IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMAR ANTWAN HARRIS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 70679

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

MATTHEW D. CARLING, ESQ.
Nevada Bar #007302
1100 S. Tenth Street
Las Vegas, Nevada 89101
(702) 419-7330

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMAR ANTWAN HARRIS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 70679

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a post-conviction appeal and does not involve the death penalty or a conviction for any offense that is a category A felony.

STATEMENT OF THE ISSUES

I. Whether Appellant Lamar Harris' claim of ineffective assistance of post-conviction counsel is insufficient to establish good cause under NRS 34.726(1).

II. Whether Harris' underlying claims cannot substantiate prejudice sufficient to ignore his procedural default.

A. Whether counsel was deficient for not challenging Prospective Juror 602 or Juror No. 7, and whether Harris was prejudiced by these decisions.

B. Whether the State's references to the witnesses' reluctance to testify affected Harris' substantial rights.

STATEMENT OF THE CASE

On June 24, 2011, the State filed an Information, charging Lamar Harris with Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165) and Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.480.2e). 1 Appellant's Appendix ("AA") 20-22. Harris' jury trial commenced on August 30, 2011, and ended on September 2, 2011, when the jury returned a verdict finding Harris guilty of Battery with a Deadly Weapon Resulting in Substantial Bodily Harm. 1 AA 179, 191; 2 AA 351; 3 AA 560, 704-07.

On November 21, 2011, Harris was sentenced to 70 to 175 months in the Nevada Department of Corrections and was given 182 days credit for time served. 1 AA 180-81. The Judgment of Conviction was entered on December 2, 2011. Id. On December 13, 2012, the Nevada Supreme Court issued an Order affirming the Judgment of Conviction. 3 AA 716-18. Remittitur issued on January 9, 2013. 3 AA 720.

On March 11, 2015, Harris filed a Petition for Writ of Habeas Corpus (Post-Conviction). 3 AA 727-49; 4 AA 750-814. The State filed its Response on May 8, 2015. 4 AA 820-29. On July 27, 2015, Harris filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). 4 AA 831-55. The State filed its Response to

this Supplemental Petition on August 12, 2015. 4 AA 856-64. On September 16, 2015, the Court denied the Petition. 4 AA 885-87.

On September 19, 2015, Harris filed a Notice of Motion and Motion for Reconsideration of Denial of Petition for Writ of Habeas Corpus (Post-Conviction). 4 AA 878-87. The State filed its Response on October 2, 2015. 4 AA 888-94.

The District Court granted the motion to reconsider on October 14, 2015, and then proceeded to conduct an evidentiary hearing on December 8, 2015. 4 AA 912, 929-73. On June 6, 2016, the District Court entered its Findings of Fact, Conclusions of Law and Order denying Harris' Petition. 4 AA 901-09. Harris filed a Notice of Appeal on June 22, 2016. 4 AA 923-25.

STATEMENT OF THE FACTS

Underlying Case

At around 12:00 A.M. on April 25, 2011, Darnella Lay visited the Seven Seas Restaurant located at 808 West Lake Mead Boulevard in Las Vegas. 2 AA 377. Eventually, Ms. Lay moved to the dance floor but, before doing so, left her purse at the bar. 2 AA 378. After she finished dancing, she headed back over to the bar to retrieve her purse. Id. In the process of retrieving her purse, she tried to get around Harris who was in her way. 2 AA 378-79, 381. After she indicated to Harris that she needed to get past him in order to get her purse, he told her that she was interrupting him. 2 AA 379, 381. She nonetheless pushed through, bumping Harris with the right

side of her body. 2 AA 410. Upset at this, Harris responded by pushing Ms. Lay over a barstool. 2 AA 379, 381. Ms. Lay got back up and then struck Harris in the face. 2 AA 382. Seeing this take place, security escorted Ms. Lay out of the establishment. Id.

After she is escorted outside, Ms. Lay comes into contact with Michael Thomas who had also been visiting the Seven Seas Restaurant that morning. 2 AA 383-84. Ms. Lay had known Mr. Thomas for about a year by virtue of his being a friend of her father's. 2 AA 376; 3 AA 532. After talking with Ms. Lay, Mr. Thomas went back inside the restaurant. 2 AA 384. Ms. Lay followed suit shortly thereafter in order to get her purse. Id. But after she reentered, she encountered Harris' girlfriend. 3 AA 385. Harris' girlfriend proceeded to throw a glass at Ms. Lay. 3 AA 385-86. In response, Ms. Lay told Harris' girlfriend to meet her outside. 3 AA 386. Harris' girlfriend, however, did not step outside alone; she was accompanied by Harris himself. 3 AA 388. Once outside, both of them proceeded to attack Ms. Lay. Id. At one point, Harris struck Ms. Lay on the face, which caused her to fall to the ground. 3 AA 388-89.

