IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMAR ANTWAN HARRIS, Appellant, vs. STATE OF NEVADA, Respondent.	Supreme Court No.: 70679

APPELLANT'S REPLY BRIEF

Peter Thunell
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
Counsel for Respondent

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

Matthew D. Carling
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATE CASES

FEDERAL CASES

CONSTITUTIONAL AMENDMENTS & ARTICLES

STATE STATUTES & REGULATIONS

FEDERAL STATUTES & REGULATIONS

OTHER SOURCES

ARGUMENT

I. THE ACTIONS OF PARK WERE SUFFICIENT TO MEET THE PROCEDURAL RULES OF NRS 34.726(1).

A. Park's Testimony Supported "Good Cause"

The procedural rules at issue in this case are found within NRS 34.726(1):

> 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.

"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). A "legal excuse" has been found to be "an impediment external to the defense [that] 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).

During the evidentiary hearing, Park offered testimony that Harris was interested in filing for post-conviction habeas corpus relief. AA933. Park testified, "I spoke with him at the prison regarding that. He wanted to know what I would put in the writ. … So I did prepare a bare bones, what I would intend to put in the writ, that I sent to Mr. Harris to review." *Id.* Park testified she never filed it, although it bore the caption for the Nevada Supreme Court and was signed and dated and mailed to Harris. AA935. During the evidentiary hearing on the writ, Park was questioned directly by the trial court judge regarding the "bare bones" petition:

> THE COURT: Why would you have signed this document if you weren't going to file it?
> THE WITNESS: Honestly, I don't recall. I don't know. I mean, it was – I think that – and I may be wrong, but I think the time deadline was coming near.[1] It was – I think just to be prepared if I had to file something. Honestly, I don't know why.
> THE COURT: And how about this, certificate of mailing
> THE WITNESS: Just that I had mailed it to him
> THE COURT: It says that you mailed to the clerk of the Nevada Supreme Court, to the District Attorney, and the Attorney General.

[1] The time deadline did not expired for another six (6) months after the "bare bones" petition was signed and dated.

THE WITNESS: I think that was just the bare bones, what the back page generally says. It was just the general writ outline.[2]
THE COURT: All right. So you also, after the conclusion, you signed it again?
THE WITNESS: Uh-huh.
THE COURT: Is that a "yes"?
THE WITNESS: Yes.
THE COURT: And, okay, and dated it again on the 6th of June, 2013 is that right?
THE WITNESS: That would be correct.

AA937-938. In essence, Park testified that she had not been retained by Harris for the post-conviction proceedings, requiring that he pay the amount owing on the appeal before she would represent him; however, she then prepared, signed and dated a post-conviction petition, a copy of which she mailed to Harris and possibly to all of the parties according to the mailing certificate affixed thereto. Park's explanation for this process is that she just wanted Harris to see what she would put in a petition if she was retained.

The district court never reached these matters, because it found that since Harris maintained no constitutional right to counsel that counsel's errors could not be "good cause" to excuse the procedural bar. However, the "good cause" analysis is something different than a *Strickland* ineffectiveness analysis that only attends a constitutional deprivation of rights. Instead "good cause" is "a

[2] The certificate of mailing on the "bare bones" petition contains Park's name, Harris' name, and the name of the district attorney.

substantial reason; one that affords a legal excuse." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506, *citing Colley,* 105 Nev. at 236, 773 P.2d at 1230. Under the State's analysis, the only "legal excuse" attached to attorney error must rise to a deprivation of a constitutional right. However, that is not how it has historically been analyzed. The standard for "legal excuse" as set out by this Court is "an impediment external to the defense [that] prevented him or her from complying with the state procedural default rules." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506, *citing Pellegrini,* 117 Nev. at 886-87, 34 P.3d at 537; *Lozada,* 110 Nev. at 353, 871 P.2d at 946; *Passanisi,* 105 Nev. at 66, 769 P.2d at 74. Nowhere in these analyses has this Court indicated that "legal excuse" must rise to deprivation of a constitutional right.

Even if it were required to rise to a constitutional level, Harris' deprivation of his right to file a petition for post-conviction relief was directly impacted by Park's actions. He is not arguing deprivation of right to counsel regarding Park, but rather that she was an external impediment that prevented him from complying with NRS 34.726(1). He believed he had retained her and that she prepared, signed, dated, and filed a post-conviction petition. Under NRCP 11(a), Park's actions communicated that she had undertaken every action necessary for filing. She says she was not retained and it was a "bare bones" draft; however, even the district court questioned why it was signed and dated.

