IN THE SUPREME COURT OF THE STATE OF NEVADA

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

ANSWER TO PETITION FOR REVIEW

COMES NOW Defendant Lamar Antwan Harris ("**Harris**"), by and through his counsel of record, Matthew D. Carling, and hereby submits the following Answer to the *State's Petition for Review*, filed December 4, 2017, (the "**State's Petition**"), which is supported by the following memorandum of points and authorities:

STATEMENT OF CASE

On June 24, 2011, the State filed an *Information*, charging Harris with one (1) count of Attempt Murder with Use of a Deadly Weapon, a felony; and one (1) count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, a felony. APP20-21. Harris' jury trial commenced on August 30 through September 2, 2011. APP192. After the district court received evidence and heard testimony, the jury found Harris guilty of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. APP706. The *Judgement of Conviction*

was filed on December 2, 2011, wherein Harris was ordered to serve a maximum of one hundred seventy-five (175) months with a minimum parole eligibility of seventy (70) months. APP181. Harris was given one hundred eighty-two (182) days credit for time served. *Id.* Further, 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.*

The Nevada Supreme Court issued its *Order of Affirmance* on December 13, 2012. APP716. The *Remittitur* was then issued on January 22, 2013. APP720. On March 11, 2015, Harris filed a pro se *Petition for Writ of Habeas Corpus (Post Conviction)* ("**Petition**") alleging ineffective assistance of counsel for the untimely filing of such petition, and other challenges to trial counsel's ineffectiveness. APP727. 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 was time barred and should be dismissed. APP821. Further, the State argued that Harris failed to establish good cause to overcome the time bar, Harris failed to demonstrate prejudice, and Harris was not entitled to the appointment of counsel for post-conviction proceedings. APP822 – 826. Harris' *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* was filed on June 27, 2015, wherein Harris argued that Leslie Park's ("**Park**") ineffectiveness

provided a substantial reason for good cause to exist to excuse the procedural default and that his Petition should not be time barred. APP841 – 855.

The *Findings of Fact and Conclusions of Law on Defendant's Petition for Writ of Habeas Corpus* was filed on June 6, 2016, which granted the State's request to dismiss Harris' Petition. APP911 – 918. Harris filed a timely *Notice of Appeal* on June 6, 2016. APP923. In November 2016, Harris filed his *Opening Brief,* arguing that "good cause" existed to excuse the delay in filing his Petition after the deadline as the delay in filing was not directly his fault since he believed that Park had actually filed the writ. Harris argued that Park's actions affected his case and his timely filing of his Petition. The State filed an *Answering Brief* on December 28, 2016, wherein they argued that Harris' Petition be denied as it was untimely for the specific reasons that he failed to demonstrate "good cause" or sufficient grounds to excuse the procedural default; and that his argument failed at establishing ineffectiveness of counsel because he had no right to post-conviction counsel. *Appellant's Reply Brief* was filed in January 2017, wherein Harris argued that Park's actions were sufficient to meet the procedural rules of NRS 34.726(1) and that Park's own testimony during the evidentiary hearing supported "good cause." Further, Harris argued that *Brown v. McDaniel,* 130 Nev. - -, 331 P.3d 867, 870 (2014) pertained only to successive petitions rather than timeliness of first petitions; *Hathaway v. State,* 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) was

assistive, that his constitutional rights to an impartial jury were not protected and the State's bolstering witness testimony with irrelevant testimony regarding threats/intimidation was improper.

On November 16, 2017, the opinion in *Harris v. State* was filed by the Court of Appeals of Nevada. *Ibid.,* 407 P.3d 348 (2017). The Court of Appeals reversed the district court's order dismissing Harris petition as they concluded that Harris demonstrated cause for delay under the test they analyzed in *Hathaway*, remanding to the district court to determine whether Harris demonstrated undue prejudice under NRS 34.726(1). *Id.*, 407 P.3d 348, 356.