When Mr. Thomas went back outside, he saw Harris striking Ms. Lay. 1 AA 15-16; 3 AA 643. At that point, he decided to get involved. 1 AA 15-16. Harris then pulled a knife and stabbed Mr. Thomas in the cheek and in the chest. 1 AA 15-16; 2 AA 450, 462; 3 AA 529, 594-95, 615, 620-21.

Post-Conviction Proceedings: Evidentiary Hearing

At the evidentiary hearing held on December 8, 2015, the Court heard testimony from Leslie Park, who represented Harris on appeal, and from Harris. 4 AA 929-73. Ms. Park testified that she had been retained by Harris to represent him on his direct appeal only. 4 AA 933. She did, however, prepare a "bare bones" habeas petition after Harris expressed an interest in filing such a petition. Id. Ms. Park sent this petition to Harris for review but indicated that if Harris wanted her to file the petition, he would have to pay her what he owed her for representing him on his direct appeal. Id. According to Ms. Park, she never did file the habeas petition. 4 AA 933, 936. The District Court pointed out, however, that the "bare bones" habeas petition was signed by Ms. Park. 4 AA 937. When asked by the judge why she would have signed the petition if she had no intention on filing it, Ms. Park responded that she did not know why. 4 AA 937-38.

Harris alleged that he believed Ms. Park had filed the petition. 4 AA 943. He spoke with Ms. Park shortly after the receiving the remittitur on his appeal in January of 2013. 4 AA 942. After receiving the remittitur, he contacted Ms. Park and indicated that he wanted to pursue a habeas petition. Id. Eventually he received a copy of a habeas petition that Ms. Park prepared. 4 AA 943. After it was brought to his attention that the habeas petition was addressed to the Nevada Supreme Court (as opposed to the District Court), he got in contact with Ms. Park and told her this.

4 AA 944. According to Harris, Ms. Park told him that "she would fix it and then send [him] a copy." Id. He never received any updated version. Id. Harris allegedly tried to get in contact with Ms. Park. 4 AA 944-45. Sometime in December of 2014, Harris wrote to both the Nevada Supreme Court and the District Court, inquiring about the status of his petition. 4 AA 954-55. Harris then filed a pro per petition on March 11, 2015. 4 AA 955-56.

SUMMARY OF THE ARGUMENT

The District Court properly denied Harris' Petition for Writ of Habeas Corpus. In the first place, Harris' habeas petition was untimely pursuant to NRS 34.726(1), and his attempt to establish good cause by arguing ineffective assistance of post-conviction counsel fails because he has no right to post-conviction counsel. Secondly, Harris failed to establish that the dismissal of his habeas petition as untimely has unduly prejudiced him because neither of the underlying ineffective-assistance-of-counsel claims he raises is meritorious.

ARGUMENT

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed 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 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:
>
> (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.

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

The one-year time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its plain meaning).

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 118, Nev. at 593, 590

P.3d at 902. The one-year time bar is therefore strictly construed. In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1). Id. at 595, 53 P.3d at 903.

Remittitur from the direct appeal issued on January 9, 2013. 3 AA 720. Therefore, Appellant had until January 9, 2014, to file a habeas petition. Unfortunately, Appellant did not file his pleading until March 11, 2015. 3 AA 727. As such, the District Court was required to dismiss the petition unless Appellant could establish both good cause and prejudice. NRS 34.726(1)(a)-(b).

I. Harris' Claim Of Ineffective Assistance Of Post-Conviction Counsel Is Insufficient To Establish Good Cause Under NRS 34.726(1) Because Harris Has No Right To Post-Conviction Counsel.

The alleged ineffectiveness of purported post-conviction counsel cannot establish good cause to ignore Appellant's procedural default.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at

506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785, 787 n.4 (1998)). However, any delay in filing of the petition *must not* be the fault of the petitioner. NRS 34.726(1)(a).