The only reasons given—that she worried she was up against the deadline and that the certificate of mailing was just in general form—are both dispelled by the record, with the petition not due for another six (6) months and the certificate bearing specific names of the attorneys and defendant on the certificate. Harris had tangible evidence and presented it to the court that he could reasonably believe that a petition was timely filed on his behalf, regardless of what Park believed. *State v. Eighth Judicial Dist. Court ex rel. County of Clark,* 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). Even if Park's testimony were credible, it would not change the communication relayed to Harris. It does not change the fact that he spoke with Park about preparing a petition and that she prepared, signed, dated, and mailed a copy to him—facts not disputed by her own testimony. When Harris contacted her about filing it in the wrong court, this would have been the opportune time for Park to correct Harris' misunderstandings—if they were misunderstandings—and inform him she did not file it nor intend to file it so he could either seek out different counsel or timely prepare one himself. Instead, Park testified she did not recall if they spoke after that. AA934.

Harris never received another copy of the writ containing a case number after June 6th, 2013. *Id.* Harris investigated the matter in early 2014 and learned that Park had never followed-through and actually filed the writ. Harris

then filed his writ with the district court. APP948. As stated *supra*, Harris demonstrated that Park's actions were an "external impediment" that prevented his Petition from being filed within the time frame of NRS 34.726(1). *See, Hathaway* 119 Nev. 252, 71 P.3d at 506, *citing Pellegrini* at 117 Nev. 886-87, 34 P.3d at 537; *Lozada* at 110 Nev. 353, 871 P.2d at 946; *Passanisi* at 105 Nev. 66, 769 P.2d at 74.

The established facts of this case speak for themselves. Park prepared, signed and dated a petition and mailed a copy to Harris. *Eight Judicial* at 121 Nev. 232, 112 P.3d at 1075. Harris had a reasonable belief that Park filed the petition, and he quickly took action upon learning the petition was never actually filed. But for Park's miscommunication, Harris' petition would have been filed within the time requirements.

Simply put, Harris cannot be faulted for the untimely filing of his Petition and was unfairly prejudiced by the Dismissal Order. NRS 34.726(1). The truthful supporting factual allegations of this case show that Harris met the procedural default rules and was entitled to relief. *Eight Judicial* at 121 Nev. 232, 112 P.3d at 1075. Thus, the Dismissal Order should be reversed.

B. <u>*Brown* Pertains Only to Successive Petitions, Not Timeliness of First Petitions.</u>

In *Brown v. McDaniel*, the Court specifically held as follows:

> Brown filed his second post-conviction petition more than four years after the issuance of remittitur on direct appeal from the judgment of conviction. His first petition was denied on the merits, and the claims that he raised in his second petition were, or could have been, raised in his first petition. Thus, as Brown concedes, his second petition is barred as untimely and successive unless he can demonstrate good cause for the default and actual prejudice.

Ibid., 130 Nev. ---, 331 P.3d 867, 870 (2014). The only procedural bar in Brown was based on the fact that Brown's issues could have been raised in Brown's first petition, directly attaching to the "successive" finding. *Brown* did not reach the procedural bar based on the time limitation contained in NRS 34.726(1) for the filing of a first petition.

The State's *Answering Brief* argued that the district court properly relied on *Brown* in rejecting Harris' argument towards "good cause" under NRS 34.726. *Ibid.* at p. 10. The State argued that Harris had no constitutional or statutory right to counsel, which precluded him from arguing ineffective assistance of counsel to show "good cause." *Id.* The State recognizes that *Brown* pertains to successive petitioners, but argues that Harris "ignores the fact that [*Brown*] also involved an untimely petition under NRS 34.726(1)." *Id.* at p. 11. The *Respondent's Answering Brief* interprets *Brown* as "explicitly" holding that "petitioner's claim of ineffective assistance of post-conviction counsel was insufficient to overcome *either* procedural bar." *Id.*

The State's interpretation of *Brown* is misplaced. That court specifically held that the procedural time bar was directly tied to the successive petition issue. It specifically stated, "the claims that he raised in his second petitioner were, or could have been, raised in his first petition." *Ibid.* at 870. On this basis, the second petition was barred as untimely. As Harris argued in his opening brief, *Brown* is differentiated since he was not filing successive petitions but simply trying to be heard on a first petition. *Brown* did not reach the procedural bar based on the time limitation contained in NRS 34.726(1) for the filing of a first petition.

