



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE 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

March 26, 2019

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

RE: BRIAN KERRY O'KEEFE vs. STATE OF NEVADA
S.C. CASE: 77797
D.C. CASE: A-18-783689-W

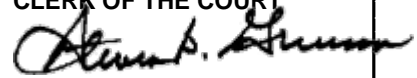
Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated March 11, 2019, enclosed is a certified copy of the Order filed March 25, 2019 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



DISTRICT COURT
CLARK COUNTY, NEVADA

BRIAN O'KEEFE,)
)
Plaintiff,) Case No. A-18-783689-W
vs.) Dept. XXX
)
THE STATE OF NEVADA,)
)
Defendant.)
_____)

ORDER

This matter, having come before the court on December 5, 2018, on a Defendant's Writ of Mandamus or, in the Alternative, Writ of Coram Nobis, and the court being fully advised in the premises herein, does hereby find the following:

FINDINGS OF FACT

1. An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony — NRS 200.400), three counts of Sexual Assault (Felony — NRS 200.364, 200.366), one count of Attempt Sexual Assault (Felony — NRS 193.330, 200.364, 200.366), and one count of Burglary (Felony — NRS 205.060).
2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). Defendant was sentenced on December 27, 2004, on count six to a minimum

1 of twenty-four months and a maximum of one hundred twenty months in the Nevada
2 Department of Corrections. Defendant's sentence was suspended and he was placed
3 on probation for an indeterminate period not to exceed five (5) years. For count one
4 Defendant was sentenced to credit for time served.
5

- 6 3. The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
7 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed
8 Defendant's Conviction of January 23, 2006. See O'Keefe v. State, Order of
9 Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on December 13, 2006.
10
- 11 4. Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
12 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying
13 this Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a
14 Motion for New Trial and a Supplement to that motion on November 14, 2006. The
15 motion was denied on December 18, 2006. Defendant filed a Notice of Appeal on
16 December 26, 2006. The Nevada Supreme Court affirmed the district court's denial of
17 Defendant's Motion for New Trial on March 24, 2008; Remittitur issued April 18,
18 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
19 2008).
20
- 21 5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
22 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition
23 on April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a
24 Notice of Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and
25 Order was filed May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada
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27
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1 Supreme Court affirmed the district court's denial of Defendant's Petition on March
2 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
3 Nos. 48673 and 49329 (March 24, 2008).

- 4
5 6. An Order Honorably Discharging Probationer was filed September 10, 2008,
6 discharging Defendant from Probation. An Order for Disposal of Exhibits was filed
7 October 17, 2012.
- 8
9 7. On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
10 Alternative, Writ of Coram Nobis in C202793. The State filed a response on. On
11 January 29, 2014, the Court heard and denied the Petition for Writ of Mandamus or,
12 in the Alternative, Writ of Coram Nobis .
- 13
14 8. On October 30, 2018, Defendant filed the instant Writ of Mandamus or, in the
15 Alternative, Writ of Coram Nobis in A-18-783689-W, which was heard and denied on
16 December 5, 2018 and which was decided upon its merit.
- 17
18 9. Defendant appealed the denial of his Writ of Mandamus or, in the Alternative, Writ of
19 Coram Nobis in A-18-783689-W to the Supreme Court;
- 20
21 10. On March 11, 2019, the Nevada Supreme Court issued an order in Appeal case
22 77797 instructing the district court to enter a "*written order memorializing the court's*
23 *decision made on December 5, 2018*", within 60 days. This Order is issued to satisfy
24 that instruction.

25 CONCLUSIONS OF LAW

- 26 1. Pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005),
27 it is mandatory for the Court to address the statutory procedural default rules when
28

1 considering post-conviction habeas petitions;

2 2. The mandatory provisions of NRS 34.726 state:

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

7 (a) That the delay is not the fault of the petitioner; and

8 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

9
10 3. NRS 34.810(1) (b) (2) requires a court to dismiss a petition if the petitioner's
11 conviction was the result of a trial and the grounds for the petition could have been
12 raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of
13 pleading and proving specific facts that demonstrate good cause for his failure to
14 present a timely claim and actual prejudice. NRS 34.810(3);

15
16 4. In *Gonzales v. State*, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court
17 rejected a habeas petition that was filed two days late, pursuant to the "clear and
18 unambiguous" mandatory provisions of NRS 34.726(1). *Gonzales* reiterated the
19 importance of filing the petition with the district court within one year mandate,
20 absent a showing of "good cause" for the delay in filing. *Gonzales*, 53 P.3d at 902.