Further, "[a petitioner] cannot attempt to manufacture good cause." Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. Warden, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps, 104 Nev. at 660, 764 P.2d at 1306; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

The Nevada Supreme Court has consistently held that there is no right to effective assistance of post-conviction counsel for noncapital prisoners. Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014); McKague v. Warden, 112 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996). In Brown, the petitioner asserted "that the ineffective assistance of his prior post-conviction counsel provide[d] cause and prejudice to excuse his failure to comply with Nevada's procedural rules governing post-conviction habeas petitions." 130 Nev. at ___, 331 P.3d at 870. In reiterating that a claim of ineffective assistance of post-conviction counsel does not

constitute good cause for overcoming the post-conviction procedural bars, the Nevada Supreme Court reasoned that "there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and where there is no right to counsel there can be no deprivation of effective assistance of counsel." Id. (internal quotations and citations omitted); see also Pellegrini v. State, 117 Nev. 860, 887-888, 34 P.3d 519, 537-538 (2001) (" 'Where there is no right to counsel there can be no deprivation of effective assistance of counsel and hence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim.' " (quoting McKague, 112 Nev. at 164-65, 912 P.2d at 258)).

In its Findings of Fact, Conclusions of Law and Order denying Harris' Petition, the District Court properly relied on Brown in rejecting Harris' attempt to establish good cause by arguing that his post-conviction counsel's ineffectiveness led to the untimely filing. 4 AA 917. The District Court held, consistent with the legal standard discussed above, that Harris "has no constitutional or statutory right to counsel in his post-conviction proceeding" and is therefore "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." Id. Harris, however, argues that the District Court "misinterpreted the position" in Brown. According to Harris, Brown applies only in context of successive petitions. Appellant's Opening Brief ("AOB") at 36 ("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 proceedings."); id. at 43 ("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."). In other words, Harris believes that Brown would only preclude his ineffective-assistance-of-counsel claim had he been seeking to overcome the procedural bar set out in NRS 34.810(2). Such an argument is belied by the plain text of Brown.

In Brown, 130 Nev. at __, 331 P.3d at 869, the Nevada Supreme Court unambiguously held that "a petitioner has no constitutional right to post-conviction counsel and that post-conviction counsel's performance does not constitute good cause to excuse the procedural bars *under NRS 34.726(1) or NRS 34.810* unless the appointment of that counsel was mandated by statute." (emphasis added). That Brown involved both procedural bars does not alter the legal conclusion that a claim of ineffective assistance of post-conviction counsel is insufficient to establish good cause to overcome *either* procedural bar. While Harris is correct in noting that Brown involved a successive petition under NRS 34.810(2), he ignores the fact that it also involved an untimely petition under NRS 34.726(1). Id. And, significantly, the Court in Brown explicitly held that the petitioner's claim of ineffective assistance of post-conviction counsel was insufficient to overcome *either* procedural bar. Id. at

__, 331 P.3d at 875 ("Based on the foregoing, we conclude that Brown's petition was barred *as untimely and successive* and that he did not demonstrate good cause and prejudice to overcome *the procedural bars*." (emphasis added)).

The fact that the Nevada Supreme Court and Nevada Court of Appeals have rejected claims of ineffective assistance of post-conviction counsel in cases involving only NRS 34.726(1)'s procedural bar further undermines Harris' argument. See e.g., Lay v. State, 2016 Nev. Unpub. LEXIS 234, *3-4, 2016 WL 1567148 (Nev. 2016) ("As such, the district court properly concluded that [appellant] did not overcome NRS 34.726(1)'s one-year time-bar because he had no constitutional or statutory right to counsel when [counsel] represented him, and therefore, [appellant] did not have a right to the effective assistance of counsel."); see also Scott v. State, 2016 Nev. App. LEXIS 221, 2016 WL 2943989 (Nev. Ct. App. 2016).[1]

In his attempt to establish good cause to excuse his late filing, Harris also relies heavily on the Nevada Supreme Court's decision in Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). AOB at 37-38, 41. In Hathaway, the petitioner argued that he had good cause to excuse NRS 34.726(1)'s procedural bar because he

