**IN THE SUPREME COURT OF THE STATE OF NEVADA**

LAMAR ANTWAN HARRIS,
Petitioner,

-vs-

STATE OF NEVADA,
Respondent.

No.: 70679



# APPELLANT'S OPENING BRIEF

Steven B. Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
*Counsel for Respondent*

Matthew D. Carling
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
*Attorney for Appellant*

Adam Paul Laxalt
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
*Counsel for Respondent*

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## ROUTING STATEMENT

This matter should be assigned to the Court of Appeals pursuant to NRAP 17(b)(1).

## JURISDICTIONAL STATEMENT

NRAP 3, 3C, and 4 provide this Court with jurisdiction over this appeal from the *Findings of Fact, Conclusions of Law, and Order* the (the "**Dismissal Order**") entered on June 6, 2016 (attached as Addendum "A"), wherein the *Petition for Writ of Habeas Corpus (Post-Conviction)* (collectively the "**Petitions**") filed by Lamar Antwan Harris ("**Harris**") was denied by the Honorable Carolyn Ellsworth, District Judge.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I. THE TRIAL COURT ERRED IN DISMISSING HARRIS' PETITIONS FOR HABEAS RELIEF BY FAILING TO ESTABLISH "GOOD CAUSE" TO EXCUSE THE TIME BAR CONTAINED IN NRS 34.726(1).**

**II. THE TRIAL COURT ERRED IN FINDING HARRIS' OTHER ISSUES IN THE PETITIONS LACKED MERIT AND/OR WERE PROCEDURALLY DEFAULTED.**

## SUMMARY OF THE ARGUMENT

Harris was convicted of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. Harris retained Leslie Park ("**Park**") to represent him on his direct appeal challenges to the sufficiency of the evidence and ineffective assistance of trial counsel. The appellate court indicated Park had

misinterpreted case law, noted that ineffectiveness claims needed to be raise by habeas corpus proceedings, and affirmed the conviction. Harris retained Park for filing a petition for writ of habeas corpus. Park prepared a petition and certificate of service, which she signed, dated and sent to Harris, a copy of which was provided to the trial court in these proceedings below. Harris assumed the petition had been filed with the district court. After receiving no response over the next six (6) months regarding the alleged filing of his petition, Harris investigated and learned that Park mistakenly filed the petition in the appellate court. He immediately informed Park, who indicated she would refile the petition in the proper court. Several months passed with Harris awaiting word on any response to his petition—Park had not contacted him and had refused to take his pre-paid non-collect calls or respond to his written correspondence. The one-year deadline contained in NRS 34.726(1) for petitions for writ of habeas corpus passed with Harris believing he had met such deadline. Harris did not know Park had not refiled the petition in the district court and let the time bar expire.

Harris filed his pro se Petition on March 11, 2015, after the one-year deadline set forth in NRS 34.726(1). Counsel herein was appointed and raised the challenge in a supplemental petition that counsel's ineffectiveness could reach the "good cause" standard to excuse the procedural bar contained in NRS

34.726(1). Harris argued Park's ineffectiveness constituted an impediment external to Harris that prevented him from complying with the time bar.

In addition to arguing the time bar issue, Harris raised a challenge to his trial counsel's performance for failing to excuse a juror who personally knew one of the witnesses. Harris additionally challenged that trial counsel and/or appellate counsel were ineffective for failing to constitutionally challenge the prosecution's request to elicit speculative and unsupported testimony regarding out-of-court intimidation towards the witnesses.

The Dismissal Order entered on June 6, 2016, wherein the Petitions filed by Harris were denied by the Honorable Carolyn Ellsworth, District Judge. The district court denied the Petitions indicating Harris had failed to establish an impediment external to the defense, and his Petitions were without merit. APP886.

## STATEMENT OF CASE

On May 2, 2011, a *Criminal Complaint* was filed in the justice court where Harris was charged with one count of Attempt Murder with Use of a Deadly Weapon, a felony; and one count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, a felony. APP5. On May 25, 2011, during an initial arraignment, Harris was advised of the charges pending

before him, waived the reading of the *Criminal Complaint*, and a preliminary hearing was scheduled. APP4.

On June 22, 2011, a preliminary hearing was held, during which the justice court found that the State had met their burden and Harris was bound-over to the district court as charged. APP3. On June 24, 2011, the State filed an *Information* charging Harris with one count of Attempt Murder with use of a Deadly Weapon, a felony; and one count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, a felony. APP20-21.

On August 19, 2011, the State filed a *Notice of Motion and Motion to Admit Testimony*, in which the State requested that the court admit prior preliminary testimony for those subpoenaed witnesses who failed to appear at trial given that the State could establish a good faith effort to locate those said witnesses. APP93-97. On August 25, 2011, Bret Whipple ("**Whipple**"), counsel for Harris, filed the *Defendants Opposition to State's Motion to Admit Prior Testimony* wherein Harris argued that the State had failed to establish a good faith effort in determining any witnesses to be unavailable. APP107-111. Also on August 25, 2011, the State filed *Material Witness Warrants* to secure the presence of the witnesses Michael Thomas ("**Thomas**") and Tamara Kasper ("**Kasper**"). APP113-139. The *Material Witness Warrants* were approved and signed by the court. *Id.*

The State filed thirty-four (34) jury instructions on September 1, 2011. APP141-171. The verdict form was filed on September 2, 2011, which indicated that juror members found Harris guilty of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. APP179. The *Judgment of Conviction* was filed on December 2, 2011, which indicated that Harris had been sentenced to the Nevada Department of Corrections to serve a maximum of one hundred seventy-five (175) months with a minimum parole eligibility off seventy (70) months; with one hundred eighty-two (182) days credit for time served for his conviction of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. APP181. Additionally, Harris was ordered to pay an administrative assessment fee in the amount of twenty-five ($25) dollars, and a DNA analysis fee in the amount of one hundred fifty ($150) dollars. *Id.*

On December 8, 2011, Whipple filed a *Substitution of Counsel* indicating that Whipple had been replaced by Leslie Park ("**Park**") as counsel of record for Harris' direct appeal. APP182. On December 28, 2011, Park filed an *Affidavit of Financial Condition* and accompanying *Ex Parte Motion for Authorization of Payment of Fees for Trial Transcripts* requesting authorization for payment of fees for trial transcripts as Harris is indigent and unable to pay for the transcripts. APP183-188. On March 14, 2012, the district court signed

the *Ex Parte Order Granting Payment of Fees for Trial Transcript* authorizing Harris to request transcripts at the state's expense. APP190.

On July 5, 2012, the *Criminal Order to Statistically Close Case* was filed, in which the clerk of the court was directed to statistically close Harris' case for the reason of a conviction obtained at trial. APP715. The Nevada Supreme Court issued its *Order of Affirmance* on December 13, 2012. On January 22, 2013, the Court then issued its *Remittitur*. APP720.

On January 20, 2015, Harris filed a *Motion to Withdraw Counsel* requesting that he be granted permission to withdraw Park as present counsel. APP721. On March 11, 2015, Harris filed his pro se Petition alleging ineffective assistance of counsel in the untimely filing of such petition, together with other challenges to trial counsel's ineffectiveness was. APP727. Also on March 11, 2015, Harris filed his *Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing*, wherein he sought for the appointment of counsel to help him "factually develop and adequately present his claims." APP737-738.

On March 19, 2015, the court filed its *Order for Petition for Writ of Habeas Corpus*, indicating that the court had reviewed the petition and ordered the State to respond within forty-five (45) days. APP815. On April 4, 2015, the court granted Harris' motion for permission to withdraw Park. APP817.

On May 8, 2015, the State filed their *Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel and Request for Evidentiary Hearing*, arguing that pursuant to NRS 34.726, Harris' petition is time barred and should be dismissed. APP821. The State also argued that Harris failed to establish good cause to overcome the time bar and that Harris failed to demonstrate prejudice. APP822-826. The State further argued that Harris was not entitled to appointment of counsel in post-conviction proceedings. APP826.