21
22 5. In order to demonstrate good cause, a petitioner must show that an impediment
23 external to the defense prevented him or her from complying with the state procedural
24 default rules." *Hathaway v. State*, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
25 *Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*,
26 110 Nev. 349, 353 871 P.2d 944, 946 (1994); *Passanisi v. Director*, 105 Nev. 63, 769
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1 P.2d 72 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252
2 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external
3 impediment could be ‘that the factual or legal basis for a claim was not reasonably
4 available to counsel, or that ‘some interference by officials’ made compliance
5 impracticable.” Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478,
6 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
7 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).
8

9
10 6. To find good cause there must be a “substantial reason: one that affords a legal
11 excuse.” Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773
12 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
13 1981). The lack of assistance of counsel when preparing a petition, and even the
14 failure of trial counsel, not to forward a copy of the file to a petitioner, have been
15 found to be non-substantial, not constitution good cause. See Phelps v. Director
16 Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v.
17 State, 111 Nev. 335, 890 P.2d 797 (1995).
18

19
20 7. NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if “[a]
21 period exceeding five years between the filing of a judgment of conviction, an order
22 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of
24 conviction....” The statute also requires that the State plead laches in its motion to
25 dismiss the petition. NRS 34.800(2).
26

27 8. A colorable showing of actual innocence may excuse a failure to demonstrate good
28

1 cause under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117
2 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842 921
3 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal
4 insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). “To avoid
5 application of the procedural bar to claims attacking the validity of the conviction, a
6 petitioner claiming actual innocence must show that it is more likely than not that no
7 reasonable juror would have convicted him absent a constitutional violation.”
8 *Pellegrini*, 117 Nev. At 887, 34 P.3d at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327
9 (1995)).

12 DISCUSSION

13 Upon review of Defendant’s Writ of Mandamus or, in the Alternative, Writ of Coram
14 Nobis, the Court failed to address in its Order denying Defendant’s Writ the following: 1)
15 the procedural default rules which apply to Defendant’s petition, 2) the prejudice to the State
16 in responding to the petition or to conduct a retrial, due to the age of the case, and 3) whether
17 Defendant was actually innocent and a failure to consider his petition would result in a
18 fundamental miscarriage of justice.
19
20

21 Defendant’s petition was thirteen years after the judgment of conviction was entered in
22 this case and also four years after the Nevada Supreme Court issued a Remittitur on
23 Defendant’s first appeal. Defendant’s first Petition for Writ of Habeas, filed on July 14,
24 2003, and was denied due to the one year procedural time bar found in NRS 34.726.
25

26 The Petition for Writ of Habeas at issue in this order was filed on October 30, 2018, and
27 could have been denied, as it was successive pursuant to 34.810, and it was time barred
28

1 pursuant to NRS 34.726(1), since it was filed more than one year after the conviction.

2 Additionally, NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if
3 “[a] period exceeding five years between the filing of a judgment of conviction, an order
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
5 conviction and the filing of a petition challenging the validity of a judgment of
6 conviction....” The statute also requires that the State plead laches in its motion to dismiss
7 the petition. NRS 34.800(2).
8

9 To overcome procedural barriers to filing successive and time barred petitions, a
10 petitioner must demonstrate good cause for delay. To demonstrate good cause, a petitioner
11 must show that an impediment external to the defense prevented him or her from complying
12 with the state procedural default rules. Such an external impediment could be ‘that the
13 factual or legal basis for a claim was not reasonably available to counsel, or that ‘some
14 interference by officials’ made compliance impracticable.” *Hathaway*, 71 P.3d at 506
15 (citations omitted). There was no such showing in the present case.
16
17

18 To find good cause there must be a “substantial reason: one that affords a legal excuse.”
19 *Hathaway*, 71 P.3d at 506 (citations omitted). No such substantial reason has been provided
20 to this Court.
21

22 A colorable showing of actual innocence may excuse a failure to demonstrate good cause
23 under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860,
24 887, 34 P.3d 519, 537 (2001) (additional citations omitted).
25

26 Although, Defendant failed to demonstrate good cause in filing his time barred
27 successive petition, his petition was based on a claim of actual innocence, and this court
28

1 wants to be sure that an innocent man is not living with a felony conviction that would be
2 improper, and consequently, this Court undertakes the following analysis.

3 Mr. O'Keefe argues that because he was acquitted on Counts 1-5, the underlying basis
4 for his conviction of Burglary (Count 6) was not present, and consequently, he should have
5 been acquitted of Count 6 also. Mr. O'Keefe is incorrect that he was acquitted of Counts 1-
6 5. In fact, he was found guilty of Count 1 - Battery (M), and found not guilty of Counts 2-5.
7 (See Verdict, dated Oct 28, 2004, attached hereto).
8

9 Burglary is defined as follows:
10

11 Except as otherwise provided in subsection 5, a person who, by day or night, enters any
12 house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
13 other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane,
14 glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or
15 **battery** on any person or any felony, or to obtain money or property by false pretenses, is
16 guilty of burglary.

17
18 (NRS 205.060[1]), emphasis added.
19

20 When Mr. O'Keefe's case was tried to a jury, the Jury was instructed that "Battery means
21 any willful and unlawful use of force or violence upon the person of another. Any person
22 who commits a battery upon another with the specific intent to commit a Sexual Assault is
23 guilty of the offense of Battery With Intent to Commit Sexual Assault." (See Instruction 4,
24 attached hereto).