STATEMENT OF FACTS

Harris was before the district court on December 8, 2015, for a hearing regarding the time bar on the writ. APP932. Harris waived his attorney-client privilege. *Id.* On direct-examination, Park testified she was not retained to file a post-conviction writ, rather was retained to handle the appeal. *Id.* She 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, she needed to be paid the remainder of the fee for the writ. *Id.* She testified the writ was never filed because she had not been paid to file the writ. APP934. 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.

During cross-examination, 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. She had discussed the necessity of needing to be paid with Harris and his wife. *Id.* She testified that the "bare bones" writ was more of an outline and would need more information to actually be filed. *Id.* Park was never approached by Harris nor his wife to actually file the writ. APP937. When questioned by the district court, Park verified that the writ contained her handwriting and signature. *Id.* She could not recall why she would have signed the writ if she had no intention of filing it. *Id.* Park indicated that the certificate of mailing attached to the writ was only for purposes of mailing to Harris. APP938. Even though the certificate of mailing mentioned the Nevada Supreme Court and the Attorney General, she claimed it was just the "bare bones" general writ outline. *Id.* After Park had prepared the "bare bones" writ, she informed Harris the writ had not been filed and she needed to be paid. APP939.

Harris retained Park for his appeal. APP942. Harris spoke with Park about filing a post-conviction writ of habeas corpus after his appeal process was complete. *Id.* Harris understood the entire process would cost eight thousand ($8,000) dollars and that Park was to be paid half the retainer fee. *Id.* After

receiving the *Remittitur* in January 2013, Harris spoke with Park indicating he wanted to file the writ. *Id.* Harris received a copy of the "bare bones" writ. APP943. 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 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 had no further contact with Park. *Id.* He learned the writ had never been filed in early 2014. *Id.* Harris wrote letters to both the Supreme Court and the district court inquiring into the status of his case. *Id.* He received a response from the district court indicating that nothing had been filed. *Id.* Harris then filed his own writ with the district court. APP948.

On cross-examination, Harris testified that he called Park periodically to find out whether the writ had been filed. *Id.* After receiving the writ, Harris spoke with Park informing her the caption was incorrect. APP949. Park had indicated to Harris that she would fix the mistake. *Id.* Harris did not initially look into the writ because he was waiting on a response. APP951. During 2014, Harris had absolutely no contact with Park and she was never paid in full. APP952.

Further, Park testified she only received approximately four thousand ($4,000) dollars in cash, even though the retainer was eight thousand ($8,000) dollars. APP690. She stated that she drafted the "bare bones" writ so Harris

would have an idea of what it would be like. APP962. 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. After hearing arguments from the parties, the district court indicated that they did not have confidence in the accuracy of Park's testimony. APP969.

ARGUMENT

I. THE PETITION FOR REVIEW SHOULD BE DENIED.

A. The Court Of Appeals Correctly Applied Applicable Law On The Contested Issue.

Harris contends that the issue of the aforementioned case is whether Park's actions were sufficient to meet the procedural default requirements set forth in NRS 34.726 to excuse the delay in filing a timely writ, rather than the fact that he was not entitled to effective assistance of counsel in post-conviction proceedings as heavily argued in the State's Petition. Although the Court of Appeals briefly noted that Harris was not entitled to effective assistance of counsel, the opinion was centered on the contested issue at hand: whether good cause for delay and undue prejudice under NRS. 34.726 had been effectively met by Harris. After a thorough analysis into the procedural default rules, the Court of Appeals reversed the district court's order dismissing Harris' Petition upon a finding that he had demonstrated good cause for the delay in filing his writ and remanded back to the

district court to determine if Harris had demonstrated undue prejudice under NRS 34.726(1)(b). *See, Harris,* 407 P.3d at 355 - 356.

