Case No. 77345

Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

Marlo Thomas,

Appellant,

vs.

William Gittere, et al.,

Appellee.

District Court Case No. 96C13682

Petition for Rehearing

DEATH PENALTY CASE

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I. Introduction

On May 2, 2022, this Court issued a decision in Marlo Thomas's case affirming in part, reversing in part, and remanding for further proceedings.[1]

Rehearing is required because this Court overlooked and misapprehended material questions of fact and law in ignoring all facts relevant to Thomas's juror misconduct/bias claim against juror Joseph Hannigan and in failing to apply the applicable standard for intrinsic juror misconduct that occurs during voir dire. NRAP 40(c)(2)(A).

Further, rehearing is required because this Court overlooked and failed to consider controlling statutory authority, NRS 34.724(1), 34.735, 34.820(4), and case law, which is directly controlling of the dispositive procedural issue decided in this case. NRAP 40(c)(2)(B). Rehearing is necessary to secure and maintain the uniformity of this Court's decisions. NRAP 40A(c).

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[1] *Thomas v. State*, 2022 WL 1700699, 138 Nev. Adv. Op. 37 (May 26, 2022) ("Opn.").

II. Argument

This Court considers a petition for rehearing when the Court has "overlooked or misapprehended a material fact in the record or a material question of law in the case" or when the Court has "overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c). Both provisions are implicated by the Court's decision in Thomas's case.

A. This Court overlooked and misapprehended material questions of fact and law in failing to address the merits of Thomas's juror misconduct/bias claim against juror Joseph Hannigan.

This Court held that Thomas was not entitled to relief from any alleged acts of juror misconduct.[2] Specifically, this Court concluded that "jurors improperly discuss[ing] Thomas's release from incarceration, clos[ing] their minds to possible sentences before deliberation, and learn[ing] of his prior death sentences before deliberation" did not warrant an evidentiary hearing as these instances were "not sufficient

[2] Opn. at 17–19.

to establish that second postconviction counsel's omission of this claim was objectively unreasonable."[3]

But the facts and law cited by this Court failed to address all the juror misconduct issues Thomas raised. In particular, this Court overlooked Thomas's juror misconduct/bias claim, which argued that juror Joseph Hannigan intentionally concealed material information during voir dire, thereby permitting a biased juror to sit on Thomas's jury.[4] Indeed, juror Hannigan is not referenced in the opinion. When listing the instances of juror misconduct that did not warrant relief, this Court excluded jurors that Thomas accused of being intentionally dishonest during voir dire, to wit juror Hannigan.[5] In ignoring this claim and its supporting facts, this Court also misapprehended the law by not applying the proper test for intrinsic misconduct that occurs during voir dire—as opposed to during deliberations—in order to determine whether juror Hannigan's omission rose to the level of misconduct and warranted an evidentiary hearing on the issue. *See*

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[3] Opn. at 18–19.
[4] AOB at 64–82; ARB at 17–20.
[5] *Compare* Opn. at 17–19, *with* AOB at 64–82 & ARB at 17–20.

Brioady v. State, 133 Nev. 285, 288, 396 P.3d 822, 824–25 (2017). This Court's failure to address this claim warrants rehearing.

To the extent this Court did not omit an analysis about juror Hannigan and intended the claim related to him to be incorporated in the "Failure to litigate claim regarding jury misconduct" discussion or any other section, rehearing is still warranted, as this Court overlooked material facts and misapprehended the relevant law concerning juror misconduct during voir dire.

1. This Court overlooked material questions of fact in failing to consider juror Hannigan's intentional dishonesty during voir dire.

In reviewing Thomas's juror misconduct claim, this Court referenced and considered three instances of misconduct: (1) "the jurors improperly discussed Thomas's release from incarceration," (2) "closed their minds to possible sentences before deliberation," and (3) "learned of his prior death sentences before deliberation."[6] However, Thomas also argued on appeal that he was prejudiced by another form of juror misconduct—intentional concealment of disqualifying information by

[6] Opn. at 17.

juror Hannigan during voir dire.[7] The Court overlooked questions of fact by failing to recognize this distinct misconduct by Hannigan.