25 The Jury was further instructed that "Every person who, by day or night, enters any
26 apartment with the intent to commit battery and/or sexual assault and/or a felony therein is
27 guilty of burglary." (See Instruction 12, attached hereto).
28

It is interesting to note that apparently while deliberating, the Jury had a question for the

1 Court as follows: "Please clarify the difference between "battery with intent to commit a
2 crime: and battery. Does the "intent to commit a crime" have to include sexual assault?"
3 The Court's response was "Please refer to and re-read Instructions number 3 and 4." (See
4 Juror Question and Response, attached hereto). Thereafter, the Jury returned a verdict of
5 guilty with regard to battery, but not with the "intent to commit a crime."

7 The Jury may have been confused because Instruction 4 discusses the possibility of a
8 conviction for "Battery With Intent to Commit Sexual Assault," but the Jury Verdict Form
9 did not provide that as an option. The Verdict form only provided the options of "Battery
10 With Intent to Commit a Crime" or "Battery." (See Verdict Form)

12 Regardless of whether the Jury was confused by the instructions or the verdict form, the
13 Jury did convict the Defendant of "battery" (which means that they found a willful and
14 unlawful use of force or violence upon the person of another), and "burglary," (which means
15 that they found that the Defendant entered an apartment with the intent to commit battery or
16 a felony therein). The Defendant's argument that the conviction of battery cannot support
17 the conviction of burglary is simply inconsistent with the language of NRS 205.060. That
18 statute specifically indicates that a person who enters an apartment or other structure with
19 the intent to commit a battery, is guilty of burglary. (See NRS 205.060).

22 O'Keefe argues in his Writ of Coram Nobis that he lived and cohabited in the apartment
23 which he was charged with entering. (See pg. 3 of Writ of Coram Nobis). The Nevada
24 Supreme Court has held that "one cannot burglarize his own home so long as he has an
25 absolute right to enter the home." *State v. White*, 130 Nev. 533, 539, 330 P.3d 482 (2014).
26 The Court further indicated that "ownership may be one factor to consider, [but] the
27
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1 appropriate question is whether the alleged burglar has an absolute, unconditional right to
2 enter the home.” *Id.*¹ Other than Mr. O’Keefe’s allegation or contention that he “lived
3 there,” there is no evidence supporting an “absolute, unconditional right to enter the home.”
4 Without more of a record, and without any supporting evidence being submitted by Mr.
5 O’Keefe, this Court must assume, based upon the conviction, that he did not have such an
6 “absolute, unconditional right to enter the home.”
7

8 Based upon all of the information, evidence, and documentation submitted to this Court,
9 the Court cannot find that Defendant has established his actual innocence. The evidence
10 and argument submitted are simply insufficient to support Mr. O’Keefe’s Petition for Writ of
11 Coram Nobis.
12

13 ORDER

14 Defendant’s Writ of Mandamus or in the Alternative Writ of Coram Nobis is denied
15 as time barred and successive and his claim of actual innocence is unfounded, therefore, his
16 Petition is hereby dismissed.
17

18 IT IS SO ORDERED.

19 DATED and DONE this 22 day of March, 2019.

20
21 
22 _____
23 JERRY A. WIESE II
24 DISTRICT COURT JUDGE, DEPT. XXX
25

26
27 ¹ In *State v. White*, the evidence indicated that although White had orally agreed to stay elsewhere during the
28 week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it. Further, he could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered it on a weekly basis to stay with his children on weekends. The Court notes that no similar evidence of Mr. O’Keefe’s possessory interest in the residence was presented in the Writ of Coram Nobis.



Clerk of the Courts
Steven D. Grierson

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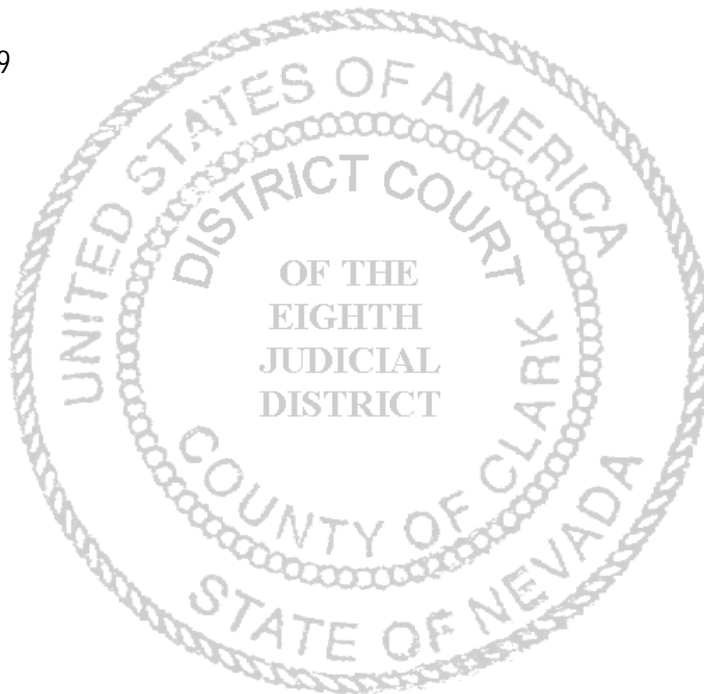
March 26, 2019

Case No.: A-18-783689-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):

Order filed 03/25/2019



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 1:31 PM on March 26, 2019.


STEVEN D. GRIERSON, CLERK OF THE COURT