Throughout his case, Harris maintained the defense that, but for the actions of Park, he would have complied with the procedural default rules of NRS. 34.726 and filed a timely writ within the one (1) year deadline. Specifically, Harris argued that Park's actions were sufficient to meet a showing of "good cause." To support his defense, Harris provided testimonial evidence from an evidentiary hearing held on December 8, 2015, wherein Park testified that although she was retained to handle his appeal, she prepared a "bare bones" writ for Harris' review. APP932. The "bare bones" writ contained a mailing certificate mentioning the Nevada Supreme Court, the Attorney General and also bearing Park's own signature, which she verified belonged to her. APP937 and APP938. Although the State focuses on the idea that Park was never paid, she testified to receiving $4000 from Harris and disputed only that this was half of the requested retainer. Nonetheless, the only thing she accomplished for that $4000 was the "bare bones" petition for writ she claims she never filed.

Harris testified that he received a copy of the "bare bones" writ and was under the impression that Park had filed the writ because that had been discussed between them. APP943. Harris discovered the writ contained the incorrect court caption and spoke with Park about the mistake. APP944 and APP949. Harris

never received another copy of a writ nor had any further contact with Park after June 6th, 2013. *Id.* Park even testified that after sending Harris a copy of the "bare bones" writ, she could not recall whether she had actually spoken to Harris again and was not positive that she had actually seen him in person. APP934. Harris filed his Petition after learning the "bare bones" writ had never been filed by Park. APP948.

Based upon the facts as stated *supra*, the Court of Appeals concluded Harris demonstrated cause for delay for the following reasons:

> First, Harris believed his counsel filed a post-conviction petition on his behalf. Second, based on Park's conduct, it was objectively reasonable for Harris to believe counsel had filed the petition on his behalf. Park provided Harris with a copy of a signed post-conviction petition with a completed certificate of service, Park affirmatively represented to Harris she had filed the petition, and Park again affirmatively represented a petition had been or was going to be filed when Harris informed her the petition she provided to him had been filed in the wrong court. Third, Park then abandoned Harris without notice and failed to file the petition. Fourth, Harris was reasonably diligent in attempting to determine whether Park filed a petition on his behalf and he filed his petition within a reasonable time after he should have known park did not file a petition on his behalf.

See, Harris, 407 P.3d at 355. To reach the determination, the Court of Appeals provided a thorough examination into precedent set by the Nevada Supreme Court on procedural laws and processes. In doing so, the Court of Appeals relied upon *Hathaway v. State,* 119 Nev. 248, 71 P.3d 503 (2003) and found it to be relevant case law. While the State's Petition argued that reliance upon *Hathaway* was

misplaced, this notion was simply not correct. *Hathaway* was similar to the aforementioned case. Both *Hathaway* and Harris argued that cause for delay should be excused as they had requested their attorney file a writ, and both had the belief that a writ had been filed. *See, Hathaway*, 119 Nev. at 254, 71 P.3d at 507. The focus of *Hathaway* by the Court of Appeals and Harris was not on a constitutional claim of ineffective assistance of counsel, but rather on the similar factual situations that lead to a finding of "good cause" sufficient to have met the procedural bars of NRS 34.726. Specifically, they both were under the assumption that a writ had been filed on their behalf. AA943. When it was discovered that no writ had been filed, both *Hathaway* and Harris filed their petitions. It was based upon the circumstances evidencing why Harris did not meet the procedural deadline that the Court of Appeals determined "good cause" for delay had been met.

Harris conceded below that he maintained no Sixth Amendment right to the effective assistance of counsel in habeas corpus proceedings, thus a constitutional *Strickland* analysis would not be applied. The Court of Appeals did not apply a constitutional *Strickland* ineffective assistance analysis, nor expand the presently existing one to include these types of circumstances. Harris argued that the fact *Strickland* did not apply did not preclude analysis of counsel's actions as it related to and impacted the "good cause" exception for excusing the procedural bar at

issue, which exception had a separate and distinct analysis regarding external impediments or interference by others as analyzed and presented in Harris' argument below. The State has not addressed the differences in this analysis, but simply claims the Court of Appeals' decision conflict with precedent; however, the precedent it claims conflicts is inapplicable here. Precedent has not precluded retained counsel's actions from the "good cause" exception to the procedural bar at issue, and the State raises no support to show that it has. The "good cause" exception is not so narrowly focused as to preclude all counsel's actions from ever being considered as impacting a defendant's ability to file for habeas relief.