During voir dire proceedings, the district court questioned juror Hannigan to determine his fitness as a potential juror. The Court asked juror Hannigan if he had been the victim of a crime, which juror Hannigan confirmed he had been.[8] Juror Hannigan explained that he had a business in Boston that was held up in 1960, but downplayed the incident by agreeing with the Court's description as "they just said, give me your money and you gave them your money and that was—."[9] Juror Hannigan alleged the individuals were never caught.[10] Additionally, when asked if he or anyone he was closely associated with had been arrested for a crime, juror Hannigan admitted he was arrested for setting up and promoting a lottery.[11] Taking juror Hannigan's responses as truthful, no further questions were asked regarding

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[7] *See* AOB at 64–81; ARB at 17–20.
[8] 21AA5229–30.
[9] 21AA5229–30.
[10] 21AA5229–30.
[11] 21AA5229–30.

victimization or criminal association, and he was seated on Thomas's jury.[12]

But Thomas later learned through court documents, news articles, and juror Hannigan himself that Hannigan's responses during voir dire were far from the truth. While juror Hannigan did disclose that his former business had been robbed over thirty years prior, he failed to disclose that just 3 years prior a different business of his, Kerrigan's Flower Shop, "was pressured by a criminal organization to participate in an illegal drug ring."[13] This "later led to federal charges being brought against" the organization and required his wife's participation in criminal proceedings against the defendants.[14]

As fully explained in the briefing before this Court, juror Hannigan routinely hired convicted felons at his flower shop.[15] One of these employees was a convicted murderer who "ended up taking advantage of [Hannigan's] kindness" by taking over the flower shop and

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[12] 21AA5229–30.
[13] 29AA7149–53 at ¶¶ 1, 12.
[14] *Id*.
[15] 29AA7149–53 at ¶ 11.

using it as a command center for his violent drug organization.[16] The drug organization was ruthless, violent, and operated out of juror Hannigan's flower shop for four years. *See United States v. Houlihan*, 92 F.3d 1271, 1277 (1st Cir. 1996). Eventually, the former employee and other members of the drug organization were charged federally with several counts, including murder. *Id.* at 1277–78. After juror Hannigan's wife testified during the 70-day trial against the organization, and fearing retaliation, the couple fled from Boston to Las Vegas.[17] *Id.* at 1297 n.28. However, even after fleeing to Las Vegas, juror Hannigan received threatening calls from the organization.[18] The couple lived in fear for decades—including the time juror Hannigan served on Thomas's jury.[19]

Reflecting upon the situation, juror Hannigan expressed disdain for having hired a convicted murderer. Juror Hannigan tried to give this man a fresh start, and the man ultimately betrayed juror Hannigan's trust and caused him to "los[e] everything, down to the shirt

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[16] 29AA7149–53 at ¶¶ 11, 12.
[17] 29AA7143 at ¶ 9; 29AA7152–53 at ¶ 12.
[18] 29AA7144–45 at ¶ 14.
[19] 29AA7142 at ¶ 6; 29AA7144–45 at ¶¶ 13, 14.

off [his] back."[20] Juror Hannigan ultimately admitted to the Federal Public Defender: "I did not disclose this information on my questionnaire or during voir dire in the 1997 case of Nevada v. Marlo Thomas."[21] He further admitted that he failed to disclose all information about his victimization and criminal activity because "he was not trying to think about it."[22]

Despite being presented in Thomas's opening and reply briefs, none of the facts related to juror Hannigan's misconduct and bias were cited or referenced in this Court's decision. In failing to consider juror Hannigan's misconduct, this Court overlooked material facts demonstrating that a seated juror was intentionally dishonest during voir dire and deliberated Thomas's fate while having a potential bias towards the specific facts of this case. Namely, that a convicted felon hired by a business was accused of carrying out a robbery and murder at that business and against his coworkers. This claim should also have been remanded for an evidentiary hearing.

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[20] 29AA7142 at ¶ 7; 29AA7152–53 at ¶¶ 11–12.
[21] 29AA7152–53 at ¶ 12.
[22] 29AA7145 at ¶ 16.

2. This Court misapprehended the law in applying the "general" intrinsic juror misconduct standard instead of applying the applicable standard for "specific" instances of juror misconduct that occur during voir dire.

In addition to overlooking material facts of juror misconduct during voir dire, this Court also misapprehended the law by applying an incorrect standard to determine whether Thomas was entitled to relief based on the misconduct of juror Hannigan during voir dire. This Court concluded that "[t]he juror misconduct alleged by Thomas generally falls into the category of intrinsic juror misconduct—'conduct by jurors contrary to their instructions or oaths.'"[23] Pursuant to this finding, the Court applied a more stringent standard of proof in which relief is only justified "in extreme circumstances" and prohibits a court from reviewing any juror statements or affidavits that "delve into the jury's deliberative process," such as "the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to

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[23] Opn. at 18 (citing *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003).

assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith."[24]

The juror misconduct alleged by Thomas regarding juror Hannigan occurred during voir dire, not deliberations. And "instances of juror misconduct, such as failing to disclose material information during voir dire, are governed by different standards" than those that occur during deliberations. *Meyer*, 119 Nev. at 559 n.3, 80 P.3d at 451 n.3. Thus, by applying the general standard for intrinsic juror misconduct, rather than the correct standard adopted for instances of dishonesty during voir dire, this Court misapprehended the law.

