



**EIGHTH JUDICIAL DISTRICT COURT
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Elizabeth A. Brown
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

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Court Division Administrator

December 12, 2018

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: SALLY D. VILLAYERDE vs. BRIAN WILLIAMS, WARDEN

S.C. CASE: 77563

D.C. CASE: A-18-780041-W

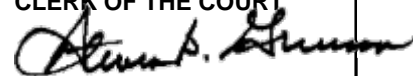
Dear Ms. Brown:

In response to the e-mail dated December 12, 2018, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed December 5, 2018 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, appearing to read "Heather Ungermann", with a long horizontal flourish extending to the right.

Heather Ungermann, Deputy Clerk



1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 KRISTA D. BARRIE
6 Chief Deputy District Attorney
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8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
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11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 SALLY VILLAYERDE,
13 #1433466

14 Defendant.

CASE NO: A-18-780041-W

DEPT NO: III

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 DATE OF HEARING: NOVEMBER 1, 2018
18 TIME OF HEARING: 9:00 AM

19 THIS CAUSE having come on for hearing before the Honorable DOUGLAS W.
20 HERNDON, District Judge, on the 1st day of November, 2018, the Petitioner not being
21 present, PROCEEDING IN PROPER PERSON, the Respondent being represented by
22 STEVEN B. WOLFSON, Clark County District Attorney, by and through DENA RINETTI,
23 Chief Deputy District Attorney, and the Court having considered the matter, including briefs,
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court
makes the following findings of fact and conclusions of law:

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 On March 23, 2003, Sally Villaverde ("Defendant") and co-defendants Rene Gato and
27 Robert Castro were charged by way of Amended Criminal Complaint with BURGLARY
28 (Felony - NRS 205.060); MURDER WITH USE OF A DEADLY WEAPON (OPEN

1 MURDER) (Felony - NRS 200.010, 200.030, 193.165) and ROBBERY WITH USE OF A
2 DEADLY WEAPON (Felony - NRS 200.380, 193.165).

3 On March 21, 2003, a preliminary hearing was held. Following the preliminary
4 hearing, the district court held all three defendants to answer to the charges in district court.

5 On March 25, 2003, Defendant and the co-defendants were charged by way of
6 Information with BURGLARY (Felony - NRS 205.060); MURDER WITH USE OF A
7 DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165) and
8 ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165). An
9 Amended Information, charging only Defendant, was filed on March 29, 2004, following the
10 district court's granting of the motion to sever their trials.

11 Defendant's jury trial commenced on March 31, 2004. On April 8, 2004, the jury found
12 Defendant guilty of all counts.

13 On June 3, 2004, Defendant was sentenced as follows: Count 1 - to a maximum of
14 ninety-six (96) months with a minimum of twenty-two (22) months in the Nevada Department
15 of Corrections; Count 2 - to a term of Life imprisonment without the possibility of parole in
16 the Nevada Department of Corrections (NDC), plus an equal and consecutive term for Use of
17 a Deadly Weapon; Count 3 - to a maximum on one hundred fifty-six (156) months and a
18 minimum of thirty-five (35) months in the NDC, plus an equal and consecutive term for the
19 Use of a Deadly Weapon, Count 3 consecutive to Count 3. The Judgment of Conviction was
20 filed on June 10, 2004.

21 Defendant filed a direct appeal. All convictions were subsequently affirmed by the
22 Nevada Supreme Court on February 15, 2006. Remittitur issued March 14, 2006.

23 On April 3, 2006, Defendant filed a Petition for Writ of Habeas Corpus. On April 20,
24 2006, he filed a Motion to Withdraw his Petition Without Prejudice. The State filed its
25 Response on April 25, 2006. Defendant filed a Reply on May 3, 2006. On May 31, 2006,
26 Defendant filed a Supplemental Petition for Writ of Habeas Corpus, Memorandum of Points
27 and Authorities In Support of the Petition, and Appendix of Exhibits.

1 On April 12, 2007, counsel was appointed to represent Defendant. On August 27, 2007,
2 appointed counsel filed a Supplement to Defendant's Petition for Writ of Habeas Corpus. The
3 State filed its Response to the Supplemental Petition on November 6, 2007, addressing the
4 merits of the Petition. The district court held an evidentiary hearing on Defendant's ineffective
5 assistance of counsel claims on January 10, 2008. Following the evidentiary hearing, the court
6 denied Defendant's Petition on the merits. The Findings of Facts, Conclusions of Law, and
7 Order was filed on February 26, 2008.

