappropriate on direct appeal and should be raised solely in a post-conviction pleading. Id. 534

Here, appellate counsel knew, or should be charged with the duty of knowing that ineffective assistance of counsel claims are not cognizable on direct appeal. Therefore, the issue should not have been raised in such context on direct appeal.

In Burke v. State, 887 P.2d 267 (Nev. 1994), the Court went on to address counsel's ineffectiveness during the direct appeal process and concluded that a defendant in a direct appeal has a constitutional right

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to effective assistance of counsel. Id. at 268.

II. "Corroboration" Claim:

Appellate counsel claimed there was no corroboration between the evidence ~~the~~ and the witnesses to connect Petitioner to the offense, relying upon Heglemeier v. State, 903 P.2d 799 (Nev. 1995).

Unfortunately, Heglemeier, is only applicable to cases only where there must be corroboration of testimony of an "accomplice."

Here, as no accomplices testified in this case, appellate counsel knew, or is charged with the duty of knowing, that not only was Heglemeier not applicable, but that such argument had absolutely no chance of success on appeal simply because Petitioner did not have a co-defendant, thus, there is no accomplice for the necessity of corroboration.

As appellate counsel questioned the evidence to connect Petitioner to the offense, counsel should have challenged

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the sufficiency of evidence presented at trial under Jackson v. Virginia, 443 U.S. 307, 319-20, 99 S.Ct 2781 (1979), see also Origel-Candido v. State, 956 P.2d 1378 (Nev. 1998).

In Burke, *supra*, the Court specifically held:

"We have previously stated that we expect that appeals brought in this court will be pursued in manner meeting high standards of diligence, professionalism, and competence."

Id. 887 P.2d at 268

Here, appellate counsel did not present the direct appeal in a manner meeting high standards of diligence, professionalism and competence, in accordance with the Constitutional right to effective assistance of counsel on direct appeal, Evitts, 105 S.Ct 830 (1985). In all actuality, the direct appeal was doomed and destined to fail from the date it was filed because it contained two arguments that one,

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should have never been raised on direct appeal, and two, an argument based upon the wrong legal principle.

When considering the totality of the circumstances, it is obvious that appellate counsel had absolutely no form of experience in properly litigating a case on direct appeal. To add insult to injury, appellate counsel was retained to file the direct appeal, and represented to Petitioner that she was not only experienced in the appeal process, but had been successful in the Nevada Supreme Court on appeal. (Exhibit A)

Unfortunately, Petitioner learned the hard way that counsel, in fact, was not experienced and as a result, was denied adequate and meaningful appellate review on direct appeal resulting from a conviction stemming from a jury trial.

The prejudicial effects are obvious and astronomical to create irreparable prejudice as appellate counsel's ineffective assistance in failing to pursue the direct appeal in a manner of high standards of diligence, professionalism

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competence, and with a slight ray of hope of success, has ultimately deprived Petitioner of the opportunity to have adequate review of the evidence used to convict him by the Nevada Supreme Court.

Under *Evitts*, *supra* and the standards of *Strickland*, 104 S.Ct. 2052, appellate counsel's performance "fell below an objective standard of reasonableness," demonstrating deficient performance resulting in prejudice and but for counsel's errors, there is a reasonable probability that had Petitioner had competent appellate counsel to raise the appropriate assignments of errors, he would have succeeded on appeal and changed the results of the conviction.

Wherefore, as Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal, the conviction must be set aside.

Relief is warranted

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Conclusion

Wherefore, based upon the foregoing facts, Petitioner prays this Court will grant the petition in its entirety and vacate the conviction.

In the alternative, appoint counsel and conduct an evidentiary hearing to resolve the factual disputes presented therein. Grant any other relief deemed appropriate in these proceedings.

Dated this 4th day of May 2015


Lamar Harris

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Exhibit

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Original

Affidavit Of Lamar Harris

County of Clark) ss

State Of Nevada)

I, Lamar Harris, Petitioner, after being duly sworn, depose and states the following:

1. That I am over 18 years of age and can testify to the contents of this affidavit.

2. That I am the Petitioner/Defendant in Case No. C274370.

3. That the Pro Se, Petition For Writ of Habeas Corpus/Post-Conviction was prepared on my behalf by: Eric Douglas #50824, Legal Assistant, as I am uneducated in law.

4. That during my jury trial on August 30, 2011 through September 2, 2011, and through sentencing on November 21, 2011, I was represented by attorney Bret Whipple.

5. That in late November of 2011, or early December of 2011, I retained attorney Leslie Park, to represent me on direct appeal. There were also some

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discussion of Ms. Park representing me in the post-conviction proceedings if the appeal was not successful.

When Ms. Park was retained, she made representations to me that she was experienced in the appeal process and had been successful on appeal in the Nevada Supreme Court.

6. That when my direct appeal was denied December 13, 2012, I retained her (Ms. Park) to prepare; file a timely petition for writ of habeas corpus/post-conviction, and represent me in those proceedings.

When asked, Ms. Park reassured me of her experience in filing post-conviction petitions and had been successful in winning cases in the district court on post-conviction.

7. That when my direct appeal was denied December 13, 2012 and remittitur was issued January 22, 2013, I advised Ms. Park that "we" had a year, up until January 22, 2014, to get the post-conviction petition filed in the district court. Ms. Park advised me that my petition

would be filed on time.

8. That between December of 2012 and June of 2013, Ms. Park and I had discussed several issues of ineffective assistance of counsel to be raised in the petition.