The court filed an *Order of Appointment* on June 24, 2015, ordering that Matthew Carling ("**Carling**") be appointed to represent Harris. APP830. On June 27, 2015, Carling filed a *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* (the "**Supplement**") arguing that Park's ineffectiveness provided a substantial reason for "good cause" to excuse the procedural default and that his Petitions should not be time barred. APP841-855. The Supplement further argued that trial counsel was ineffective for having failed to excuse a juror who personally knew one of the witnesses, and that trial counsel and/or appellate counsel were ineffective for failing to constitutionally challenge the prosecution's request to elicit speculative and unsupported testimony regarding out-of-court intimidation towards the witnesses. *Id.*

On August 12, 2015, the State filed its *Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, arguing Harris' Petitions were time barred and should be dismissed. APP856. The State argued that an impediment external can be based on a factual or legal basis not being available to counsel or some interference by officials that made compliance impracticable. APP0859. The State argued "any delay in filing must not be the fault of the defense." *Id.* The State's position was that, since Harris did not have a right to effective assistance of counsel in post-conviction proceedings, he cannot complain of errors made by his retained counsel during or at the inception of them. It stated, "the actions of post-conviction counsel simply cannot form the basis for" the "good cause" to excuse the procedural bar. The State faulted Harris for not following up to verify the filing. APP0860. As to his other claims, the State argued that they were without merit since Park's misinterpretation of case law on the appeal caused no prejudice because the appeal found there was sufficient evidence to support the verdict. APP0862. The State argued that a prospective juror's familiarity with a witness does not require excusing that juror where the juror unequivocally states they will remain impartial. *Id.*

Harris filed his *Petitioners Reply on Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* on September 9, 2015. APP865. Harris

argued therein that Park's failure to file the petition timely in the correct court was not being raised under an ineffectiveness analysis for purpose of habeas relief, but rather only under a "good cause" analysis for purpose of excusing the time bar—two separate and distinct analyses. Harris was not attempting to stack petitions, as is discouraged by precedent under *Brown* to avoid contravening the single post-conviction allowance, but only to have his ***first*** petition heard. Harris noted that the court had bifurcated the time bar issue from the others and so Harris had presented other issues only for the purpose of evidencing prejudice in denying the issue to excuse the time bar. Harris anticipated further briefing on those issues and the ones raised in Harris' pro se Petition if the time bar was excused. APP 0872-3.

On September 19, 2015, Harris filed his *Notice of Motion and Motion for Reconsideration of Denial of Petition for Writ of Habeas Corpus (Post-Conviction)* arguing that the evidence respecting the time bar was not contained in the record and thus not belied by the record. APP878;APP882. Harris argued that an evidentiary hearing was required to place the matters on the record. APP882. For this reason, Harris sought reconsideration affording Harris an evidentiary hearing prior to determination.

The *State's Response to Defendant's Motion for Reconsideration of Denial of his Post-Conviction Petition for Writ of Habeas Corpus* was filed on

October 2, 2015, arguing that Harris was attempting to "judge shop" because a senior judge had entered the Dismissal and another district judge would have to hear the reconsideration. APP890-1. The State argued no new evidence was raised warranting reconsideration. *Id.* The response argued that Harris had not proven he was entitled to an evidentiary hearing or relief on the factual allegations he raised. APP892.

Harris filed his *Reply to State's Response to Motion for Reconsideration of Denial of Petition for Writ of Habeas Corpus (Post-Conviction)* on October 12, 2015. APP895. Harris argued that he was unaware until he appeared that a senior judge would be sitting on the case, and it was apparent that such senior judge had not read the reply on the Petitions since the judge did not articulate any reasoning pertaining to the novel "impediment external to the defense" theory raised by Harris to allow counsel's errors to rise to "good cause" to excuse the time bar. Harris argued that the issues raised were not belied by the record, remained outside the record, and thus required an evidentiary hearing. APP897.

An evidentiary hearing was held December 8, 2015, on the Petitions. Thereafter, the *Findings of Fact and Conclusions of Law on Defendant's Petition for Writ of Habeas Corpus* (previously defined as the Dismissal Order *supra)* was filed and signed by district court judge Carolyn Ellsworth on June 6,

2016, granting the State's request to dismiss Harris' petition and the writ discharged. APP911-918. The Dismissal Order concluded that Harris maintained "no constitutional or statutory right to counsel in his post-conviction proceeding," citing *Brown v. McDaniel*, 130 Nev. Adv. Op. 60, 331 P.3d 867, 870 (Nev. 2014). APP917. In paragraph 54, the Dismissal Order quotes *McKague v. Whitley* stating "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel." *Ibid.*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) It then interpreted this law to conclude that Harris was "precluded from relying upon a claim of ineffective assistance of counsel to show good cause to excuse the procedural default of his Pro Per Petition." APP917. The Dismissal Order continued that Harris had "not presented any other impediment external to the defense for a finding of good cause." It further found that the other claims "were available to [Harris] at the time the remittitur issued and are thus procedurally defaulted themselves." APP917.

On June 22, 2016, Harris filed his timely *Notice of Appeal* to the Nevada Supreme Court from the Dismissal Order. APP923. The *Case Appeal Statement* was filed on June 22, 2016. APP926.

## STATEMENT OF THE FACTS

### A. Preliminary Hearing – June 22, 2011

On June 22, 2011, Harris was before the justice court for a preliminary hearing. APP35. The State called Kasper as their first witness. *Id.*

**1. Direct-examination of Kasper**

On April 25, 2011, Kasper was at the Seven Seas bar having a drink with friends. APP36. While at the Seven Seas bar, Kasper witnessed an altercation occur when Darnella Lay ("**Darnella**") attempted to get past Harris. *Id.* Kasper could not re-call informing officers in her initial statement that Harris had punched Darnella several times in the face. APP37. Kasper knew who Harris was; however, she did not know him on a personal level. *Id.* Kasper could not re-call her statement to police about where she first the knife nor that she so an individual get stabbed. *Id.* Kasper held a towel on the victim's chest after he was stabbed. APP38. Kasper identified the photograph's marked as State's Exhibit 1 and 2, as the male she knew as Thomas. APP39. Kasper identified that she observed the stab wound to Thomas' chest on Exhibit 1. *Id.* Kasper did not recognize the stab wound to Thomas' face in Exhibit 2. *Id.* The State moved to admit Exhibit 1. *Id.* Whipple requested that he be allowed to vior dire Kasper. *Id.*

**2. Vior Dire of Kasper by Whipple**

Kasper verified that she observed the stab wound contained in the photo on Exhibit 1. *Id.* Kasper testified that she did not know how the stab wound had occurred or who had caused the wound. *Id.* Whipple objected to the

admission of Exhibit 1 based upon foundation. *Id.* The justice court admitted Exhibit 1. *Id.*

**3. Direct-examination of Kasper continued**

Kasper did not re-call informing officers in her statement whether Thomas had a weapon. *Id.* Kasper did not witness the stabbing that occurred outside of the Seven Seas. *Id.* Kasper could re-call giving the police a statement; however, she could not whether it was taped or what she had said. *Id.* Kasper could not re-call the photo line-up where she identified Harris marked as State's Exhibit 3. APP40.

**4. Cross-examination of Kasper**

Kasper verified that she did not observe what occurred outside. APP41. Kasper testified that the only way she would have gained her information was from what she had heard other people say. APP42. Kasper testified that when she wrote the statement on her photo line-up she was going off what she had heard. *Id.*

**5. Re-directed examination of Kasper**

At the time her statement was given, Kasper did not tell the police her statement was based on what she had heard from others. *Id.* The State called Darnella as their next witness. *Id.* The State requested that the exclusionary rule be invoked based upon the fact that Darnella was scared to testify. *Id.* The justice court denied the State's motion to invoke the exclusionary rule. APP43.

**6. Direct-examination of Darnella**

On April 25, 2011, Darnella was at the Seven Seas bar when she got into a fight with another girl over the girl's boyfriend. APP44. Darnella pushed Harris and the other girl while attempting to get her purse. *Id.* Harris then pushed Darnella over a bar stool. *Id.* Darnella got up and hit Harris. *Id.* Harris' girlfriend then threw a Heineken bottle at Darnella, which did not hit her. *Id.* Darnella and the other girl met outside and started fighting. APP45. While Darnella was fighting with the other girl, Harris hit her. *Id.*

Darnella saw Thomas at the Seven Seas bar and knew Thomas, as a friend of her father's. *Id.* When Darnella was still inside the bar, Thomas stepped in between her and Harris. *Id.* After the fight was over outside, Darnella saw Thomas hold his chest. *Id.* Darnella testified that she did not know how Thomas got the injury to his chest. *Id.* During her initial statement to the police, Darnella informed them that she thought she saw Harris with a weapon, a knife. APP46-47.