[1] Citation to 2016 unpublished opinions as persuasive authority is permissible pursuant to NRAP 36(c)(3). See also MB Am., Inc. v. Alaska Pac. Leasing Co., 132 Nev. __, __, 367 P.3d 1286, 1292, n.1 (2016) (Feb. 4, 2016) (allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

believed that his attorney was pursuing a direct appeal and did not learn about his attorney's failure to file such an appeal until after the one-year deadline had expired. Id. at 250, 71 P.3d at 505. The Court agreed that "[t]rial counsel is ineffective if he or she fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal" and set out a three-part test for district courts to apply when evaluating an allegation of good cause based upon a petitioner's mistaken belief that counsel had filed a direct appeal: (1) the petitioner must actually believe that his counsel was pursuing a direct appeal; (2) that belief must be reasonable; and (3) the post-conviction petition must be filed within a reasonable time after learning that a direct appeal had not been filed. Id. at 254-55, 71 P.3d at 507-08 (adopting the three-part test set out in Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000)).

Harris' reliance on Hathaway is misplaced, however. As explained by the District Court in its Findings of Fact, Conclusions of Law and Order denying Harris' Petition, "Hathway's holding was clearly couched in the fact that the petitioner there had a Sixth Amendment right to the effective assistance of counsel *on a direct appeal* . . . ." 4 AA 917 (emphasis added). Unlike Hathaway, this case involves a habeas petition, not a direct appeal. And as discussed above, Harris has no right to counsel in these post-conviction proceedings. That being the case, Harris' attempt to parallel the facts of his case with those of Hathaway necessarily fails.

Based on the foregoing, this Court should find that the District Court properly concluded that Harris failed to establish good cause necessary to overcome NRS 34.726(1)'s procedural bar. In concluding his argument on why his late filing should have been excused, Harris goes on to argue that he was prejudiced. AOB at 45 ("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. [ ] 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." (internal citation omitted)). This claim, however, fails for the very reason that the underlying claims (discussed below) contained in Harris' habeas petition were not meritorious. Therefore, having failed to establish either good cause or undue prejudice, Harris failed to excuse his untimely filing.

II. Harris' Underlying Claims Cannot Substantiate Prejudice Sufficient To Ignore His Procedural Default.

Harris raises two claims of ineffective assistance of counsel. Such claims are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes

an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.' " Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with a presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584

P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Not only must the petitioner show that counsel was incompetent, but he must also demonstrate that but for that incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Harrington, 562 U.S. at 111-12, 131 S. Ct. at 791-92 (internal quotation marks and citations omitted); accord McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (noting that a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different).

Importantly, when raising a Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means, 120 Nev. at 1012, 103 P.3d at 33. "Bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel; claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

A. Counsel Was Not Deficient For Not Challenging Prospective Juror 602 Or Juror No. 7, And Harris Has Failed To Establish That He Was Prejudiced By These Decisions.

Harris first argues that counsel was ineffective for failing to exercise a peremptory challenge to excuse "Ed" Small, who was Prospective Juror 602.[2] AOB at 48.[3] As noted by Harris, NRS 16.040—the statute governing challenges to jurors—provides that "[e]ither party may challenge the jurors" and that "[t]he

[2] Ed Small became Juror No. 11. 1 AA 178. However, given Harris' consistent reference to Mr. Small as "Prospective Juror 602," the State will refer to him as such (when not referring to him by name) in order to avoid any confusion.

[3] Based on the record, it would seem that Mr. Small's first name is "Clint," not "Ed." 1 AA 178, 197; 2 AA 314.

challenges must be to individual jurors and be peremptory or for cause." Moreover, "[e]ach side is entitled to four peremptory challenges." NRS 16.040.

Harris avers that "his right to trial by an impartial jury" was adversely impacted by trial counsel's decision not to exercise a peremptory challenge to strike Mr. Small from the jury. AOB at 49. He explains how Mr. Small went to high school with Stacy Monroe, one of the State's witnesses. Id. at 48; see also 1 AA 316. Mr. Small came to know of Mr. Monroe because the latter was a "pretty prominent football star" at the high school that they both attended. Id. However, Mr. Small also noted that Mr. Monroe was one year ahead of him and was an "acquaintance, at best." Id. Moreover, according to Mr. Small, he had not seen Mr. Monroe "in over 20 years." Id. While Harris accurately summarizes the extent of Mr. Small's "relationship" with Mr. Monroe, he grossly exaggerates its significance. See AOB at 49 (alleging that Mr. Small was "personally associated" with Mr. Monroe).