Both this Court and the United States Supreme Court have determined that to obtain relief based on juror misconduct during voir dire, a party must meet a two-prong test. *Brioady*, 133 Nev. at 288, 396 P.3d at 824 (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). First, the party must "'demonstrate that a juror failed to answer honestly a material question on voir dire.'" *Id.* (quoting *McDonough*, 464 U.S. at 556; *Lopez v. State*, 105 Nev. 68, 89, 769 P.2d

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[24] *Id.* (quoting NRS 50.065(2)(a)).

1276, 1290 (1989)). Only intentional concealment of information qualifies. *Id.* at 824–25, 396 P.3d at 287–88. Unlike with other intrinsic juror misconduct, juror testimony and statements are admissible to prove intentional concealment during voir dire because it does not "delve into the jury's deliberative process." *Id.* at 823–25, 396 P.3d at 287–89; *Meyer*, 119 Nev. at 565, 80 P.3d at 456. Second, the party must "'show that a correct response would have provided a valid basis for a challenge for cause.'" *Brioady*, 133 Nev. at 288, 396 P.3d at 824. Under this standard, which the Court failed to apply, Thomas was entitled to relief—or at least an evidentiary hearing—on his claim concerning juror Hannigan's misconduct during voir dire.

Here, based on the evidence provided by Thomas, juror Hannigan's answers meet the first prong because he failed to honestly answer a materially important question related to his victimization and criminal association. Juror Hannigan told the trial court he was only a victim of an unarmed robbery in the 1960s and stated that he did not testify at a trial because the suspects were never caught. Juror Hannigan also claimed he had no criminal associations other than his own arrest for promoting an illegal lottery. Yet, in a sworn declaration

juror Hannigan admitted he and his wife were both the victims of a serious crime that was similar to the crime Thomas was accused of committing. From 1989 to 1993, Hannigan and his wife's business, Kerrigan's Flower Shop, was taken over by a violent drug organization and used as a command center. The takeover occurred because Hannigan hired a convicted felon who, unknown to Hannigan, was the ringleader of a drug organization. The organization continued its criminal activities inside Hannigan's business until federal authorities arrested the members, including the employee Hannigan had hired. The indictment charged members of the organization with over 40 counts, including several murder related counts. The trial lasted 70 days, and Hannigan's wife testified for the prosecution against the drug organization.

Although this Court can consider Hannigan's declaration, his intentional concealment is also clear from sources other than juror Hannigan himself. In *United States v. Houlihan*, the First Circuit issued an opinion detailing the drug organization's takeover of Kerrigan's Flower Shop and Hannigan's wife's testimony at trial. 92 F.3d 1271, 1277 (1st Cir. 1996). The New York Times also published an

article about the drug organization's reign over the Charlestown neighborhood in Boston and identified Kerrigan's Flower Shop as its headquarters.[25] The government investigation of the organization cost more than one million dollars to protect witnesses, including "a half-dozen residents who asked to be moved out of the neighborhood for fear of retribution."[26]

Juror Hannigan's representations during voir dire meet the first prong, because not only were his answers dishonest but his dishonesty was intentional concealment. In *Brioady*, this Court analyzed three types of dishonesty: (1) "[s]imple forgetfulness," (2) a misunderstanding that the information needed to be provided, and (3) intentional concealment. The final category is the only type that warrants relief.

In *Brioady*, the appellant argued he was prejudiced by a juror's dishonesty during voir dire. 133 Nev. at 286, 396 P.3d at 823. Brioady was charged with sexual assault of a minor. *Id*. During voir dire, the

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[25] *See Neighborhood Finally Talks, And Loosens Crime's Grip*, N.Y. Times, Mar. 26, 1995 (available at https://www.nytimes.com/1995/03/26/us/neighborhood-finally-talks-and-loosens-crime-s-grip.html).

