

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY DANIELS MORAGA,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Mar 22 2019 08:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-18-782168-W

Docket No: 78172

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

ROY D. MORAGA #31584,
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

I N D E X

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CASE NO. C92174
Dept No. 8

A-18-782168-W

VI

FILED

OCT 01 2018

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR

THE COUNTY OF CLARK STATE OF NEVADA

CLERK OF COURT

ROY D. MORAGA,

Petitioner,

vs.

ISIDOR BACA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS OF

ACTUAL INNOCENCE PURSUANT TO

NRS 207.010 TO NRS 207.012 AND

THE FIRST AMENDMENT CLAIM

THE Petitioner is incarcerated at the Northern Nevada
Correctional Center P.O. Box 7000, CARSON CITY, NV 89702.

The Petitioner's Constitutional Amendment Rights have been
Violated as the petitioner is Actually INNOCENT OF THE ENHANCED
Habitual Criminal Statute.

Petitioner Now Seeks relief From judgment.

JURISDICTION

PURSUANT TO NRS 34.724(2)(C)

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OCT 01 2018

CLERK OF THE COURT

A-18-782168-W
PWHC
Petition for Writ of Habeas Corpus
4786108



1 3. Name and location of the court which entered the judgment of conviction under attack:

2 8th Judicial District Court

4 4. Date of judgment or conviction: MARCH 15, 1990

6 5. Case Number(s): 92174

7 6. Length of sentence: LIFE WITHOUT (HABITUAL CRIMINAL ONLY)

10 7. Nature of the offense(s) involved regarding the conviction being challenged:

11 (N/A ON CONVICTION)

12 HABITUAL CRIMINAL STATUTE ONLY

15 8. What was your plea? (check one):

16 (a) Not guilty: ✓
17 (b) Guilty: _____
(c) Nolo Contendere: _____

18 9. If you were found guilty after a plea of not guilty, was the finding made by:
(check one):

19 (a) Jury: ✓
20 (b) Trial without a jury: _____

22 10. Did you testify at trial: Yes

23 11. Did you appeal from judgment of conviction: Yes

24 12. If you did appeal, answer the following:

25 (a). Name of the court: District Court To NEVADA Supreme

26 Court - IN a MOTION To CORRECT AN illegal

27 SENTENCE ON other grounds, Never heard on these

28 new grounds / Newly Discovered Evidence

(b) Case(s) Number (s) or Citation(s) :

Motion To correct AN illegal Sentence

CASE NO 92174

NRS 202.010, NRS 202.012,

Ex Post Facto Rule

WALKER V. Deeds, 50 F.3d 670, 673 (9th Cir. 1995)

NRS 34.724 (2)(c)

(c) Results

Barred By the Case

State concisely every ground on which you claim that you are being held unlawfully or restrained of your liberty. Summarize briefly the fact(s) supporting each ground.

Ground: The court has previously barred this Action, citing "LAW OF THE CASE DOCTRINE" however, LAW OF THE CASE DOES NOT BAR THIS COURT FROM ADDRESSING THIS CLAIM FOR (4) FOUR REASONS, FIRST, PURSUANT TO THE FIRST AMENDMENT IN PART STATES; TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES. SECOND, ACTUAL INNOCENCE CLAIM, THIRD NRS 207.010, FOURTH NRS 207.012

Supporting Facts:

ON MAY 23, 1990, PETITIONER WAS SENTENCED TO THE LARGE HABITUAL CRIMINAL STATUTE. WHAT THE STATE FAILED TO PROVIDE THIS COURT WAS THAT PURSUANT TO NRS 207.012 "NONVIOLENT PROPERTY CRIMES DO NOT WARRANT HARSH SANCTION AVAILABLE UNDER HABITUAL CRIMINAL STATUTE. PRIOR CONVICTIONS FOR NONVIOLENT PROPERTY CRIMES, ALTHOUGH REPREHENSIBLE, DO NOT WARRANT HARSH SANCTION AVAILABLE UNDER THE HABITUAL CRIMINAL STATUTE. SEE NRS 207.010, AND WALKER V. DEEDS, 50 F.3D 670, 673 (9TH CIR. 1995) ("NEVADA) AND EXHIBIT 1 ATTACHED HEREWITH, ALSO APPLIED (EX POST FACTO). NRS 207.010-DECISION TO ADJUDICATE DEFENDANT AS HABITUAL CRIMINAL IS NOT AUTOMATIC; CHARACTERIZATION AND ADJUDICATION OF DEFENDANT AS RECIDIVIST IS MATTER PURELY WITHIN DISCRETION OF TRIAL COURT. "NO DISCRETION WAS USED" ON APPEAL OF AN ORDER OF THE DISTRICT COURT DENYING THE DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF, WHEREIN THE RECORD INDICATED THAT THE DISTRICT COURT DID NOT EXERCISE ITS DISCRETION BY WEIGHING APPROPRIATE FACTORS FOR AND AGAINST HABITUAL CRIMINAL ENHANCEMENT (SEE NRS 207.010), BUT INSTEAD MISTAKENLY CONCLUDED THAT THREE CONVICTIONS AUTOMATICALLY ESTABLISHED THE DEFENDANT AS A HABITUAL CRIMINAL, THE ENHANCEMENT OF THE DEFENDANT'S SENTENCE TO LIFE