That a prospective juror is familiar with a witness does not require excusal of the prospective juror where the juror unequivocally states that he or she can remain impartial. See Preciado v. State, 130 Nev. ___, ___, 318 P.3d 178, 179 (2014). And that is exactly the case here. After Mr. Small described how it was that he knew Mr. Monroe, the State followed up with questions to ensure that Mr. Small could remain fair and impartial despite his "familiarity" with Mr. Monroe:

Ms. Jimenez: Okay. Is there anything about the fact that you -- he was someone that you knew in high

	school that would affect your ability to listen to his testimony in this case?
Prospective Juror 602:	Not at all.
Ms. Jimenez:	And would you take his testimony, you know, for what it's -- what it's worth, the same way you would take any other witness, how, you know, his ability to perceive, how he acts on the stand, things of that nature?
Prospective Juror 602:	Absolutely.
Ms. Jimenez:	And nothing about your prior history of him that wouldn't affect whatever determination you make about what weight or value you're going to give to his testimony?
Prospective Juror 602:	No, like I said, he probably wouldn't even remember my name. I haven't seen him in two decades. It would make no difference whatsoever.

2 AA 316-17. In light of Mr. Small's unequivocal confirmation that he would remain impartial and the fact that Mr. Small's acquaintance with Mr. Monroe twenty years prior to the trial seemed casual at best, Harris' trial counsel had no reason to pursue excusal of Mr. Small and therefore cannot be deemed ineffective for choosing not to exercise a peremptory challenge to excuse him.

Harris nonetheless goes on to argue that his trial counsel's decision not to challenge Mr. Small's inclusion on the jury prejudiced him. Harris describes his case as "one where the witnesses' testimonies would differ from that of their statements to the police, leaving the jury to hinge their determination in the entire case on juror

credibility." AOB at 50. However, because Harris has failed to establish actual bias on the part of Mr. Small, he has necessarily failed to prove that there is a reasonably probably that but for Mr. Small's inclusion on the jury, the outcome of the trial would have been different. See Harrington, 562 U.S. at 111-12, 131 S. Ct. at 791-92 (observing how "Strickland asks whether it is reasonably likely the results would have been different")

Nestled in this section of Harris' brief is a claim regarding Ms. Arena, who was Juror No. 7. AOB at 48 ("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. [ ] Juror No. 7 stated it would not affect their deliberation, and both parties including Harris' counsel indicated they did not see any prejudice. (internal citation omitted)).[4] Harris, however, failed to raise his claim against Ms. Arena below. Therefore, this claim is subject to plain error review. See Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson

[4] The three sentences just quoted are the only reference made to Juror No. 7 in section II of Harris' brief, which deals predominantly with the claim of ineffective assistance of counsel regarding counsel's decision not to challenge Mr. Small's inclusion on the jury. The argument that follows this reference to Juror No. 7 deals exclusively with Mr. Small. See AOB at 49-51.

v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Here, there was no error—let alone any error that affected Harris' "substantial rights"—by the continued inclusion of Ms. Arena on the jury. As noted by Harris, Ms. Arena came forward on the second day of trial, indicating that she *may* know Tamara Kasper, one of the State's witnesses:

> The Court: All right. This is outside the presence of the other jurors. I – thank you for your note, by the way. I remember I told you that, initially, I always say, are you acquainted with any of the witnesses that the – that the State has read to you. And I even said it after, if you remember, or something comes in your mind, you have not previously disclosed this to me, please do so, write a note, and you – per – you followed my instructions.
>
> But you – you did – you wrote, I think I may know Tamara Kasper
>
> Juror No. 7: Right
>
> The Court: What's the situation?

Juror No. 7: And can I elaborate on that? Tamara, the name – I didn't recognize – I don't – don't recognize her physically, but when – it just started dawning on me that I have a family member that use to date a bartender, and her name was Tamara, and he told me that she looks like, you know, that her physical appearance was like that. So I'm not quite certain –

. . .

The Court: But that's fine, and it might not be same person.

Juror No. 7: Exactly, it might not.

The Court: And even if it were –

Juror No. 7: And even if it was –

The Court: – I don't know –

Juror No. 7: – I cannot discuss it with my family member until after the trial.

The Court: Right. But even -- this is not going to affect your deliberation in this case, is it?

Juror No. 7: Right.

The Court: Is it?

Juror No. 7: No, absolutely not. No.