[26] *Id*.

court asked all prospective jurors whether they had been the victim of a crime. *Id*. Despite being molested as a child, a venire member, later seated as Juror Three, said nothing. *Id*. After trial, Juror Three was questioned about her untruthfulness. *Id*. at 287, 396 P.3d at 824. In response, Juror Three stated she did not recall ever being asked if she was a crime victim, did not feel she was a victim, and "didn't feel it was necessary for [her] to bring up an event that happened when [she] was four years old" because "she could be a fair and impartial juror." *Id*. Juror Three admitted that she thought of her childhood molestation during voir dire but decided it was not relevant to her being a fair and impartial juror. *Id*. This Court concluded that Juror Three's dishonesty constituted intentional concealment and that Juror Three's misunderstanding of the court's question was belied by the record. *Id*. at 288–89, 396 P.3d at 824–25.

Like the juror in *Brioady*, juror Hannigan "knowingly failed to honestly answer a question during voir dire." 133 Nev. at 289; 396 P.3d at 825. When later asked why he never revealed material information regarding his victimization and criminal associations, juror Hannigan

stated it was because "he was not trying to think about it."[27] Juror Hannigan did not forget the crime, which occurred a mere five years before Thomas's trial and was the sole reason he was forced to flee his hometown and relocate to Las Vegas. Juror Hannigan also did not forget his criminal associations. The leader of the drug organization was someone he had personally hired, the organization's crimes had caused him to lose everything he owned, and he continued to be threatened by the organization after his relocation to Las Vegas.

Finally, the record demonstrates that juror Hannigan did not misunderstand the court's questions. He answered the questions about prior victimization and criminal associations in the affirmative yet intentionally omitted all information about the drug organization, Kerrigan's Flower Shop, his wife's participation at trial against the organization, and his relocation to Las Vegas. Juror Hannigan's admission that he omitted this material information because he did not want to talk about it further shows he did not misapprehend the court's questions but rather intentionally failed to provide the information.

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[27] *See* 29AA7145 at ¶ 16.

Turning to the second prong, had juror Hannigan been truthful during voir dire, Thomas would have had "a valid basis for a challenge for cause." *Brioady*, 133 Nev. at 288, 396 P.3d at 824. Thomas, a convicted felon himself, was being accused of carrying out a robbery and multiple murders at the restaurant where he worked. The correlations between the crimes that occurred at juror Hannigan's business and the crimes Thomas was accused of committing necessarily created a bias against Thomas. At the time of Thomas's trial, juror Hannigan was still profoundly affected by the crimes at his business. Juror Hannigan and his wife had just finished a grueling 70-day trial two years prior to Thomas's trial and were living in a constant state of fear because the organization continued to threaten to retaliate against the Hannigans. The trauma Hannigan was experiencing was clearly significant because he was willing to lie during a court proceeding to avoid reliving the details.

Considering the seriousness of the charges and potential punishment that Thomas faced, had these facts been exposed, they would have supported a challenge for cause. Accordingly, juror Hannigan's intentional concealment of material information constituted

juror misconduct, which prejudiced Thomas at trial. Because the Court failed to apply this legal framework, rehearing is necessary. This Court should grant Thomas relief or remand for further factual development.

B. This Court's procedural ruling is inconsistent with Chapter 34 of the Nevada Revised Statutes and with controlling case law interpreting those statutory provisions.

This Court rejected Thomas's arguments of good cause based on post-conviction counsel's ineffective assistance as it applied to the guilt phase of the case, holding that his procedural arguments were untimely.[28] *See* NRS 34.726. In rejecting this claim, this Court reiterated its conclusion in *Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935 (2021), that petitioners must "assert good-cause claims based on postconviction counsel's performance as to guilt-phase issues within 1 year after the remittitur issues on appeal from the district court order denying postconviction relief as to the convictions even where that postconviction proceeding resulted in a penalty phase retrial."[29] Citing to general Nevada case law holding that ineffective assistance of

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[28] Opn. at 6.

[29] Opn. at 6 (citing *Chappell v. State*, 137 Nev. Adv. Op. 83, __, 501 P.3d 935, 946 (2021)).

postconviction counsel can constitute good cause for untimely and successive petitions, this Court held Thomas had to challenge his conviction within 1 year after remittitur issued following Thomas's guilt-phase conviction proceedings on March 9, 2004.[30] However, on March 9, 2005, Thomas had not been formally sentenced and still was represented in his penalty phase retrial by guilt-phase post-conviction counsel, David Schieck. Requiring Thomas to file a second postconviction petition challenging the effectiveness of Schieck's representation in the postconviction proceeding before his sentence was final and while Schieck continued to represent Thomas is inconsistent with state statutes, this Court's case law, and is a rule that creates an unnecessary and unworkable conflict of interest between client and counsel in circumstances such as these.