**7. Cross-examination of Darnella**

Darnella testified that she felt like she was being pressured by several people including the detective. APP47.

**8. Re-direct examination of Darnella**

Darnella testified that she referred to being pressured because she felt that if she did not say the right thing, she would go to jail. APP48. Darnella testified

that she had been told if she did not testify, she would go to jail until she did testify. *Id.* The State next called Detective Michael Fletcher ("**Fletcher**") as their next witness. *Id.*

**9. Direct-examination of Fletcher**

Fletcher was employed with the Las Vegas Metropolitan Police Department. *Id.* On April 25, 2011, Fletcher was assigned to investigate a stabbing that had occurred at the Seven Seas bar. *Id.* Fletcher interviewed Thomas at the hospital. *Id.* While interviewing Thomas, Fletcher observed an injury to his face and chest. APP49. Throughout the course of the investigation, Fletcher determined that Harris was a suspect. *Id.* Fletcher presented photo line-ups to several witnesses. *Id.* Fletcher identified State Exhibit 5 as the transcript for the interview with Kasper. *Id.* The State moved for the admission of Exhibit 5. *Id.* Whipple's request to voir dire Fletcher was granted. *Id.*

**10. Voir Dire of Fletcher by Whipple**

Fletcher did not conduct the initial interview with Kasper. APP50. Fletcher did interview Kasper when he presented her with a photo line-up. *Id.* Fletcher did not speak with Kasper at all on April 25, 2011. *Id.* Fletcher verified that he did not conduct the audio interview with Kasper. *Id.* The audio interview was conducted by Detective Carter, who then placed the audio on the bureau network drive to be transcribed. *Id.* Once the interview had been

transcribed, Fletcher received a copy. *Id.* Whipple objected based on lack of chain of custody from when the interview was taken by another officer, transcribed, and the transcript provided to Fletcher. *Id.*

**11. Direct-examination continued**

Fletcher identified State's Exhibit 3 and 4 as photo line-ups shown to Kasper and Darnella. APP51-52. The court admitted the State's Exhibit 3 and 4. *Id.*

**12. Cross-examination of Fletcher**

Fletcher knew Darnella from the investigation. APP53. Fletcher saw Darnella outside the courtroom and told her she was a witness and that her testimony was necessary to the investigation and that her life had been saved by the victim. *Id.* Fletcher told Darnella to testify truthfully. *Id.* After argument from counsel, the justice court found there was marginal evidence based upon the *Complaint* and bound Harris over to district court for further proceedings. APP54.

**B. Jury Trial – August 30 – September 2 , 2011**

On August 30, 2011, Harris was before the court for a jury trial. APP192. Outside the presence of the empaneled jury, Harris confirmed that he had rejected the State's offer. APP344. The State also indicated that their previously filed motion to admit prior testimony was moot due to the witnesses been serviced subpoenas. *Id.* After some discussion in regards to Harris'

moniker, the court allowed witnesses to make reference to Harris' moniker as long as they did not associate it with a gang moniker. APP337. The court heard argument as to the relevance of Harris' gang affiliation coming out through witness testimony. APP338. The court ruled that no witnesses are allowed to use the word "gang" because it would be prejudicial to Harris. APP345. After opening statements were given to the jurors. The State called Darnella as their first witness. APP374.

**1. <u>Direct-examination of Darnella</u>**

Darnella was at the Seven Seas bar on April 25, 2011, where she saw Thomas. APP375. Darnella knew Thomas who was a friend of her fathers. APP376. Darnella also saw Kasper at the Seven Seas. APP377. Darnella knew Kasper and used to do her hair. *Id.* Darnella also knew that Kasper was employed at the Seven Seas; however, on April 25 Kasper was at the bar on her own. APP377-378. Darnella left her purse with Kasper when she went out on the dance floor. APP378. After she finished dancing, Darnella went to retrieve her purse. *Id.* Darnella got into an altercation with Harris. *Id.* Harris pushed her over a barstool. *Id.* When Darnella got off the floor, she started swinging and hit Harris. APP382. After hitting Harris, Darnella was escorted outside by security. *Id.* Darnella spoke with Thomas outside and explained to him that

she was attempting to get her purse. APP384. Darnella eventually went back inside the bar to retrieve her purse. *Id.*

Once Darnella was back inside the bar, Harris' girlfriend threw a glass bottle at her. APP385. Darnella then told Harris' girlfriend to meet her outside and walked out of the bar. APP386. An altercation ensued again and Darnella began fighting with a girl. Harris soon joined in and hit Darnella in the face. APP388. Darnella could not recall observing Thomas approaching Harris nor Thomas speaking with Harris. APP389. Darnella could recall giving the police a statement where she named Harris as the male she got into an altercation with. APP390. Darnella testified that she did not know Harris, was not positive that Harris was the individual she got into a fight with and did not see a weapon. APP390-391. Darnella was previously shown a photo line-up where she identified Harris. APP391.

Darnella did not want to testify because she felt she had no protection outside of the courtroom. APP392. After Darnella testified at the preliminary hearing, she received phone calls where she was told that she was a snitch and if she testified she would be killed. APP394-395. After having received two phone calls, Darnella changed her phone number. APP396. Darnella testified that she left the bar after she saw that Thomas had been stabbed. APP402. During the fight, Darnella lost some jewelry and broke a few nails. APP405.

Darnella identified Harris in the courtroom as the individual who she fought with at the bar. APP407.

**2. Cross-examination of Darnella**

Darnella testified that she was legally old enough to drink; however, she was not twenty-five (25) years old which was the required age to be allowed into the Seven Seas bar. APP409. Darnella "bumped" Harris as she attempted to retrieve her purse. APP410. Darnella testified that she had had several drinks and being intoxicated affected her ability to remember what happened that night. APP413. Darnella did not know what Harris did while outside the bar, never saw a knife, nor Harris stab anyone. APP414. Darnella had no personal knowledge of Harris and was only able to identify him from talking about the incident with other people. APP415.

**3. Re-direct examination of Darnella**

Darnella testified that she was intoxicated on that night even though she told the officers in her statement that she had very little to drink. APP417. Darnella also testified that she did not know who had a knife. *Id.* Darnella testified that she did not know if Harris was the individual who was at the bar or had a knife. APP418.

**4. Re-cross examination of Darnella**

Darnella had conversations with the State prior to testifying. *Id.* During those conversations, Darnella was told she would be held in contempt and arrested until she testified. APP419. This made Darnella scared. *Id.* The State called Shelly Shrum ("**Shrum**") as their next witness. APP420.

**5. Direct-examination of Shrum**

Shrum was a senior crime scene analyst for the Las Vegas Metropolitan Police Department. APP421. On April 25, 2011, Shrum responded to the Seven Seas bar. APP422. Upon arrival at the bar, Shrum spoke with initial officers, walked around the scene and took photos. *Id.* Shrum also took four (4) different swabs of blood from various areas along the blood trail. APP433.

**6. Re-direct examination of Shrum**

Shrum took photographs and collected evidence. APP434. Shrum tested the blood samples as a confirmatory, meaning if it was actually blood. *Id.* The four samples collected tested positive for the presence of blood. *Id.* The State's next witness was Kasper. APP439.

**7. Direct-examination of Kasper**

Kasper was employed as a bartender at the Seven Seas bar. APP440. Kasper would go to the bar on her days off to socialize. *Id.* On April 25, 2011, Kasper was at the Seven Seas drinking. APP441. Kasper testified that an altercation occurred when Darnella get into a yelling match with Harris.

APP442. Kasper stepped in the middle of Darnella and Harris to break-up the fight. *Id.* Kapser knew Harris from the bar and identified him in court. APP444. Kasper did not view the fight that had occurred outside. APP446. Kasper held a towel to the stab wound on Thomas' chest. APP451. Kasper was extremely intoxicated that night and could not recall providing a taped statement to officers. APP452. Kasper testified that she did not view the altercation outside the bar even though her prior statement to the police indicated that she did. *Id.* Kasper did not want to testify and get involved. APP456.

**8. Cross-examination of Kasper**

Kasper verified that she did not witness Thomas getting stabbed and made a huge mistake in her initial statement that she saw the altercation. APP471. Kasper did not want to be in court testifying. *Id.* The State then called Officer Jason Vallad ("**Vallad**") as their next witness. APP497.