8 On January 28, 2008, Defendant filed a Notice of Appeal regarding of the denial of his
9 Petition on the merits. The Nevada Supreme Court subsequently affirmed this Court's denial
10 of Defendant's Petition. Remittitur issued June 4, 2010.

11 On August 28, 2018 - over eight years later - Defendant filed the instant Petition for
12 Writ of Habeas Corpus (Post-Conviction). The State responded on October 29, 2018.

13 On November 1, 2018, this court held a hearing on Defendant's claims.

14 ANALYSIS

15 I. DEFENDANT'S PETITION IS PROCEDURALLY BARRED

16
17 The Nevada Supreme Court has held that "[a]pplication of the statutory procedural
18 default rules to post-conviction habeas petitions is mandatory, noting:

19 Habeas corpus petitions that are filed many years after conviction
20 are an unreasonable burden on the criminal justice system. The
21 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

22 State v. District Court (Riker), 121 Nev. 225, 231 331 112 P.3d 1070, 1074 (2005).
23 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
24 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
25 has granted no discretion to the district courts regarding whether to apply the statutory
26 procedural bars; this Court must apply them. Since the Supplemental Fourth Petition is
27 procedurally barred, it is denied.
28

1 **A. THE PETITION IS TIME-BARRED.**

2 Defendant's Petition is time-barred. Pursuant to NRS 34.726(1):

3 Unless there is good cause shown for delay, a petition that
4 challenges the validity of a judgment or sentence must be filed
5 within 1 year of the entry of the judgment of conviction or, if
6 an appeal has been taken from the judgment, within 1 year after
7 the Supreme Court issues its remittitur. For the purposes of
8 this subsection, good cause for delay exists if the petitioner
9 demonstrates to the satisfaction of the court:

- 10 (a) That the delay is not the fault of the petitioner; and
11 (b) That dismissal of the petition as untimely will unduly
12 prejudice the petitioner.

13 NRS 34.726(1) (emphasis added).

14 The Supreme Court of Nevada has held that NRS 34.726 should be construed by its
15 plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). The one-
16 year time bar proscribed by NRS 34.726 begins to run from the date the Judgment of
17 Conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114
18 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

19 The one-year time limit for filing petitions for post-conviction relief under NRS 34.726
20 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the
21 Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
22 evidence presented by the defendant that he purchased postage through the prison and mailed
23 the Notice within the one-year time limit. Gonzales reiterated the importance of filing the
24 petition within the mandatory deadline, absent a showing of "good cause" for the delay in
25 filing. 118 Nev. at 590, 53 P.3d at 902.

26 In this case, Defendant's Judgment of Conviction was filed on June 10, 2004.
27 Defendant pursued a direct appeal, his convictions were all affirmed, and Remittitur issued
28 March 14, 2006. As such, Defendant had until March 14, 2007 to file a timely post-conviction
petition. The instant Petition was filed on August 28, 2018, over eleven years after this
mandatory time bar. Thus, the Petition is time-barred and therefore denied.

1 **B. THE PETITION IS BARRED BY LACHES.**

2 When a period exceeding five years has passed “between the filing of a judgment of
3 conviction...and the filing of a petition challenging” its validity, there is a “rebuttable
4 presumption of prejudice to the State.” NRS 34.800(2). In Groesbeck v. Warden, the Nevada
5 Supreme Court noted that petitions filed so long after a conviction create an “unreasonable
6 burden on the criminal justice system.” Groesbeck, 100 Nev. 259, 679 P.2d 1268 (1984). It
7 continued that the “necessity for a workable system dictates that there must exist a time when
8 a criminal conviction is final.” Id. To invoke the presumption, the statute requires the State
9 plead laches in its motion to dismiss the petition. NRS 34.800(2).

10 The State affirmatively pleaded laches here – Defendant’s Judgment of Conviction was
11 filed on June 10, 2004. Defendant pursued a direct appeal, his convictions were all affirmed,
12 and Remittitur issued March 14, 2006. As such, more than fourteen years have passed since
13 the Judgment of Conviction was filed (and more than twelve years have passed since
14 Remittitur on direct appeal). This time lapse, which is significantly longer than the statutory
15 five year period, presumptively prejudices both the State’s ability to respond to the merits of
16 any claims and, should relief be granted, to retry the case. Further still, Defendant has failed
17 to rebut this presumption. Therefore, the Petition is barred by laches and denied.