Ground: CONTINUED From page 4

Supporting Facts:

imprisonment was improper. A decision to Adjudicate a person as a habitual Criminal is NOT Automatic, and it was incumbent upon the district Court to weigh properly whether the habitual Criminality Count should have been dismissed pursuant to the discretion conferred by NRS 207.010. As a Characterization AND Adjudication of the defendant as a recidivist is a matter of Criminal Statute.

Ground: Violation OF NRS 202.010

Supporting Facts:

The purpose of this Section is to permit dismissal when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice. Moraga maintains that because one (1) of the prior convictions used in support of the habitual criminal charge is well over (13) years old, it is too stale to support his conviction. He now argues that because his conviction is so remote, the District Court abused its discretion. Moraga's past conduct, though reprehensible, simply does not warrant the harsh sanction available under the habitual criminality statute. So under these circumstances, it is an abuse of discretion for the District Court to have adjudicated Moraga a habitual criminal and imposed the maximum sentence. Surely a case involving crimes less violent and more stale than presented here would be hard to find; hence, the adjudication of habitual criminality in this case serves neither the purposes of the statute nor the interests of justice.

WHEREFORE, Petitioner prays that the court grants Petitioner's relief to which he may be entitled to in this proceeding. Writ of habeas Corpus

EXECUTED at N N C C, Nevada on
this day of September 26, 2018.

Roy D. Wraga
PETITIONER

AFFIRMATION
Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, Petition For writ of
habeas Corpus of Actual Innocence Pursuant to NRS 202.010, NRS 202.012 and
First Amendment claim (Title of Document)

Filed in case number: C92124

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of person as required by:

☐ A specific state or federal law, to wit

Or

☐ For the administration of a public program

Or

☐ For the application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 9-26-18

Roy D. Moraga
(Signature)

Roy D. Moraga
(Print Name)

Pro Se
(Attorney For)

IN THE SUPERIOR COURT

MARICOPA COUNTY, STATE OF ARIZONA

12-N

Feb. 7, 1977

JUDGE RAPP, PRESIDING

OFFICE DISTRIBUTION

CLERK	
DEPUTY CLERK	
RECORDS	
CLERK OF COURT	
DEPUTY CLERK	
RECORDS	
CLERK OF COURT	

WILSON D. PALMER, Clerk
Carol S. Movalle, Deputy

CR 95949

STATE OF ARIZONA

County Attorney

vs.

By: Lin N. Stuart

Related
Cases:

ROY DANIELS MORAGA

Adult Probation Department

Maricopa County Sheriff's Office

P.D. Robert A. Hartsberg
Defense Counsel

95949

SENTENCE - PROBATION - NO JAIL

The State is represented by the above-named deputy;
the defendant is present with counsel above named. Court
Reporter: Marilyn Sanchez

The defendant is advised of the charge, the
determination of guilt and is given an opportunity to speak.
The Court has reviewed the Pre-Sentence Report.
Having found no legal cause to delay, the Court
enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant
is guilty of the crime of Aggravated Assault, Open-End

committed on: December 21, 1976

in violation of ARS 13-241, 13-245 (A)

As punishment for this crime,

ORDERED suspending imposition of sentence and placing
the defendant on probation for a period of FIVE (5) YEARS
commencing February 7, 1977, under the supervision of
the Probation Department of this Court, in accordance with the
formal Judgment and Order suspending sentence and imposing terms
of probation signed by the Court.