**9. Direct-examination of Vallad**

Vallad was a patrol officer with the Las Vegas Metro. APP498. On April 25, 2011, Vallad responded to the Seven Seas bar. *Id.* Upon arrival, Vallad observed Thomas with blood on him. APP499. Vallad separated witnesses and taped off the scene to preserve evidence. APP500. Vallad spoke with Kasper who provided a nickname for Harris. APP502. Vallad had Kasper

prepare a written statement. APP504. Vallad testified that Kasper was not intoxicated that night. APP505. Vallad testified that Kasper hesitated about writing a statement and told her only to write down what she observed. APP507.

**10. Cross-examination of Vallad**

Vallad could not recall exactly when the call came in for him to respond to the Seven Seas. APP508. Vallad confirmed he made contact with Kasper and believed she was not intoxicated; however, he did not perform a breathalyzer or blood test. APP509.

**11. Re-direct examination of Vallad**

Vallad was shown his CAD call as well as the call log sheet which indicated that he arrived at the Seven Seas at 1:56 a.m. APP510. The State called Jocelyn Boston ("**Boston**") as their next witness. APP515.

**12. Direct-examination of Boston**

Boston was at the Seven Seas drinking on April 24, 2011. APP516. Boston knew Harris and identified him in court. APP517. Boston saw Kasper at the bar but never saw her drinking. APP518. Boston saw a bar fight begin and left. APP519. Boston testified that it looked like Harris was getting "jumped." APP520.

**13. Cross-examination of Boston**

Boston verified it looked like Harris was getting "jumped." APP525. The State called Thomas as their next witness. APP526.

**14. Direct-examination of Thomas**

Thomas was familiar with the Seven Seas and had been there before. APP 527. Thomas went to the Seven Seas in April where he was injured and ended up in the hospital. APP528. Thomas knew Darnella and saw her for a brief second at the bar. APP531-532. Thomas recalled a scuffle with security guards occur inside the bar. APP533. Thomas was not involved in the scuffle and was dancing when it occurred. *Id.* Thomas could not recall how he got injured and thought he may have slipped on some glass. *Id.* Thomas vaguely re-called a taped interview with police. APP534. Thomas did re-call writing a statement. *Id.*

**15. Cross-examination of Thomas**

Thomas did not know who stabbed him. APP539. Thomas had been drinking all day and night and drank an eighteen (18) pack. APP540. Thomas asked Darnella what Harris was wearing and what he looked like. APP541. Thomas heard a fight beginning to occur, turned around and saw girls arguing and throwing stuff back and forth. APP542. The only weapons that Thomas saw that night belonged to the security guards. APP543. Thomas did not see

Harris with a weapon. APP544. The State called Stacy Monroe ("**Monroe**") as their next witness. APP562.

**16. Direct-examination of Monroe**

Monroe was employed at the Seven Seas bar as a bartender. APP563. On April 25, 2011, Monroe was at the bar socially. APP563-564. Monroe observed two females arguing and then a bottle was thrown right above his head. APP564. Monroe could not re-call the details contained within the statement that he gave to officers. APP568. Monroe walked over to Harris to speak to him and Harris motioned toward his waistband. APP569. When Monroe saw this he backed off. *Id.* Monroe eventually went outside and observed Thomas bleeding. APP570. Monroe was not outside when Thomas was stabbed. *Id.* Monroe observed Thomas bleeding from his chest and face. *Id.*

**17. Cross-examination of Monroe**

Monroe testified that he saw Thomas bleeding not Darnella. APP576. Monroe was not positive who was involved in the altercation. APP579. Monroe did not see any weapons. *Id.*

**18. Re-direct examination of Monroe**

Monroe recognized Harris in the photo line-up he had been shown by officers. APP581. Monroe identified Harris in the courtroom. *Id.*

**19. Re-cross examination of Monroe**

Monroe saw Harris inside the bar. *Id.* He never saw Harris outside of the bar. *Id.* The State called Fletcher as the next witness.

**20. Direct-examination of Fletcher**

Fletcher was employed as a detective with the Las Vegas Metropolitan Police Department. APP582. On April 25, 2011, Fletcher was called out to investigate a stabbing at the Seven Seas bar. APP583. Upon arrival, Fletcher received briefing from patrol officers and was given Harris' name as possible person who was involved. APP585. Fletcher obtained the surveillance video. APP587. Fletcher conducted a taped interview with Thomas at the hospital. APP589. Fletcher presented photo line-ups to Monroe, Kasper, and Darnella. APP592.

**21. Cross-examination of Fletcher**

Fletcher identified the initial suspect as Harris. APP600. Fletcher confirmed that a person is not guilty of a crime for being named a suspect. APP601.

The State rested. APP623. The defense called no witnesses and rested. APP632. The district court heard closing statements. APP640-699. After deliberation, the jury found Harris to be guilty of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. APP706. The guilty verdict

was unanimous. APP707-709. Harris sentencing was scheduled for November 7, 2011, and Harris was remanded without bail. APP710-711.

**C. Hearing: Time Bar on Writ – September 16, 2015**

Harris was not present for a hearing in regards to the time bar on writ issue. APP886. The district court indicated that they have read Harris' supplemental as well as the State's response. *Id.* Carling addressed the district court stating that he filed a reply arguing that prior counsel's behavior and/or performance was an impediment to Harris and that good cause existed to excuse the filing of the petition after the one (1) year mark. *Id.* The State argued the petition is time barred. *Id.* The district court agreed with the State that Harris' petition was time barred. *Id.* The district court denied the writ because Harris failed to establish an impediment external to the defense, and his petition was without merit. *Id.*

**D. Hearing: Time Bar on Writ – December 8, 2015**

On December 8, 2015, Harris was before the court for a hearing concerning the time bar on the writ. APP932. Carling indicated that Harris would be waiving his attorney-client privilege. *Id.* Carling called Park as his first witness for defense. *Id.*

**1. Direct-examination of Park**

Park was not retained to file a post-conviction petition for writ of habeas corpus, rather was retained to do the appeal. *Id.* Park prepared a "bare bones" post-conviction petition for writ of habeas corpus when Harris had asked what she would argue in the writ. *Id.* Park sent the "bare bones" writ to Harris for review, however, needed to be paid the remainder of the fee for the writ. *Id.* Park identified Defense Exhibit A as the "bare bones" writ. APP934. Park testified the writ was never filed because she had not been paid to file the writ. *Id.* After Park sent Harris a copy of the "bare bones" writ, she could not recall whether she had spoken with Harris and was not positive that she actually saw him in person again. *Id.* Park never filed the writ with the Nevada Supreme Court nor the District Court. APP935. Park testified that she never filed the writ. *Id.*

**2. <u>Cross-examination of Park</u>**

Park testified that Harris never paid her in full for his appeal and that to this day he still owed her money. *Id.* Park never filled out a fee agreement nor was paid. APP936. Park discussed with Harris and his wife the necessity of needing to be paid. *Id.* Park verified that she had expressed to Harris that she had filed the appeal but never the writ. *Id.* Park testified that the "bare bones" writ was more of an outline and would need more information to actually be

filed. *Id.* Park testified that she was never approached by Harris or his wife to actually file the writ. APP937.

**3. Re-direct examination of Park by Peter Thunell ("Thunell")**

Park was not positive if she had ever prepared a post-conviction writ of habeas corpus before. *Id.*

**4. Park questioned by the court**

Park verified that her handwriting and signature was on the writ. *Id.* Park could not recall why she would have signed the writ if she did not intend to file it. *Id.* The certificate of mailing was only for purposes of mailing to Harris. APP938. The certificate of mailing mentioning the Nevada Supreme Court and the Attorney General was just the "bare bones" general writ outline. *Id.*

**5. Further questions by Thunell**

Park spoke with Harris' wife in her office on more than one occasion in relation to be paid. *Id.* Even after Park had prepared the "bare bones" writ, she informed Harris the writ had not been filed and she needed to be paid. APP939.

**6. Park questioned by the court**

Park verified that she had a copy of the fee agreement that specifically stated for appeal. *Id.* Park testified that Harris' wife signed the fee agreement. APP940. Park spoke with Harris regarding his wife signing the fee agreement. *Id.* Carling called Harris as the next witness for defense. APP941.