18 **C. THE PETITION IS SUCCESSIVE.**

19 Defendant’s Petition is procedurally barred because it is successive. NRS 34.810(2)
20 reads:

21 A second or successive petition must be dismissed if the judge or
22 justice determines that it fails to allege new or different grounds
23 for relief and that the prior determination was on the merits or, if
24 new and different grounds are alleged, the judge or justice finds
25 that the failure of the petitioner to assert those grounds in a prior
26 petition constituted an abuse of the writ.

27 NRS 34.810(2) (emphasis added). Second or successive petitions are petitions that either: 1)
28 fail to allege new or different grounds for relief and the grounds have already been decided on
the merits or 2) that allege new or different grounds but a judge or justice finds that the
petitioner’s failure to assert those grounds in a prior petition would constitute an abuse of the

1 writ. Second or successive petitions will only be decided on the merits if the petitioner can
2 show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d
3 944, 950 (1994).

4 The Nevada Supreme Court has stated that “[w]ithout [] limitations on the availability
5 of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse
6 post-conviction remedies. In addition, meritless, successive and untimely petitions clog the
7 court system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at
8 950. The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly
9 require a careful review of the record, successive petitions may be dismissed based solely on
10 the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
11 other words, if the claim or allegation was previously available with reasonable diligence, it is
12 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
13 497-498 (1991).

14 In this case, Defendant’s first Petition – through appointed counsel – was considered
15 on the merits. An evidentiary hearing was held on the first Petition. Following the evidentiary
16 hearing, the Court denied Defendant’s first Petition on the merits. The Findings of Facts,
17 Conclusions of Law, and Order was filed on February 26, 2008. Defendant appealed the denial
18 of his first Petition on the merits, and the Nevada Supreme Court affirmed this Court’s denial.
19 Remittitur issued June 4, 2010. Defendant filed this subsequent Petition on August 28, 2018.
20 As such, this subsequent Petition is successive and an abuse of the writ. Accordingly, it must
21 be, and is, denied.

22 **II. DEFENDANT FAILS TO SHOW GOOD CAUSE AND PREJUDICE**
23 **NECESSARY TO OVERCOME THE MULTIPLE MANDATORY**
24 **PROCEDURAL DEFAULTS.**

25 A showing of good cause and prejudice may overcome procedural bars. To show good
26 cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) “[t]hat
27 the delay is not the fault of the petitioner” and (2) that the petitioner will be “unduly
28 prejudice[d]” if the petition is dismissed as untimely.

1 “To establish good cause, appellants must show that an impediment external to the
2 defense prevented their compliance with the applicable procedural rule. A qualifying
3 impediment might be shown where the factual or legal basis for a claim was not reasonably
4 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)
5 (emphasis added). The Court continued, “appellants cannot attempt to manufacture good
6 cause[.]” Id. at 621, 81 P.3d at 526.

7 Once a petitioner has established good cause, he must also show actual prejudice
8 resulting from the errors of which he complains. In other words, in order to establish prejudice,
9 the defendant must show “not merely that the errors of [the proceedings] created possibility
10 of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the
11 state proceedings with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952,
12 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct.
13 1584, 1596 (1982)). To find good cause there must be a “substantial reason; one that affords a
14 legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley
15 v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Claims asserted in a petition for
16 post-conviction relief must be supported with specific factual allegations, which if true, would
17 entitle the petitioner to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. “Bare” and “naked”
18 allegations are not sufficient, nor are those belied and repelled by the record. Id.

19 As alleged good cause, Defendant claims that he is innocent of the charges. However,
20 to support this allegation of actual innocence, Defendant challenges the jury instructions,
21 claims that the State committed prosecutorial misconduct during closing argument, and other
22 aspects of his trial. Not only is this not a claim of actual innocence, it is insufficient and
23 completely without merit.

24 Actual innocence means factual innocence, not mere legal insufficiency. Bousley v.
25 United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998) (emphasis added); Sawyer v.
26 Whitley, 505 U.S. 333, 338-39, 112 S. Ct. 2514, 2518-19 (1992). Actual innocence is a
27 stringent standard designed to be applied only in the most extraordinary situations. Pellegrini,
28 117 Nev. at 876, 34 P.3d at 530.