The facts of each case differ, and this case happens to have a very particular fact scenario that supports granting the exception, just as the Court of Appeals properly did. The State's concerns of any impact of the Court of Appeals' decision on a different area of law altogether—the lack of constitutional ineffectiveness as a viable claim against habeas counsel—are without merit. The Court of Appeals was specific in their decision, and the facts of this case are particular in supporting application of the "good cause" exception

The State tries to rely on Park's testimony that she did not file the "bare bones" petition, but she could not explain why the petition and mailing certificate were signed by her. The State claims Park never got paid and testified she would not have filed it, but she did in fact testify to receiving $4000 from Harris—it just

was not the full retainer, but surely sufficient enough for the "bare bones" petition she prepared. APP690. Even the district court indicated they did not have confidence in the accuracy of Park's testimony after hearing arguments from the parties. APP969. Yet the State hinges its petition for review on her testimony, which raised more questions than it answered about why things were done the way they were.

The facts of this cases were particular, with an emphasis on what Harris reasonably believed had occurred with regard to his right to file a habeas corpus petition. He was diligent in attempting to get one filed before the procedural bar, having hired private counsel, paying her $4000, and then receiving a signed and executed copy from her. The core issue for the procedural bar is not technically on what Park's actions were or were not, but on what Harris did and could reasonably draw from the circumstances as to a belief he had protected his own rights. Thus, the Court of Appeals correctly applied applicable law and the State's Petition should be denied.

B. The State's Reliance Upon *Brown* And *McKague* Was Misplaced.

Further, Harris contends that the State's reliance upon *Brown* and *McKauge* was misplaced. In *Brown v. McDaniel,* 130 Nev. ___, 331 P.3d 867, 870 (2014) and *McKague v. State,* 112 Nev. 159, 912 P.2d 255 (1996), both defendants filed a second post-conviction petition. Both the *Brown* and *McKague* courts analyzed

the procedural default bars; however, the analysis was constructed around the premises of the filing of successive petitions—the concept of trying to claim constitutional ineffectiveness against counsel in their actual representation of the defendants in habeas corpus proceedings where the constitutional protections of effective counsel did not apply. *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 of *Brown*'s holdings and statutory interpretation was to limit petitioners "to one time through the post-conviction system" although it acknowledged extraordinary circumstances could provide exception.

No successive petitions were filed herein, and Harris was not making a constitutional ineffectiveness claim but rather a "good cause" claim to excuse the barring of his first and only petition. The two (2) cases were differentiated from Harris and did not require the Court of Appeals to make any explanation on whether or not they are still considered good law as argued by the State. *See, State's Petition* at pg. 11. Harris' decision from the Court of Appeals does not

conflict with or abrogate the holdings in *Brown* and *McKague,* nor does the opinion state that it should be read that way.

Any in-depth analysis into these two (2) cases would only muddy the waters and take away from the Court of Appeals' analysis on a first and only petition and whether or not the procedural time bars had been met to justify a showing of good cause for delay. The Court of Appeals did not need to delve into whether *Brown* and *McKague* were still good law. It would not have been appropriate in Harris' opinion as the facts of his case were more closely related to *Hathaway*, which was effectively applied and argued as stated *supra*. The fact that the Court of Appeals did not analyze *Brown* or *McKague* does not mean the cases are not still good law but rather they recognized that an analysis on successive petitions was not correct for the facts at hand. The Court of Appeals was correct not to rely heavily on *Brown* and *McKauge.* The Court of Appeals opinion should be upheld and the Petition for Review denied.

CONCLUSION

WHEREFORE, based upon the foregoing, Harris respectfully requests that this Court deny the State's Petition for Review and that the ruling rendered by the Court of Appeals be upheld.

Respectfully submitted this 2nd day of February, 2018.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Response 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 the Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman Style.

2. **I further certify** that this Answer complies with the page or type volume limitations of NRAP 40(b)(3) because it contains 3,429 words (4,667 max.).

DATED this 2nd day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of February, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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