3 AA 545-46. The fact that Ms. Arena was not even certain that Ms. Kasper was the bartender who a family member of hers used to date renders Harris' claim against Ms. Arena even weaker than his claim against Mr. Small. And, as explained above, Harris' attempt to establish bias on the part of Mr. Small was unsuccessful in light

of Mr. Small's unequivocal assertion that he would remain impartial notwithstanding his former acquaintance with one of the State's witness. Harris' attempt to establish bias on the part of Ms. Arena fails for the same reason. As the dialogue above makes clear, Ms. Arena unequivocally affirmed that her deliberation would not be affected by the fact that she had family member who dated someone known as "Tamara" who may or may not have been the same "Tamara" who testified for the State. Given Ms. Arena's uncertainty respecting Ms. Kasper's identity and whether there was even a relationship between Ms. Kasper and this "family member," there is no reason to suspect the veracity of Ms. Arena's assertion that she would remain impartial.

Based on the foregoing, this Court should find that Harris has failed to establish that counsel was deficient for choosing not to challenge either Mr. Small's or Ms. Arena's inclusion on the jury or that he was prejudiced by these decisions. And in failing to prove this ineffective-assistance-of-counsel claim, Harris has necessarily failed to establish that he has suffered undue prejudice by the application of NRS 34.726(1)'s procedural bar.

B. The State's References To The Witnesses' Reluctance To Testify Did Not Affect Harris' Substantial Rights.

Harris' last claim is that his "trial counsel and/or appellate counsel were ineffective for failing to challenge the prosecution's request to elicit speculative and unsupported testimony regarding out-of-court intimidation towards the witnesses."

AOB at 51. First, this Court should note that Harris raises both an ineffective-assistance-of-counsel argument and a judicial-error argument regarding the "witness-intimidation" issue. He argues judicial error insofar as he faults the District Court for allowing the State to question Ms. Lay, Ms. Kasper, and Mr. Thomas regarding their reluctance to testify. See AOB at 52. To the extent Harris' claim is predicated on this allegation of judicial error, the Court should find that it is procedurally barred pursuant to NRS 34.724(2)(a) and NRS 34.810(1)(b). This claim could have been brought on direct appeal, and it was not. Therefore, it should be deemed waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

But perhaps even more important to note is the fact that Harris failed to raise either argument—that is, either the judicial-error argument or the ineffective-assistance-of-counsel argument—below. Thus, Harris' claim regarding witness intimidation is subject to plain error review. See Martinorellan, 131 Nev. at __, 343 P.3d at 593; Maestas v. State, 128 Nev. at __, 275 P.3d at 89; Green, 119 Nev. at 545, 80 P.3d at 95; Patterson, 111 Nev. at 1530, 907 P.2d at 987; Ford, 111 Nev. at 884, 901 P.2d at 130. Thus, in order to prevail on this claim, Harris must prove that the State's questioning of Ms. Lay, Ms. Kasper, and Mr. Thomas regarding their reluctance to testify or the State's references to this reluctance to testify in its closing argument affected his substantial rights. This he has failed to do.

"Evidence that after a crime a defendant threatened a witness with violence is directly relevant to the question of guilt." Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001), overruled on other grounds by Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015). Nonetheless, suggesting that a criminal defendant has intimidated a witness constitutes reversible error unless there is "substantial credible evidence," establishing that the defendant was, in fact, the source of the intimidation. Baltazar-Monterrosa v. State, 122 Nev. 606, 618, 137 P.3d 1137, 1145 (2006); Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-451 (1994) ("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.").

Reversible error will not be found, however, in cases where the references to, or implications of, witness intimidation are not tethered to the defendant. See Lay, 110 Nev. at 1193, 886 P.2d at 451. In Lay, 110 Nev. at 1193, 886 P.2d at 450, the defendant argued that the State committed prosecutorial misconduct requiring reversal because it "made repeated, unfounded references to witness intimidation and threats, and to the general reluctance of witnesses to testify." In rejecting the defendant's argument, the Court explained the following:

> We first note that although many of these references were not relevant to any issue in the case, neither were they direct references to witness intimidation by Lay. Nor was there any implication that the witnesses were reluctant to testify because they thought Lay himself might

> retaliate against them or that Lay had threatened them. Most of the references appear, rather, to have been attempts to show the witnesses' reluctance to testify because of the presence in the witnesses' neighborhoods of Lay's fellow gang members who might retaliate against them for testifying. Although these references may have been irrelevant to the examination of most of the witnesses, we conclude that the references are not misconduct requiring reversal.