1 To establish actual innocence of a crime, a Defendant “must show that it is more likely
2 than not that no reasonable juror would have convicted him absent a constitutional violation.”
3 Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

4 “Without any new evidence of innocence, even the existence of a concededly
5 meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice
6 that would allow a habeas court to reach the merits of the barred claim.” Schlup v. Delo, 513
7 U.S. 298, 316, 115 S. Ct. 851, 861 (1995). Furthermore, any alleged newly discovered
8 evidence suggesting a defendant’s innocence must be “so strong that a court cannot have
9 confidence in the outcome of the trial.” Id. at 316, 115 S. Ct. at 861.

10 Moreover, actual innocence is not a free-standing claim. The United States Court of
11 Appeals for the Eighth Circuit has “rejected free-standing claims of actual innocence as a basis
12 for habeas review, stating, ‘[c]laims of actual innocence based on newly discovered evidence
13 have never been held to state a ground for federal habeas relief absent an independent
14 constitutional violation occurring in the underlying state criminal proceeding.’” Meadows v.
15 Delo, 99 F.3d 280, 283 (8th Cir. 1996) (emphasis added) (citing Herrera v. Collins, 506 U.S.
16 390, 400, 113 S. Ct. 853, 860 (1993)). Once a defendant has made such a showing, he may
17 then use the claim of actual innocence as a “gateway” to present his constitutional challenges
18 to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115
19 S. Ct. at 861.

20 In this case, Defendant does not actually claim that he is innocent. Rather, he again
21 challenges aspects of the trial – jury instructions, closing arguments, and the like. This is not
22 sufficient. Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998)
23 (emphasis added) (actual innocence means factual innocence, not mere legal insufficiency);
24 see also Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S. Ct. 2514, 2518-19 (1992).
25 Moreover, Defendant has presented no new evidence in support of this claim. In addition,
26 Defendant’s claims of ineffective assistance of appellate counsel and others raised in the
27 instant Petition were readily available to him at the time he filed his initial, timely Petition that
28

1 was considered (and denied) on the merits. Thus, for all these reasons, Defendant has failed to
2 overcome the multiple mandatory procedural bars to the instant Petition and it is denied.

3
4 **ORDER**

5 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
6 shall be, and it is, hereby denied.

7 DATED this ____ day of November, 2018.

8
9 
DISTRICT JUDGE

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

12
13 BY  *for*

KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010301

14
15
16
17 **CERTIFICATE OF MAILING**

18 I hereby certify that service of the above and foregoing was made this 5 day of
19 December, 2018, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

20 SALLY VILLAVERDE, #1187297
21 HIGH DESERT STATE PRISON
22 PO BOX 650
23 INDIAN SPRINGS, NV 89070

24 BY 

E. DEL PADRE
Secretary for the District Attorney's Office

25
26
27
28 ed/GCU



Clerk of the Courts
Steven D. Grierson

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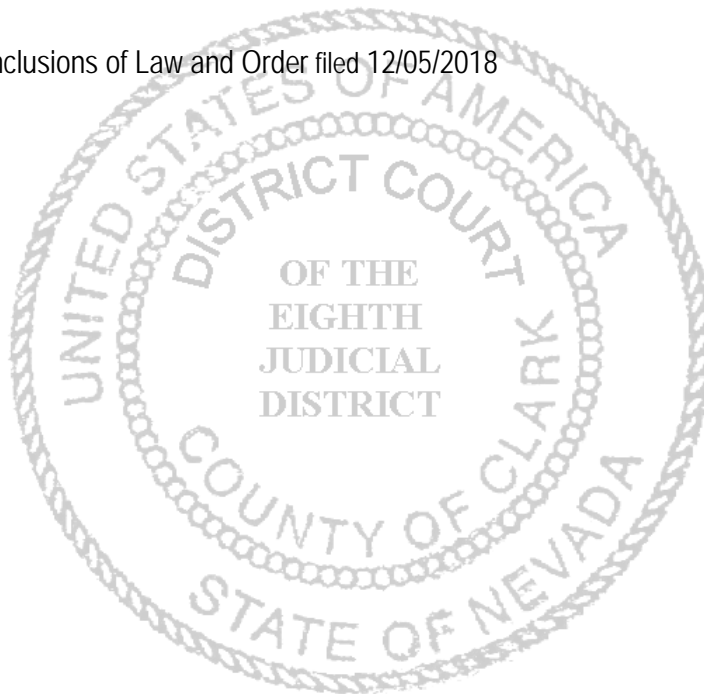
December 12, 2018

Case No.: A-18-780041-W

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 12/05/2018



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 12:39 PM on December 12, 2018.

A handwritten signature of Steven D. Grierson in black ink.

STEVEN D. GRIERSON, CLERK OF THE COURT