In mid June of 2013, I received a "Petition for Writ of Habeas Corpus" bearing the heading of The Nevada Supreme Court. The attached Certificate of Mailing indicated the petition was mailed to the Nevada Supreme Court on June 6, 2013.

9. That in December of 2013, I made contact with Ms. Park and advised her of the fact that the petition for writ of habeas corpus/post-conviction was filed in the wrong court, as it should have been filed in the district court.

I expressed my concern to the fact of the one year deadline approaching to have the petition correctly filed in the district court on time, because "we" had already lost 6 months between June of 2013 and December of 2013, by sitting in the wrong court.

Ms. Park, recognizing the petition had to be filed with the district court no later than January 22, 2014, she assured me that my post-conviction petition would be re-filed on time.

10. That in January of 2014, I made contact with Ms. Park about my petition and she told me that she had already filed it with the Clerk of Court and that she would send me a copy of the filed petition.

By July of 2014, my attempts to contact Ms. Park were unsuccessful and I had not yet received a filed copy of the petition that was said to be filed in the district court.

Between July of 2014 and November of 2014, I had absolutely no form of communication with Ms. Park, as she refused to accept my "pre-paid" non-collect calls and refused to respond to all of my written correspondence. Also, I had not received a copy of the filed petition, said to be filed in the district court.

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11. That in early January of 2015, I wrote directly to the Clerk of Court inquiring about the status of my petition for writ of habeas corpus/post-conviction and whether or not Ms. Park actually filed the petition.

On January 6, 2015, the Clerk of Court printed a "Case Summary", to which I received on January 16, 2015, and it was then I discovered Ms. Park **did not** file my post-conviction petition in the district court as she was hired to do and assured me was done.

12. That in early January of 2015, I received the Nevada Supreme Court Docket Sheet (No. 59817), printed on December 31, 2014, and discovered that the "Petition For Writ of Habeas Corpus" bearing the heading of; "Nevada Supreme Court, State of Nevada", with Case No. 59817, and the "Certificate of Mailing" indicating the petition was mailed to the Nev. Sup. Court on June 6, 2013, to which Ms. Park mailed to me, had in fact, had never been filed with the Nev. Sup. Court.

This counterfeit petition was designed to, and caused me to believe she had filed a petition for writ of habeas corpus/post-conviction.

13. That from June of 2013, approximately six (6) months from the denial of my direct appeal of December 13, 2012, up until January 16, 2015, I honestly believed my retained attorney, Ms. Park had filed my petition in the New Sup. Court and then refiled in the 8th Jud District Court, within the 1 year time period to file a post-conviction petition.

Based upon the documents received by Ms. Park (although counterfeit) and her representations to me that she filed my petition (although lies), I had no reason not to believe her because I paid her for these services.

14. That had I known Ms. Park had not filed my petition in either court, within the 1 year period for filing a timely petition (January 22, 2013 and January 22, 2014), I would have filed my petition myself or retained new counsel to file the petition in a timely

manner.

However, because I honestly believed my petition had been timely filed, I had no reason to file a petition in proper person or with new counsel.

15. That this affidavit is true and correct to the best of my personal knowledge.

16. That affiant sayeth naught.

Dated this 15th day of February 2015

The foregoing affidavit is made pursuant to NRS 208.165, and made under penalty of perjury pursuant to NRS 208.165.

~~Lamar Harris~~
Lamar Harris #71088
S.D.C.C.
P.O. Box 208
Indian Springs, NV
89010

B

Exhibit

B

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LESLIE A. PARK, ESQ.
Nevada Bar No. 0008870
630 South Seventh Street
Las Vegas, NV 89101
P: (702) 382-3847
Attorney for Petitioner
LAMAR HARRIS

NEVADA SUPREME COURT
STATE OF NEVADA

LAMAR HARRIS.

Petitioner,

13.

STATE OF NEVADA,

Respondent

Docket no. 59817

PETITION FOR WRIT OF HABEAS CORPUS

(Post Conviction)

TO: CATHERINE CORTEZ-MASTO, STATE OF NEVADA ATTORNEY GENERAL
STEVE WOLFSON, CLARK COUNTY DISTRICT ATTORNEY

The Petition of LAMAR HARRIS by and through his attorney LESLIE PARK, ESQ., attorney for the above captioned individual, respectfully shows:

I.

POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to NRS 34.360, this petition is being filed to inquire into the cause of the unlawful restraint of liberty.

Based on the foregoing, the Petitioner has met the requirements of 34.360 for a post-conviction petition for a writ of habeas corpus.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF PETITIONER LAMAR HARRIS'**
3 **POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS**

4 **I.**

5 **INTRODUCTION**

6 Petitioner LAMAR HARRIS has filed in this Court a post-conviction petition for a writ
7 of habeas corpus requesting that this Court issue a writ of habeas corpus or grant him an
8 evidentiary hearing or such other relief as law and justice require.
9

10 **II.**

11 **BACKGROUND**

12 On November 21, 2011, Lamar Harris was sentenced inn the Eighth Judicial District
13 Court. He was convicted by a jury of Battery with use of a deadly weapon causing substantial
14 bodily harm.
15

16 The Court sentenced Mr. Harris to 70 to 175 months in the Nevada Department of
17 Corrections.
18

19 Subsequently an appeal was filed in this Court on July 2, 2012. That appeal was
20 denied.
21

22 **III.**

23 **LEGAL ARGUMENT**

24 **A. STANDARD FOR ISSUANCE OF A WRIT OF HABEAS CORPUS**

25 The remedy of habeas corpus is available to one that is unlawfully confined or
26 Restrained from liberty. NRS 34.360
27
28