The State additionally cites *Phelps v. Director, Nev. Dep't of Prisons*, 104 Nev. 656, 764 P.2d 1303 (1988) in the State's *Respondent's Answering Brief*. However, similar to *Brown*, the analysis in *Phelps* pertains to whether ineffective assistance of counsel can excuse the procedural bar on issues raised in successive petitions rather than first petitions. *Phelps* does not pertain to timeliness of first petitions contrary to the State's assertion.

The State's reliance on *Hood v. State*, 111 Nev. 335, 890 P.2d 797 (1995) is additionally misplaced. *Hood* pertains to only whether trial counsel's failure to provide the files to a defendant in time to prepare and file a petition constituted "good cause." The fact scenarios differ significantly since the attorney in *Hood* was not continuing representation.

C. *Hathaway* is Assistive.

The State argues that Harris cannot rely on *Hathaway* since it pertains to a constitutional right to counsel in the filing of an appeal. *Respondent's Answering Brief* at p. 13. However, Harris did not cite *Hathaway* as precedent on this precise issue, but rather sought application of its analysis to these similar facts where attorney error foreclosed a right of the defendant to file for review. Without any existing precedent or rule to guide these situations, Harris' opening brief argued as follows:

> 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. (2000). A reasonable belief that counsel had acted when they had not can excuse jurisdictional procedural bars.

Hathaway's analysis can be applied because it pertains to a defendant's request, application of a jurisdictional time bar, and an attorney not accomplishing the task defendant had requested, which barred the defendant from being able to seek relief. Harris cited *Hathaway* to show that this precise type of behavior is in error and typically afforded relief.

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 v. Hatcher, Warden,* 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996). 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. TRIAL COUNSEL FAILED TO PROTECT HARRIS' CONSTITUTIONAL RIGHTS FOR AN IMPARTIAL JURY.

The Nevada Constitution, like the U.S. Constitution, guarantees litigants the right to a jury trial. *Sanders v. Sears-Page*, 354 P.3d 201, 205 (2015) *citing* Nev. Const. Art. 1 § 3; see U.S. Const. Amend. VII. "The right to trial by jury, if it is to mean anything, must mean the right to a fair and impartial jury." *Id. citing McNally v. Walkowksi*, 85 Nev. 696, 700, 462 P.2d 1016, 1018 (1969). "The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this county. *Id. citing Whitlock v. Salmon,* 104 Nev. 24, 27, 752 P.2d 210, 212 (1988). Under Nevada's Constitution, civil litigants are entitled to impartial jurors who will fairly and honestly deliberate the case without interference from personal bias or prejudice. *Id. citing McNally*, 85 Nev. at 700-01, 462 P.2d at 1018-19.

More broadly, under the Sixth Amendment – applicable to the states through the Fourteenth Amendment – and principles of due process, a defendant has the right to an impartial jury. *Daniel v. State*, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003) *quoting* U.S. CONST. AMEND. VI and XIV. Peremptory challenges "are a means to achieve the end of an impartial jury." *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005).

Harris had a constitutional right to a fair trial by an impartial jury. *See, Sanders* at 205 *citing* McNally at 85 Nev. 700, 462 P.2d at 1018; NEV. CONST. ART. 1 § 3; and *Daniel* at 119 Nev. 517, 78 P.2d at 903 *citing* U.S. CONST. AMEND. VI and XIV. Harris was deprived his fundamental due process right when Small and Arena were empaneled as jury members during his trial proceedings. U.S. CONST. AMEND. XIV.

Both Small and Arena claimed to have known witnesses who testified at trial; Small went to high school with Monroe and Arena had a family member who dated Kasper. APP316 and APP546. Small and Arena both indicated that their associations with Monroe and Kasper would not affect their deliberations in any way; however, their mere presence as jury members negatively impacted Harris' guarantee to the right of a jury trial with an impartial jury who would fairly and honestly deliberate without personal bias or prejudice. *See, Sanders*

at 205 *citing* McNally at 85 Nev. 700 - 01, 462 P.2d at 1018-19; Nev. Const. Art. 1 § 3 and U.S. CONST. AMEND. VI.

Trial counsel saw no issue with Arena and passed for cause on Small rather than exercising a peremptory challenge to achieve an impartial jury. *See*, *Blake* 121 Nev. 796, 121 P.3d at 578. By these small actions, trial counsel failed to protect Harris' constitutional rights. Small and Arena did not give Harris the privilege of a truly impartial jury, thus his Dismissal Order should be reversed.

III. IT WAS IMPROPER FOR THE STATE TO "BOLSTER" THE TESTIMONY OF THEIR WITNESSES WITH IRRELEVANT TESTIMONY REGARDING WITNESS THREATS/INTIMIDATION.