Id. at 1193-94, 886 P.2d at 451. The Court, however, did find that "the questions about reluctance and fright were relevant" to one witness in particular who had been impeached on cross-examination regarding a prior inconsistent statement. Id. at 1194, 886 P.2d at 451. As regards that witness, the Court explained how fright or general concern for his safety "could have explained to the jury" why the witness made the prior inconsistent statement. Id.

The instant case resembles Lay insofar as none of the references to, or implications of, witness intimidation were connected to Harris. As noted by Harris, the three witnesses who testified regarding their reluctance to testify were Ms. Lay, Ms. Kasper, and Mr. Thomas. AOB at 52. However, only two of these witness explained how their reluctance to testify was due to the fear of violence.[5] The first

[5] Despite Harris' assertion to the contrary, Ms. Kasper did not testify that she was reluctant to testify because of fear of violence. See AOB at 54 (referring to the "threats allegedly received by Darnella, Kasper and Thomas"). When asked on direct examination why she was reluctant to testify, Ms. Kasper explained that she "just didn't want to get involved." 2 AA 456. When pressed further on cross examination, she disclaimed any notion of being afraid:

> Q: And you don't want to be here?

of these was Ms. Lay, who testified that she received threatening phone calls after she testified at the preliminary hearing. 2 AA 394. According to Ms. Lay, these callers were anonymous and had called from "blocked numbers." 2 AA 394-95. At no point did the State seek to elicit testimony from Ms. Lay—and at no point did Ms. Lay allege—that these anonymous callers were associated with Harris or were acting at the behest of Harris. In fact, Ms. Lay readily acknowledged on cross-examination that it could have been just about anybody:

> Q: You – you mentioned these – these phone calls that you've received?
>
> A: Yes.
>
> Q: And they were from a – blocked number?
>
> ---
>
> A: No, I mean, I don't want to be here.
>
> Q: Are you afraid to be here?
>
> A: No, I'm not.
>
> Q: You're not afraid of anyone.
>
> A: No, I'm not.

2 AA 471. She then went on to explain how she did not want to testify about what she did not see with her own eyes. Id. ("I just don't want to testify to something – I can testify to the altercation inside, absolutely, but I can't testify to something that I actually did not see with my own two eyes that happened outside."). Thus, fear of violence had nothing to do with Ms. Kasper's reluctance to testify. Harris fails to cite any other portion of the record that would contradict this.

A: Correct.

Q: So that – that could have been anybody that called you?

A: Correct.

Q: Could have been somebody on the streets that – that my client isn't related to, or has even talked to?

A: Correct.

2 AA 416. At one point, on re-cross examination, Ms. Lay was even asked if she feared Harris. 2 AA 419. She unambiguously denied being scared of Harris. Id. Thus, as in Lay, there was no direct reference to Harris nor was there any implication that Ms. Lay was reluctant to testify because she thought Harris would retaliate against her or that Harris had threatened her. In fact, as just noted, Ms. Lay explicitly denied have any such fear of Harris.

Morever, as in Lay, testimony regarding the threats Ms. Lay received was essential to bolster her credibility as a witness. At the trial, Ms. Lay was unable to remember many of the essential details of what occurred after she stepped outside of the restaurant the second time.[6] She was not sure whether Harris was the man who stepped outside. 2 AA 388. She could not recall seeing Mr. Thomas. 2 AA 389. She

[6] As discussed in the facts above, see supra at 3-4, Ms. Lay was escorted outside of the restaurant after striking Harris. She reentered shortly thereafter in order to recover her purse. When she reentered, she encountered Harris' girlfriend, who then proceeded to throw a glass at her. In response, Ms. Lay told Harris' girlfriend to meet her outside. The events that transpired after she stepped outside this second time are what Ms. Lay had "difficulty" recalling at trial.

could not recall seeing any weapons. 2 AA 390. At one point, she even denied ever knowing Harris. 2 AA 390-91. The State, however, introduced the statement Ms. Lay provided to the police shortly after the incident. 2 AA 389, 397-408. And in that statement, Ms. Lay stated that Harris was indeed the man who stepped outside, that Mr. Thomas encountered Harris outside, that Harris was armed with a knife, and that Harris went on to stab Mr. Thomas with this knife. 2 AA 397-408. Eliciting testimony respecting Ms. Lay's reluctance to testify because of a concern for her own safety helped explain to the jury why her testimony regarding these essential points was at odds with what she told the police after the incident.