**7. <u>Direct-examination of Harris</u>**

Harris retained Park for his appeal. APP942. Harris spoke with Park about filing a post-conviction writ of habeas corpus after the appeal process was completed. *Id.* After receiving the remittitur in January 2013, Harris spoke with Park indicating he wanted to file the writ. *Id.* It was Harris' understanding that the whole process would cost eight thousand ($8,000) dollars and that Park was paid half the retainer fee. *Id.* Harris confirmed that he had been incarcerated since 2011. APP943. Harris verified that he received the writ marked as Defense Exhibit A. *Id.* After reading through the writ, Harris was under the impression that Park had filed it because that is what had been discussed. *Id.* Harris learned that the writ had been filed in the wrong court and spoke with Park about it. APP944. Harris never received another copy of the writ after June 6th, 2013, nor a copy with a district court case number. *Id.* Harris attempted to contact Park but was unsuccessful. APP945. Park never visited Harris in prison. *Id.*

In early 2014, Harris realized that the writ had never been filed APP946. Harris confirmed that he had given Park half of the money. APP 947. Harris wrote letters to both the Supreme Court and the district court inquiring into the status of his case. *Id.* Harris received a response from the district court indicating that nothing had been filed. *Id.* Harris then filed his own writ in the

district court. APP948. Harris was not positive when the deadline was to have filed the writ. *Id.*

**8. Cross-examination of Harris**

Harris called periodically to find out whether the writ had been filed. *Id.* After receiving the writ, Harris spoke with Park informing her it was in the wrong court. APP949. Park indicated to Harris that she would fix the problem. *Id.* Harris testified that Park never told him that she needed to be paid in full. *Id.* Harris said payment was never an issue because he was paying Park as they went along. APP950. Harris testified Park never asked him about money. *Id.* Harris did not initially look into the writ because he was waiting on a response. APP951. During 2014, Harris had no contact with Park and she was never paid in full. APP952. Harris testified that as of the current date, Park had never been fully paid. APP953.

**9. Harris questioned by the court**

Harris wrote letters to the Supreme Court and district court inquiring about his case. APP954-955. Harris confirmed that he received letters back. *Id.* Harris confirmed that the petition was not in his handwriting; however, he helped his friend prepare it. APP 957. Harris' wife delivered cash to Park for payment. APP958.

**10. Further re-direct examination of Park**

Park verified that she had received four thousand ($4,000) dollars in cash on behalf of Harris. APP960. The total retainer was eight thousand ($8,000) dollars. *Id.*

**11. Re-cross examination of Park**

Park had not received additional funds when she had drafted the "bare bone" writ. *Id.* The four thousand ($4,000) payment Park received was before anything with the case had happened. APP961. Park had a conversation with Harris' wife while Harris was on the phone about needing to be paid in order for the writ to be followed. *Id.*

**12. Park questioned by the court**

Park did not send Harris letters in regards to their fee balance. APP962. Park had phone contact with Harris' wife who would indicate she would come in but never did. *Id.* Park received close to have the retainer before she filed the appeal. *Id.* Park drafted the "bare bones" writ when Harris would have an idea of what it would be. *Id.* Park recalled the conversation about the wrong caption and had indicated that would be something she would fix. *Id.* Park never sent Harris a letter informing him of the deadline for filing the writ. APP963. Park never sent anything in writing in regards to the deadline. *Id.* Park believed that she visited Harris in prison but could be mistaken. *Id.*

**13. Arguments**

Carling addressed the court and argued that Harris placed his trust in Park and assumed the writ had been filed when he received a copy of it. APP965. Carling further argued Park had a duty to file a notice of appeal under the fast track rule and the writ Harris received showing that it had been filed speaks "volumes as to what his understanding of the situation was." *Id*. Carling argued that once an affirmance decision had been received counsel should indicate what the next procedure is in writing. *Id.* Carling argued that Harris was under the impression that the writ had been taken care of and that the circumstances surrounding the issue were beyond his control. APP966. Carling sought for the court to waive the untimeliness matter and consider the petition on is merits. *Id.*

Thunell argued that *Hathaway* case was in reference to the direct appeal, where a defendant would have a right to counsel; however, since this is a writ, it is not the same right to counsel. *Id.* Thunell argued that Park had been very clear that the writ was not going to be filed. APP968. Thunell believed that there was a difference between a direct appeal versus a writ and the right to counsel. *Id.* The State's position is that a direct appeal would be different than the writ. APP969.

The court did not have confidence in the accuracy of Park's testimony. *Id.* The court could not understand why you would do work on a case that you haven't been paid for. *Id.* The court could also not understand why Park would have a fee agreement that was blank except for the name of the client and a signature from someone other than the client. *Id.* The court indicated that they would re-read *Hathaway* and issue an order concerning if additional briefing was needed. APP971.

Carling further addressed the court indicating that *Hathaway* was a direct appeal that was not filed. *Id.* The *Hathaway* court used an analysis from the Ninth Circuit that a time bar had to be overcome by three (3) things: (1) defendant's belief that counsel was pursuing a direct appeal; (2) defendant's belief was objectionable reasonable and (3) that a post-conviction petition was filed within a reasonable time frame after the discovery of what happened. *Id.* Carling argued that Harris had met all three (3) objectives needed to overcome the time bar issue. *Id.*

## ARGUMENT

### I. THE TRIAL COURT ERRED IN DISMISSING HARRIS' PETITIONS FOR HABEAS RELIEF BY FAILING TO ESTABLISH "GOOD CAUSE" TO EXCUSE THE TIME BAR CONTAINED IN NRS 34.726(1).

The issue presented below was a novel one pertaining to whether retained counsel's duties to their client, and failure to perform those duties with regard

to meeting a deadline, could rise to "good cause" to excuse the time bar for a petition for writ of habeas corpus where the client had no control over counsel's omissions, and reasonably believed—albeit had been actually informed by counsel—that counsel had undertaken their duties to protect the client's rights. Harris conceded below that he maintained no Sixth Amendment right to the effective assistance of counsel in habeas corpus proceedings, thus a *Strickland* analysis would not be applied. However, Harris did not believe this precluded analysis of counsel's actions as related to the "good cause" exception, which had a separate and distinct analysis regarding external impediments or interference by others as analyzed and presented in Harris' argument below. The Dismissal Order erroneously rendered a novel interpretation of the unavailability of Sixth Amendment protection in habeas corpus proceedings to foreclose the "good cause" analysis for the procedural time bar altogether simply because Harris' position was based on egregious errors made and misrepresented to Harris by his counsel. Harris argued the external impediment requirement for excusing the time bar could encompass errors made by defense counsel who had accepted the duty of representing a defendant in habeas proceedings. Otherwise, the courts fail to protect the integrity of the court system and those who practice before it.

NRS 34.726(1) limits the time that is necessary to file a petition for writ of habeas corpus and states the following in regards to "good cause:"

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be file within 1 year after entry of the judgment of conviction, or if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) that the delay is not the fault of the petitioner, and
>
> (b) that dismissal of the petition as untimely will unduly prejudice the petitioner.

The plain language of NRS 34.726(1) absent any appellate interpretation indicates that "good cause" required demonstration that delay was not the petitioner's fault, and dismissal would be unduly prejudicial. Any interpretation made by this court cannot and did not undermine this plain language.

"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 (1981). "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).

The Dismissal Motion misinterpreted the position in *Brown v. McDaniel* that a defendant is not constitutionally entitled to the appointment of counsel in habeas corpus proceedings, to thus foreclose a defendant from relying on habeas corpus counsel's ineffectiveness for "good cause" to excuse the procedural bar. *Ibid.*, 331 P.3d 867, 870 (2014). On reply to the Supplement, Harris analyzed *Brown* and thoroughly differentiated it. *Brown*'s holdings pertained to the procedural bar of a ***second*** post-conviction petition filed on first post-conviction counsel's alleged ineffectiveness after conclusion of those first proceedings. *Id.; see Pellegrini v. State*, 117 Nev. 860, 870-73, 876-77, 34 P.3d 519, 526-28, 530 (2001)(setting forth the history of Nevada's post-conviction remedies). The bar was not excused in *Brown* because Nevada's statutes directing the filing of only one post-conviction petition to challenge a conviction or sentence that contains all grounds or claims for relief. *Id.* The purpose was to limit petitioners "to one time through the post-conviction system" although it acknowledged extraordinary circumstances could provide exception. *Brown* at 872-73. The *Brown* decision analyzed *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), which pertained to a second successive petition for writ of habeas corpus holding that a court could

"entertain the merits on a procedurally defaulted claim in state court where a petitioner was represented by … allegedly ineffective post-conviction counsel in the initial-review collateral proceedings." However, *Brown* declined to adopt *Martinez* because *Martinez* applied an equitable analysis that it decided could not be reconciled with Nevada's statutory provisions. *Brown* at 874 (footnote omitted).