Thomas was initially convicted and sentenced to death in June 1997.[31] Schieck was appointed to represent Thomas in his post-conviction proceedings and filed a supplement to Thomas's *pro per*

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[30] Opn. at 6 (citing *Chappell*, 137 Nev. Adv. Op. 83, __, 501 P.3d at 946.

[31] 24AA5964–70, 24AA5971–81.

petition in the district court in 2001.[32] On February 10, 2004, this Court affirmed Thomas's convictions, but reversed and remanded to the district court for a new penalty trial.[33] Represented by Schieck at the penalty retrial, Thomas was again sentenced to death on November 28, 2005.[34] After sentencing and following an appeal, Thomas was represented by Brett Whipple during post-conviction proceedings.[35]

This Court must reconsider its procedural ruling because NRS Chapter 34 expressly requires the existence of a conviction *and* sentence before a petitioner may file a postconviction petition. *See* NRS 34.724(1). Moreover, this Court has previously acknowledged that it cannot interpret the procedural default rule of NRS 34.810 in a manner that would require a petitioner to attack the performance of the attorney who is currently representing him. *See*, *e.g.*, *Nika v. State*, 120 Nev. 600, 606–07, 97 P.3d 1140, 1144–45 (2004). Finally, the Court's decision forces petitioners to ignore NRS 34.820(4)'s single petition requirement and this Court's related precedent.

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[32] 5AA1065–1142.
[33] 6AA1267–84.
[34] 6AA1285–88.
[35] 6–7AA1499–1509.

In *Chappell*, this Court first decided that a penalty phase retrial is grounds to split postconviction proceedings between guilt phase and penalty phase retrial proceedings. 137 Nev. Adv. Op. __, 501 P.3d at 948. However, deciding that a petitioner is obligated to collaterally attack the guilt portion of a vacated judgment during the pendency of the second penalty phase is plainly contrary to NRS Chapter 34 and this Court's own precedent in *Nika*, 120 Nev. at 606–07, 97 P.3d at 1144–45, and *Johnson v. State*, 133 Nev. 571, 573, 402 P.3d 1266, 1271 (2017).

Indeed, NRS 34.724(1) limits postconviction relief to petitioners who have a judgment of conviction for a crime *and* a corresponding sentence. Specifically, NRS 34.724(a) states that "[a]ny person convicted of a crime *and* under a sentence of death or imprisonment . . . [may] file a postconviction petition for writ of habeas corpus." (Emphasis added). On March 9, 2005, Thomas had been convicted of crimes, but was not under a sentence of death or imprisonment. Therefore, this Court's holding that Thomas was required to file a petition within one year of the remittitur following guilt-phase post-conviction proceedings—on or

before March 9, 2005—when he had not been sentenced, violates NRS 34.724(1) on its face.

This Court's new interpretation of NRS 34.726 in *Thomas* and *Chappell* is also inconsistent with its own decision in *Nika*. In *Nika*, this Court interpreted NRS 34.810(1)(b)'s procedural default rule as only applicable to a petitioner who received a remand during direct appeal under former SCR 250(VI)(H)[36] to conduct an evidentiary hearing on ineffective assistance of trial counsel claims. *Nika*, 120 Nev. at 606–07, 97 P.3d at 1144–45. This Court found that "determining the effectiveness of trial counsel during a direct appeal was impracticable," because "the simultaneous litigation of both the direct appeal and the SCR 250 proceeding" placed Nika and his trial counsel in "an untenable position." *Id*. at 1145. At the SCR 250 proceeding, counsel "found themselves defending their own conduct of the trial against challenges by Nika. In fact, Nika was required to waive his privilege of attorney-client confidentiality in that proceeding even though his direct

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[36] Former SCR250(IV)(H) "provided that this court could refer a capital case on appeal to the district court to conduct hearings on any issue this court considered important." *Nika v. State*, 120 Nev. 600, 606, 97 P.3d 1140, 1145 (2004).

appeal was not decided." *Id*. Consequently, this Court concluded that Nika could not fully and adequately raise grounds of ineffective assistance of counsel pursuant to NRS 34.801(a)(b) at the SCR 250 proceedings. *Id*.