The second witness to have expressed a concern for his safety is Mr. Thomas. However, at no point did Mr. Thomas express this concern at trial. See 3 AA 526-44. The State had to elicit such testimony from Detective Michael Fletcher. 3 AA 582-622. According to Detective Fletcher, Mr. Thomas told him that "he was afraid to come to court . . . because of fear of repercussions of testifying." 3 AA 620. Specifically, he feared Harris and what Harris might do if he testified against him. 3 AA 621-22. However, at no point did Detective Fletcher state that this fear was the result of any threat or action undertaken by Harris or anyone associated with Harris.

Again though, as with Ms. Lay, the State had to elicit such testimony in order to explain why Mr. Thomas' testimony at trial was so different from the statement that he provided to the police shortly after the incident. At trial, Mr. Thomas could

not recall any fight and could not recall being stabbed. 3 AA 532. He went so far as to state that he sustained his injuries by slipping and falling on some glass. 3 AA 533. However, according to the statement that he provided to the police shortly after the incident, Mr. Thomas explained how he had seen Ms. Lay get into an altercation with a male (who turned out to be Harris) and how he went outside to check on Ms. Lay after she had stepped out of the restaurant. 1 AA 15-16; 3 AA 533-34, 641-43. The statement further reflected how he noticed Harris beating Ms. Lay outside of the restaurant, which prompted him to get involved. 1 AA 15-16; 3 AA 641-43. After striking Harris, he then recalled being stabbed in the face and in the chest. Id. In order to make sense out of this latter account which differed so drastically from the account provided at trial (or, rather, failed to provide at trial), the State had to elicit testimony from Detective Fletcher that Mr. Thomas was concerned for his safety.

Significantly though, this concern did not result from any direct threat received by Mr. Thomas. In fact, this concern did not result from any threat whatsoever. Unlike Ms. Lay, Mr. Thomas never alleged to have received any threats. While he did explicitly state that he feared Harris, this was not due to any threat he received. Considering that Mr. Thomas was the one stabbed by Harris, his continued fear of Harris—despite the lack of any threat of future harm—is quite understandable.

Lastly, turning to the State's comments in closing, the Court should reject Harris' argument that "[t]he 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." AOB at 54. Had the State's references tied Harris to the threating phone calls Ms. Lay received,[7] Harris may have had a potential argument. However, as explained above, the threats to Ms. Lay were not in any way connected to Harris. And at no point did the State suggest otherwise. See 3 AA 654, 657, 688-89.

Based on the foregoing, this Court should find that Harris has failed to establish that his substantial rights were affected by the State's elicitation of testimony concerning Ms. Lay's, Ms. Kasper's, and Mr. Thomas' reluctance to testify and its references to that reluctance in closing.

CONCLUSION

The State respectfully requests that this Court affirm the District Court's Order denying Harris' Petition for Writ of Habeas Corpus (Post-Conviction). The District Court properly denied Harris' Petition for Writ of Habeas Corpus on the basis that it was untimely pursuant to NRS 34.726(1). Moreover, the District Court

[7] As discussed above, only Ms. Lay received any threats. Ms. Kasper's reluctance to testify had nothing to the fear of violence. See supra at n.5. And Mr. Thomas' reluctance to testify had to do with his own personal fear of Harris, not because Harris or anyone associated with Harris (or anyone, for that matter) threatened to do him harm if he testified.

properly concluded that Harris failed to establish good cause to excuse this untimeliness. Harris' attempt to establish good cause by arguing ineffective assistance of post-conviction counsel necessarily fails because he has no right to post-conviction counsel. Additionally, Harris failed to establish that the dismissal of his habeas petition as untimely has unduly prejudiced him because neither of the underlying ineffective-assistance-of-counsel claims he raises is meritorious.

Dated this 28th day of December, 2016.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE 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 font of the Times New Roman style.
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 either proportionately spaced, has a typeface of 14 points of more, contains 7,880 words.
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 December, 2016.

Respectfully submitted

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

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

ADAM PAUL LAXALT
Nevada Attorney General

MATTHEW D. CARLING, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ j. garcia
Employee, Clark County
District Attorney's Office

JEV/Alexander Vail/jg