In *Hathaway v. State,* the Supreme Court of Nevada defined the meaning of "good cause."

> Generally, 'good cause' means a "substantial reason; one that affords a legal excuse." 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. An impediment external to the defense 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.

*Ibid,* 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). The interpretation of "impediment external to the defense" was likely created based on the "good cause" language contained in NRS 34.726(1)(a) stating the petitioner's burden to prove that the delay was not the fault of the petitioner. It did not intend to couple a petitioner in with counsel to comprise "the defense" which is more appropriately speaking about a petitioner's defense of his rights and not counsel's representation.

This concept exists in *Hathaway* where it stated that a procedural default—albeit a notice of appeal in that matter—could be excused by demonstration that "(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should have known that his counsel was not pursing his direct appeal." *Ibid.*, 119 Nev. 248, 254, 71 P.3d 503, 508-509 *citing Loveland v. Hatcher*, 231 F.3d 640, 644. (9th Cir. 2000). A reasonable belief that counsel had acted when they had not can excuse jurisdictional procedural bars.

Harris had the "burden of pleading and proving *specific* facts that demonstrate: (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and (b) actual prejudice to the petitioner." *Bejarano v. Warden, State Prison*, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996). "[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 state proceeding with error of constitutional dimensions.'" *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519, 537 (2001).

The *Order of Affirmance* herein issued on December 13, 2012 and the *Remittitur* was issued on January 22, 2013. APP720. Harris filed his pro se

Petition on March 11, 2015. APP727. Harris' Petition alleged ineffective assistance of counsel in the untimely filing of such petition. *Id.*

On December 8, 2015, Harris' hearing on his time bar writ was heard. APP932. During the hearing Park testified that she only prepared a "bare bones" petition for habeas corpus relief and had sent it to Harris for his review. *Id.* Park never filed the writ, even though she signed and dated it. APP937. Park testified that, although the "bare bones" petition contained a certificate of service showing it was mailed to the Nevada Supreme Court, it was only for purposes of a general outline. APP938. Park claimed that the petition was never filed because she needed to be paid the reminder of her retainer fee; however, she could not re-call whether she had spoken with Harris again or visited Harris in prison after sending a copy of the "bare bones" petition to him. APP932, APP934, APP963.

Harris testified that after he received the *Remittitur,* he asked Park to file a petition for habeas corpus relief on his behalf. APP942. Harris received a copy of the alleged "bare bones" petition from Park and was under the impression that it had been filed. APP943. Harris discovered that the Petition had been filed in the wrong court and spoke with Park about it. APP944. Harris never received another copy of the Petition, was unsuccessful in his attempts to contact Park, and Park never visited him in prison. *Id.*, APP945. It

was not until 2014, that Harris realized that his Petition had never been filed. APP946. Harris took it upon himself to contact both the Nevada Supreme Court and the district court inquiring into the status of his case. APP947. Harris received letters back from the courts indicating that nothing had been filed. APP948. It was only after he had received confirmation back from the court that no Petition had been filed that Harris filed his Petition. On June 6, 2016, the Dismissal Order was filed wherein the court dismissed Harris' Petition and discharged the writ. APP911-918.

The Dismissal Order concluded that Harris maintained "no constitutional or statutory right to counsel in his post-conviction proceeding," citing *Brown v. McDaniel*, 130 Nev. Adv. Op. 60, 331 P.3d 867, 870 (Nev. 2014). APP917. In paragraph 54, the Dismissal Order quotes *McKague v. Whitley* stating "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel." *Ibid.*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) It then interpreted this law to conclude that Harris was "precluded from relying upon a claim of ineffective assistance of counsel to show good cause to excuse the procedural default of his Pro Per Petition." APP917. The Dismissal Order continued that Harris had "not presented any other impediment external to the defense for a finding of good cause." It further found that the other claims

"were available to [Harris] at the time the remittitur issued and are thus procedurally defaulted themselves." APP917.

Harris contends that "good cause" exists for this Court to accept his Petition that was filed well after the one-year deadline as the filing delay was not directly his fault. *Brown* at 870 *quoting* NRS 34.726(1)(a) and NRS 34.810(3). Harris had conversations with Park about filing a writ and was under the impression that the writ he received from Park, that was actually signed and dated, had been filed. APP397-938, APP943. Harris waited for a response from the courts or word from Park. When Harris heard nothing, he contacted this Court as well as the district court inquiring into the status of his case. APP947. When he received letters indicting that nothing had been filed, he filed his pro se Petition on March 11, 2015.

Harris believed that Park had filed the writ; Harris' believe was reasonable objectionable; and Harris filed his Petition within a reasonable time frame after the discovery that his writ had not been filed. *Hathaway,* 119 Nev. at 254, 71 P.3d at 508-509 *citing* Loveland at 644. Thus, "good cause" does exist. Harris' faith in Park and his belief that she actually had filed the writ was an "impediment external" to Harris that prevented him from complying with the "procedural default rules" of filing his Petition within one-year after entry of the *Remittitur*. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506.

The failure of Park to follow-through with Harris' request and file the writ worked towards his "actual and substantial disadvantage" and affected further proceedings in his case and ultimately the timely filing of his Petition. *Pellegrini*, 117 Nev. at 860, 34 P.3d 537. In Park's own words the writ was "bare bones" and just a general outline to help her be prepared. APP938. Park never indicated to Harris in any way that the writ was only a general outline and would not be filed. Park signed and dated the mailing certificate. In fact, after sending the "bare bones" writ to Harris, Park admitted that she could not recall if she had spoken to Harris again or visited him in prison. APP932, APP934, APP963. Park testified that she never filed the writ because she needed more money. Harris testified that Park never asked about money because he was paying her as they went along. APP950. Park's poor communication with Harris in regards to the true meaning of the writ he received, whether the writ was ever filed, and the fact that she needed more money was grossly negligent and clearly unprofessional.

Based upon the facts as stated *supra,* Harris met his burden by proving that the specific facts sounding the circumstances of the late filing of his Petition were sufficient to develop the requirements of "good cause," and that Park's action prejudiced Harris. *Bejarano* 112 Nev. at 1471, 929 P.2d at 925.

NRS 34.726(1)'s plain language authorizes a finding of "good cause" to excuse the procedural bar as long as Harris demonstrates that the delay was not his fault and the Dismissal Order unduly prejudices him, which he did below. Harris' provided sufficient and substantial reasons affording a legal excuse. *Hathaway* at 506, *citing Colley,* 105 Nev. at 236 (*quoting Estencoin*, 63 Haw. 264, 625 P.2d at 1042). Park was an "impediment external" to Harris that prevented him from complying with the procedural time bar. *Id., citing Pellegrini,* 117 Nev. at 886-87; *Lozada,* 110 Nev. at 353; *Passanisi,* 105 Nev. at 66.

The Dismissal Motion misinterpreted the position in *Brown v. McDaniel*, which never intended to apply to situations like Harris'. *Brown* barred habeas corpus petition stacking—filing a second petition on fully litigated grounds of ineffectiveness in the first petition. *Ibid.* at 870 (2014)*; see Pellegrini*, 117 Nev. at 870-73, 876-77, 34 P.3d at 526-28, 530. Harris was not petition stacking, but asking that his ***first*** petition be heard. The concept was set out in *Martinez v. Ryan*, that Harris' court could have "entertain the merits on a procedurally defaulted claim in state court where [he] was represented by … allegedly ineffective post-conviction counsel in the initial-review collateral proceedings." *Brown* misinterpreted *Martinez* as opening the floodgates of successive

petitions; however, its concept can be applied to "good cause" determinations without the risk *Brown* thought existed.

Harris demonstrated that Park interfered with or created an impediment to his ability to timely file a petition for habeas corpus relief. *Hathaway*, 119 Nev. at 252. It was not Harris' fault that the petition prepared, signed and dated on the mailing certificate never reached by the court. Harris diligently informed counsel when she had the wrong court captioned on the petition and was assured she would refile it properly. Harris had no reason to believe otherwise and reasonably relied on this report. To fault Harris for not double-checking could result in an overwhelming amount of calls to the court by defendants doing the same. Harris actually believed Park had filed it, his belief was objectively reasonable, and he filed his pro per petition soon upon notification of the error. *Hathaway*, 119 Nev. at 254. *Hathaway* dictated that a reasonable belief that counsel had acted when they had not can excuse jurisdictional procedural bars. Harris had such reasonable belief and should have been granted habeas relief thereby.