A. The State Misinterprets *Lay*

In its *Respondent's Answering Brief* the State relies upon *Lay v. State* for the proposition that "[r]eversible error will not be found, however, in cases where the references to, or implications of, witness intimidation are not tethered to the defendant." *Ibid.*, 110 Nev. 1189, 886 P.2d 448 (1994). However, *Lay* specifically states as follows:

> 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. … 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."

Id., 110 Nev. at 1193 (citations omitted). The *Lay* case holds that "[i]t is well established that where evidence of guilt is overwhelming, prosecutorial misconduct may be harmless error." *Id.*, 110 Nev. at 1194. The Court disapproved of some of the prosecutor's references therein, but concluded that in light of the entire record those references would have been harmless.

The State never produced substantial credible evidence below nor on appeal that defendant was the source of the intimidation. Rather, the State's arguments seem to contradict *Lay* by arguing that witness intimidation evidence is admissible if it is not tied directly to the defendant; however, this would still imply the existence of threats or violence and render it inadmissible.

B. The Witness Intimidation Testimony Was Inadmissible.

Further, the State's own recitation of *Lay* indicates that the references made by the prosecutor with regard to witness intimidation were considered irrelevant, although not considered prosecutorial misconduct. All relevant evidence is admissible, except evidence which is not relevant is not admissible. NRS 48.025(2). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Under NRS 48.035(1), relevant evidence is inadmissible "if its

probative value is substantially outweighed by the danger of unfair prejudice." *State v. Distr. Ct (Armstrong),* 127 Nev. 927, 933, 267 P.3d 777 (2011).

The prosecution's intimations of witness intimidation by a defendant are reversible error unless the prosecutor also presents substantial credible evidence that the defendant was the source of the intimidation. *Rippo v. State,* 113 Nev. 1239,1252-1253, 946 P.2d 1017 (1997) *citing Lay v. State,* 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994)(*citing 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 (D.C. Cir. 1969); *Hall v. United States,* 419 F.2d 585 (5th Cir. 1969)). 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). "[T]he credibility of the witnesses is of primary significance to the jury's ultimate determination of guilt or innocence." *Klein v. State,* 105 Nev. 880, 883, 784 P.2d 970 (1989).

Darnella testified that she felt she had no protection outside of the courtroom and did not want to be testifying. Further, Darnella testified she received two (2) phone calls during which she was told she was a "snitch" and would be "killed" if she testified. APP394-395. Any speculation that Harris

was the individual who directly threatened Darnella had a negative impact on his case since the testimony diverted the jury's attention from the primary focus of the facts that had been established through proper evidence.

Harris had a fundamental right to have the jury determine Darnella's credibility as a witness without any enhancement of her testimony. APP394-395. *See*, *Klein* at 105 Nev. 883, 784 P.2d 970. Yet, the State argued that "[t]estimony regarding the threats [Darnella] received was essential to bolster her credibility as a witness." *See*, Answering Brief at pg. 28. Although Darnella was unable to recall certain events surrounding the incident, her testimony should not have been "bolstered" with irrelevant facts. NRS 48.025(2). The references towards witness threats and intimidation was clearly unfounded through any factual or other testimonial evidence; and therefore, was non-admissible to the trial proceedings. NRS 48.025(1).

The "bolstering" of witness testimony was clearly improper and was unfairly prejudicial to Harris. *See*, *Armstrong* at 127 Nev. 933, 267 P.3d 777 *quoting* NRS 48.035(1). Absolutely no "substantial credible evidence" was presented during trial that showed Harris was a participant to or was the actual "source" of the threats/intimidation Darnella had received. *See*, *Rippo* at 113 Nev. 1252-1253, 946 P.2d 1017 *citing Lay* at 110 Nev. 1193, 886 P.2d at 450-51; *Rios* at 1343; *Peak* at 1339; and *Hayward* at 147. Testimony making any

reference to threats of harm was irrelevant to the proceedings. Therefore, Harris' Dismissal Order should be reversed. *See, Muscarella* at 248-49 *citing Love* at 87.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 27th day of January, 2017.

CARLING LAW OFFICES, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.
Nevada Bar No. 007302
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
Counsel 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 Reply 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 Reply 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 3,686 words (7,000 max.).

3. Finally, I hereby certify that I have read this Reply 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 27th day of January, 2017.

CARLING LAW OFFICES, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.
Nevada Bar No. 007302
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of January, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

MATTHEW D. CARLING
Counsel for Appellant

CARLING LAW OFFICES, PC

/s/ Matthew D. Carling
MATTHEW D. CARLING, ESQ.
Nevada Bar No. 007302
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
Counsel for Appellant