However, under this Court's new procedure, Thomas's guilt phase post-conviction and penalty phase retrial counsel, Schieck, was required to follow just this "untenable" procedure. According to this Court, Schieck was required to represent Thomas during penalty phase retrial while simultaneously defending himself against ineffective assistance of counsel claims as guilt-phase post-conviction counsel.

Additional provisions of Chapter 34 illustrate the requirement for both a conviction and sentence to file a petition for writ of habeas corpus. NRS 34.820(4) requires that "all claims which challenge the conviction or imposition of sentence *must be joined in a single petition* and that any matter not included in the petition will not be considered in a subsequent proceeding." (Emphasis added). However, pursuant to this Court's new decisions in *Thomas* and *Chappell*, a petitioner whose conviction has been affirmed but whose sentence has been vacated cannot comply with Chapter 34. Following this Court's decisions, a

petitioner must file separate petitions for each phase of trial and hope the Court does not apply the requirements of NRS 34.820(4) to the second, penalty retrial petition.

Moreover, failing to follow NRS 34.820(4)'s single petition requirement will also require petitioners to ignore this Court's precedent. In *Johnson v. State*, this Court clearly stated that "Nevada's postconviction scheme contemplates filing one petition from a final judgment of conviction." 133 Nev. 571, 573, 402 P.3d 1266, 1271 (2017). In *Johnson*, this Court vacated Johnson's death sentence on direct appeal and held that because "the statutory scheme envisions the filing of a *single petition* challenging the validity of a petitioner's convictions *and* sentences," the "judgment of conviction was not final until the sentences for the murder convictions were settled." *Id*. at 133 Nev. 573, 402 P.3d at 1271 (emphasis in original). Properly applying the statutes and this Courts' precedent must result in the conclusion that because Thomas's judgment of conviction was not final until he was sentenced after penalty phase retrial, the one-year period, pursuant to NRS 34.726, did not begin until remittitur issued on his death sentence. *Id*.

Pursuant to Chapter 34, *Johnson,* and *Nika*, post-conviction proceedings were contained in one combined petition, which included both guilt and penalty phase claims, that was filed after a conviction and sentence were settled. Based on these rules, Thomas properly filed his one, combined petition once he was sentenced and within one year of remittitur following the post-conviction proceedings for his penalty retrial. This Court misapplied both statute and precedent in determining that Thomas was required to file his guilt and penalty phase claims in two, separate petitions before his conviction and sentence were settled on March 9, 2005. This Court must grant rehearing and reconsider its present decision to ensure the uniformity of the Court's decisions.

C. Applying this Court's newly announced default ruling retroactively to Thomas violates his constitutional rights to due process and equal protection.

This Court cannot constitutionally apply a ruling retroactively to penalize Thomas for an alleged omission that occurred over fifteen years ago when he had no notice from the statutes or this Court's case law that such a rule existed. *Cf. Pelligrini v. State*, 117 Nev. 860, 874,

34 P.3d 519, 529 (2001) (noting due process requirement that habeas petitioners be allowed one-year grace period after the effective date of NRS 34.726 to comply with that provision). Rehearing and reconsideration is independently required to alleviate the harsh result that would otherwise occur with retroactive application of this Court's new rule that requires filing separate post-conviction petitions at the conclusion of each phase of trial to Thomas.

Due process principles prevent this Court from announcing a new procedural rule and retroactively applying it to Thomas to encompass events that occurred over fifteen years ago. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). As this Court has acknowledged, "[n]ew rules apply prospectively unless they are rules of constitutional law, and then they apply retroactively only under certain circumstances." *Gier v. Ninth Judicial Dist. Ct.*, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The procedural ruling just announced and applied to Thomas is not constitutional in nature so it can only be applied prospectively.

The procedural default rule this Court announced in *Chappell* and Thomas's cases was not foreseeable, as it contravenes statute and

precedent. Alternatively, even procedural rules that "appear[] 'in retrospect to form a part of a consistent pattern of procedures,'" are not sufficient for petitioner to be "deemed to have been apprised of its existence." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). Such rules cannot bar review of meritorious claims because they were not "firmly established" at the time of the events giving rise to the default. *Id.* at 424.

III. Conclusion

For the foregoing reasons, Thomas requests that this Court grant his petition for rehearing, vacate his death sentence, and remand for

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consideration of his arguments of juror misconduct and bias and ineffective assistance of postconviction counsel as applied to the guilt phase of the case.

Dated this 13th day of June, 2022.

Respectfully submitted,

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Certificate of Compliance

1. I hereby certify that this petition for rehearing 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 petition for rehearing has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 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 4,659 words.

Dated this 13th day of June, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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