Harris proved his facts with the most damaging of evidence against Park—the actual petition prepared, signed, dated and mailed to Harris as his copy. Although Park testified this was just a "draft", no attorney would sign and

date a pleading on a day other than the one where filing and service were anticipated.

The trial court should have concluded that "good cause" existed and, having not done so, Harris suffered actual prejudice by deprivation of his right to file for habeas relief, and by the failure to obtain meritorious determinations on the other issues contained in the Petitions. *Bejarano*, 112 Nev. at 1471, 929 P.2d at 925. The errors worked to Harris' actual and substantial disadvantage by depriving him of the only chance he has to bring issues respecting his trial and appellate counsel's ineffectiveness. It should thus be reversed.

## II. THE TRIAL COURT ERRED IN FINDING HARRIS' OTHER ISSUES IN THE PETITIONS LACKED MERIT AND/OR WERE PROCEDURALLY DEFAULTED.

The Sixth Amendment to the United States Constitution entitles criminal defendants the right to the effective assistance of counsel. In *Ellis v. State* it states as follows:

> To state a claim of ineffective assistance of counsel…a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome in the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984).

*Ibid.*, 281 P. 3d 1170 (Nev. 2009). Although challenges to trial strategy are considered "virtually unchallengeable for purposes of defendant's claim of ineffective assistance of counsel" there is a caveat to this statement, namely that the trial strategy "must be supported by reasoned and deliberate determination…" *O'Hara v. Wigginton*, 24 F.3d 823 (6th Cir. 1994).

> Deficient assistance of counsel is representation that falls below an objective standard of reasonableness. *Dawson* [*v. State*], 108 Nev.[112] 115, 825 P.2d [593,] 595 [1992]. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

*Kirksey v. State*, 923 P.2d 1102, 1107 (NV 1996).

Our United States Supreme Court has set forth the history behind the right to peremptory challenges as follows:

> The peremptory challenge is part of our common-law heritage. Its use in felony trials was already venerable in Blackstone's time. See 4 W. Blackstone, Commentaries 346-348 (1769). We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury. *See, e.g., Swain v. Alabama*, 380 U.S. 202, 212-213, 218-219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 38 L.Ed. 208 (1894). But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. *Ross*, 487 U.S. at 88, 108 S.Ct. 2273; *see Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 63 L.Ed. 1154 (1919)("There is nothing in

> the Constitution of the United States which requires the Congress to grant peremptory challenges.")

*U.S. v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S.Ct. 774, 779, 145 L.Ed.2d 792 (2000). However, the Court further acknowledged that it was "a principal reason for peremptories [ ] to help secure the constitutional guarantee of trial by an impartial jury. *Id.*, 528 U.S. at 316, 120 S.Ct. at 782; *see e.g., J.E.B.*, 511 U.S. at 137, n. 8, 114 S.Ct. 1419 (purpose of peremptory challenges " 'is to permit litigants to assist the government in the selection of an impartial trier of fact'")(*quoting Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)); *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 120 L.E.2d 33 (1992)(peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial."); *Frazier v. United States*, 335 U.S. 497, 505, 69 S.Ct. 201, 93 L.Ed. 187 (1948)("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury").

Nevada has adopted this same concept. The governing statute regarding peremptory challenges in Nevada is NRS 16.040, which states that, "[e]ither party may challenge the jurors. The challenges must be to individual jurors and be peremptory or for cause. Each side is entitled to four peremptory challenges." The Nevada Supreme Court has additionally acknowledged that, "[t]here is nothing in either the Constitution of the United States or the Nevada

Constitution which requires Congress or the state legislature to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." *Anderson v. State*, 81 Nev. 477, 480, 406 P.2d 532, 533 (1965), *citing Stilson v. United States*, 250 U.S. 582, 40 S.Ct. 28, 63 L.Ed. 1154 (1919); *State v. McClear*, 11 Nev. 39 (1876).

The trial began on August 30, 2011. During jury selection, it became apparent that one of the jurors had a conflict with the case. Prospective Juror 602, Ed Small mentioned he knew Stacy Monroe, one of the witnesses. 8/30/11 Tr. at p. 125. He went to high school with Monroe and was a year ahead. *Id.* Monroe was a pretty prominent football star at Western High School. *Id.* Small had not seen him in over 20 years. *Id*. at p. 126. Small claimed his prior history with Monroe would not affect whatever determination he made about what weight or value to give his testimony. *Id.* Harris' trial counsel, Mr. Gill passed for cause, then waived Harris' third peremptory challenge. *Id*. at p. 127. Towards the end of the second day of trial on August 31, 2011, another juror came forward claiming to know one of the witnesses. Juror No. 7 claimed to know Tammy Kasper, who used to date one of their family members. *Id*. at pp. 195-6. Juror No. 7 stated it would not affect their deliberation, and both parties including Harris' counsel indicated they did not see any prejudice. *Id*. at p. 197.

Harris' right to peremptory challenges reinforces his right to a trial by an impartial jury. *Martinez-Salazar*, 528 U.S. at 311, 120 S.Ct. at 779; *see e.g.*, *Swain*, 380 U.S. at 212-213, 218-219, 85 S.Ct. 824; *Pointer*, 151 U.S. at 408, 14 S.Ct. 410. While such challenges do not specifically invoke constitutional rights for Harris, the Nevada Code has codified them as auxiliary just as the federal Rule 24 did in *Martinez-Salazar*. *Id., citing Ross*, 487 U.S. at 88, 108 S.Ct. 2273; *see Stilson*, 250 U.S. at 586, 40 S.Ct. 28; *see* NRS 16.040; *Anderson*, 81 Nev. at 480, 406 P.2d at 533 (1965), *citing Stilson*, 250 U.S. 582, 40 S.Ct. 28; *McClear*, 11 Nev. 39. Thus, Harris' right to the four (4) peremptory challenges codified in NRS 16.040 had a principal purpose to secure his constitutional guarantee to trial by an impartial jury. *Id.*, 528 U.S. at 316, 120 S.Ct. at 782; *see e.g., J.E.B.*, 511 U.S. at 137, n. 8, 114 S.Ct. 1419; *Edmonson*, 500 U.S. at 620, 111 S.Ct. 2077; *McCollum*, 505 U.S. at 57, 112 S.Ct. 2348; *Frazier*, 335 U.S. at 505, 69 S.Ct. 201; *see also Anderson*, 81 Nev. at 480, 406 P.2d at 533, *citing Stilson*, 250 U.S. 582, 40 S.Ct. 28; *McClear*, 11 Nev. 39. Rather than utilizing his last peremptory challenge against a juror who was personally associated with a witness in the case, Harris' counsel instead waived it without consulting Harris and providing him an opportunity to utilize all of the challenges afforded him by statute to secure his right to an impartial jury. Trial counsel Gill's failure to exercise a needed peremptory challenge and

instead waiving it directly after such juror was empaneled evidences deficient performance falling below an objective standard of reasonableness. *Ellis*, 281 P. 3d 1170, *citing Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052; *Warden*, 100 Nev. at 432–33, 683 P.2d at 505.

Although trial strategy is virtually unchallengeable, this is not what Gill was undertaking since waiver of a perpemptory challenge to leave a juror empaneled who is personally associated with a witness is not "supported by reasoned and deliberate determination." *O'Hara*, 24 F.3d 823. Gill was fully aware that this case was one where the witnesses' testimonies would differ from that of their statements to police, leaving the jury to hinge their determination in the entire case on juror credibility. Thus, Gill's perspective at the time, knowing Small would be the last juror empaneled and knowing Harris had a peremptory challenge available, should have exercised such challenge rather than waiving Harris' right to it. *Kirksey v. State*, 107 Nev. 499, 923 P.2d 1102, 1107 (1996), *citing Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Gill failed to ask meaningful questions to ascertain that Small had a conflict, then failed to consult with Harris prior to waiving his final peremptory challenge. Based on Gill's ineffectiveness in waiving rather than exercising Harris' peremptory challenge to Small, Harris was deprived of his rights under

NRS 16.040 and subsequently his right to an impartial jury. Thus, Harris' conviction should be set aside.

## III. HARRIS' TRIAL COUNSEL AND/OR APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO CONSTITUTIONALLY CHALLENGE THE PROSECUTION'S REQUEST TO ELICIT SPECULATIVE AND UNSUPPORTED TESTIMONY REGARDING OUT-OF-COURT INTIMIDATION TOWARDS THE WITNESSES.

In *United States v. Rios*, the 10th Circuit held that "generally references to threats or danger to prosecution witnesses are improper unless admissible testimony is offered connecting the defendant with threats of danger." *Ibid.*, 611 F.2d 1335 (10th Cir. 1979); *see e.g., United States v. Marshall*, 556 F.2d 371, 379-80 (6th Cir), *cert denied*, 434 U.S. 925, 98 S.Ct. 406, 54 L.Ed.2d 284; *United States v. Davis*, 487 F.2d 112, 125-126 (5th Cir), *cert denied.*, 415 U.S. 981, 94 S.Ct. 39 L.Ed.2d 878. Federal courts have consistently held that the prosecution's references to, or implications of, witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial, credible evidence that the defendant was the source of the intimidation. *See, e.g., United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979); *United States v. Peak*, 498 F.2d 1337, 1339 (6th Cir. 1974); *United States v. Hayward*, 420 F.2d 142, 147 (B.C. Cir. 1969). This federal holding was adopted in Nevada in *Lay v. State*, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994). Federal courts have also reversed convictions where prosecutors have implied the existence of

threats that "in the context of the whole record" specifically "hint[ed] of violence." *United States v. Muscarella,* 585 F.2d 242, 248-49 (7th Cir. 1978), *citing United States v. Love,* 543 F.2d 87 (6th Cir. 1976).

At the onset of trial, the State made an oral motion to be able to ask witnesses—specifically Darnella, Kasper and Thomas—as to why they do not want to testify at the trial, indicating that they would not specifically mention Harris' affiliation with the Gerson Park Kingsman gang, but arguing it was relevant to witness bias. 8/30/11 Tr. at pp. 148-154. The trial court faulted the State for not bringing a motion in limine to have prior bad acts presented so as to allow briefing of the issue. Gill objected to the use of any reference to Harris being in a gang, stating it was irrelevant to the proceedings and citing *State v. Evans*, 117 Nev. 609, 28 P.3d 498, in support. The State requested that Darnella be allowed to testify to threats she received from blocked phone calls, and the trial court authorized it on the basis of relevancy. 8/30/11 Tr. at p. 154. Gill asked whether it should be allowed even if they cannot be traced to Harris, but failed to cite the constitutional standard requiring the state to produce "substantial, credible evidence" linking Harris to any threat by intimidation or otherwise. *Id.* Thus, the trial court indicated that Gill's cross-examination could "handle that." *Id.*

In the State's presentation of its case, Darnella testified that she was afraid of what would happen to her if she testified. 8/31/11 Tr. at p. 57. Detective Mike Fletcher testified that Darnella told him she was afraid of what might happen on the streets if she testified. 9/1/11 Tr. at p. 50. Detective Fletcher testified that Thomas told the detective over the phone he was afraid to come to court and, in fact, did not show up at court for the preliminary hearing. *Id*. at p. 61. Fletcher testified that Thomas told him before that he is afraid of the boy that stabbed him and what he might do. *Id.* at p. 62.

In the State's closing arguments, the prosecutor indicated to the jury that, when the witnesses were on stand, they were evasive and backpedaling. 9/2/11 Tr. at p. 97. The prosecutor specifically stated that Ms. Lay said she got threatening calls, and that people do not want to be labeled as a snitch. *Id*. at p. 95. The prosecutor indicated that Darnella talked about threats that made her nervous to testify. *Id.* at p. 97. The prosecutor further argued that there was a lot of consistency with the witnesses, with them coming in and nobody wanting to say they saw Harris stabbing the victim. *Id*. at p. 129. He mentioned a second time to the jury that Darnella was also afraid to testify, just like Ms. Kasper. *Id*. at p. 130. She was concerned about retaliation. *Id.* She was getting blocked number phone calls threatening her. *Id*. This happened in the neighborhood Darnella has grown up in, people do know where she lives. *Id.*

The State's general references to threats allegedly received by Darnella, Kasper and Thomas were improper since they were unsupported by admissible testimony connecting Harris with the threats of danger. *Rios*, 611 F.2d 1335; *see e.g., Marshall*, 556 F.2d at 379-80; *Davis*, 487 F.2d at 125-126. The State's reference to or implication of witness intimidation constituted reversible error since the prosecutor did not produce substantial, credible evidence that Harris was the source of that intimidation. *Id.* at 1343; *Peak*, 498 F.2d at 1339; *Hayward* at 147; *see also Lay,* 110 Nev. at 1193, 886 P.2d at 450-51. Harris' conviction should be reversed where the prosecutor not only implied the existence of threats, but specifically elicited them from the witnesses throughout the trial as part of its strategy to explain away the inconsistencies in its own witnesses' statements and testimonies. *See, e.g., Muscarella*, 585 F.2d at 248-49, *citing United States v. Love*, 543 F.2d 87 (1996). The prosecutor should have been barred from implying that Harris directly or indirectly invoked fear in the witnesses with regard to their testifying, and such improper use of what should be considered "bad acts" evidence is not authorized to show witness bias, contrary to the prosecutor's argument below. Further, the question does not just hinge on a question of relevancy as the trial court determined.

With regard to this error, either Gill was ineffective for failing to specifically cite the constitutional standard requiring the state to produce

"substantial, credible evidence" linking Harris to any threat by intimidation or otherwise; or, if his objections below were sufficient to preserve such an issue, Park was ineffective for failing to challenge such issue on Harris' direct appeal from his conviction. This repetitive error from the beginning of trial throughout the end of trial informing the jury that the witnesses were all afraid of testifying, but without presentation of any substantial and compelling evidence linking such intimidation directly to Harris, was highly prejudicial. Given the inconsistent statements of the witnesses between their witness statements to their testimonies, this was a case where the jury had to weigh the credibility of each witness. However, crediting their written statements above their testimonies was the only way to obtain the conviction that the jury handed down. This was only accomplished through the improper reference to witness intimidation and threats, which impacted Harris' character and credibility by allowing unsupported "bad acts" to be used against him.

Either Gill or Park's representation of Harris with regard to this issue demonstrates deficient performance below an objective standard of reasonableness, with unquantifiable resulting prejudice and a reasonable probability of a different outcome in the proceedings. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052; *Warden*, 100 Nev. at 432–33, 683 P.2d at 505. There is no sound trial strategy supported by reasoned and deliberate determination that

can be gleaned from counsel allowing Harris' rights to be infringed upon in this manner. *O'Hara*, 24 F.3d 823. Gill had researched the case by presentation of his cite to *Evans* in anticipation of the State's request. Although the trial court indicated its desire to handle such matters by motion in limine and briefing, Gill was somewhat prepared and presented a defense, albeit one that was focused on relevancy only rather than the constitutional standard and burden of proof for the State. Park had a chance to review the entire case in preparation of the appeal and did not sufficiently research the issues, presenting only ones that were not viable for appeal. Counsel's perspectives at the time should have enabled them to protect Harris' rights against having speculative evidence of bad acts used against him repeatedly in trial. *Kirksey v. State*, 923 P.2d at 1107, *citing Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Having demonstrated that Gill and/or Park were both ineffective with regard to protecting Harris' rights against presentation of speculative unsupported "bad acts" evidence to the jury, to his substantial prejudice, this Court should reverse the Dismissal Order.

## CONCLUSION

WHEREFORE, based upon the following, Harris respectfully requests that this Court reverse the district court's Dismissal Order and take any such further action as this Court deems necessary.

DATED this 28th day of November, 2016.

CARLING LAW OFFICE, PC

*/s/ Matthew D. Carling*
MATTHEW D. CARLING
Nevada Bar No. 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
*Attorney for Appellant*

## CERTIFICATION OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,777 words (14,000 max.).

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

DATED this 28th day of November, 2016.

CARLING LAW OFFICE, PC

*/s/ Matthew D. Carling*

MATTHEW D. CARLING
Nevada Bar No. 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
*Attorney for Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of November, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

MATTHEW D. CARLING
Attorney for Appellant

CARLING LAW OFFICE, PC

*/s/ Matthew D. Carling*
MATTHEW D. CARLING
Nevada Bar No. 007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
*Attorney for Appellant*