51-SENTENCE - PROBATION - NO JAIL
(Continued on next page)

Page 11

54

3
Div

June 6, 1988
Date

JAMES B. SULT
Judge or Commissioner

Mary Slaughter
Deputy

No. 12891

STATE VS. ROY DANIELS MORAGA

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the crime of _____

Third Degree Burglary

a Class 4 felony/~~misdemeanor/undesignated~~ nondangerous and nonrepetitive offense, in violation of A.R.S. 13-1506, 13-1501, 13-701, 13-702, 13-801, committed on January 10, 1988

and _____

a Class _____ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. _____

committed on _____

and _____

a Class _____ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. _____

committed on _____

and _____

a Class _____ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. _____

committed on _____

and _____

a Class _____ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. _____

committed on _____

(Continued)

Page 2

Exhibit 2

64

THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
12 - 17
WILL FOLLOW VIA
U.S. MAIL

27

FILED
OCT 16 2018
CLERK OF COURT

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Roy D Moraga,
Petitioner,
vs.
Isidor Baca,
Respondent,

Case No: A-18-782168-W
Department 6

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on October 01, 2018. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 2 day of January, 2019, at the hour of

8:30AM clock for further proceedings.

[Handwritten Signature]

District Court Judge B6

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OCT 15 2018
CLERK OF THE COURT

A-18-782168-W
OPWH
Order for Petition for Writ of Habeas Corpus
4788567



1 ROY D. MORAGA #31584
2 NHCC P.O. Box 7000
3 CARSON CITY, NV 89702

FILED
NOV 06 2018
Clerk of Court

4
5 IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF CLARK

8 ROY D. MORAGA)
9 Petitioner/Plaintiff,)
10 vs.)
11 ISIDOR BACA)
Respondent/Defendant)

CASE NO. A-19-392169-W
MOTION FOR APPOINTMENT
OF COUNSEL PURSUANT TO
NRS 34.750

13 Petitioner, ROY D. MORAGA, pursuant to NRS 34.750

14 (1) (2) request the Honorable Court to appoint counsel to represent him in this Habeas
15 petition for the following reasons:

16 1. Petitioner is not able to afford counsel, see motion to proceed In Forma Pauperis and Affidavit in
17 support filed with the court.

18 2. The issues involved in this matter are very complex.

19 3. The issues involved in this case will require investigation which the petitioner cannot do while
20 confined in prison.

21 4. Petitioner has very limited knowledge of the law and processes thereof.

22 5. The ends of justice would best be served in this case if an attorney was appointed to represent the
23 petitioner.

24 Dated this 31 day of October, 2018.

25 1st Roy D. Moraga

RECEIVED

NOV 06 2018

CLERK OF THE COURT

POY D. Moraga #31584
AMOC P.O. Box 20000
Oakland City, NY 87702


10/11/2011

Clerk of the Court
200 Lewis Ave, 3rd Floor
Las Vegas, Nevada 89101
702-331-8000

[illegible]

000000000000





RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

**ROY MORAGA,
#938554**

Defendant.

CASE NO: **A-18-782168-W
89C092174**

DEPT NO: **VI**

**STATE'S RESPONSE TO DEFENDANT'S PETITION FOR
WRIT OF HABEAS CORPUS (POST-CONVICTION)**

DATE OF HEARING: **JANUARY 2, 2019**
TIME OF HEARING: **8:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in this State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On January 9, 1990, Roy Moraga (hereinafter “Petitioner”) was charged by way of
4 Information with two (2) counts of Burglary (Felony – NRS 205.060) and two (2) counts of
5 Sexual Assault (Felony – NRS 200.364, 200.366). On January 11, 1990, Petitioner entered a
6 plea of not guilty and his case proceeded to trial.

7 Petitioner’s jury trial began on March 12, 1990. On March 15, 1990, the jury found
8 Petitioner guilty of all counts. On June 4, 1990, the State filed a Notice of Motion to Amend
9 Information in order to seek habitual treatment. On June 13, 1990, pursuant to an Amended
10 Information filed the same day, Petitioner was sentenced to life imprisonment without the
11 possibility of parole under the “large” habitual criminal statute, NRS 207.010. Petitioner filed
12 a Notice of Appeal on June 27, 1990. The Judgement of Conviction was filed on July 7, 1990.

13 On August 27, 1991, the Nevada Supreme Court affirmed Petitioner’s conviction but
14 remanded for the district court to resentence Petitioner separately on the underlying counts
15 rather than giving him a single life sentence under the habitual criminal statute. Remittitur
16 issued on September 7, 1991.

17 On October 21, 1991, pursuant to the Nevada Supreme Court’s Remand Order, the
18 district court took notice of the felony convictions entered at Defendant’s initial sentencing
19 and resented Defendant to the following: as to Count I – ten (10) years in the Nevada
20 Department of Corrections (“NDC”); as to Count II- ten (10) years in NDC consecutive to
21 Count I; as to Count III – life imprisonment with parole eligibility beginning after five (5)
22 years, consecutive to Count II; and as to Count IV – pursuant to NRS 201.010, life without the
23 possibility of parole, consecutive to Count III. The Amended Judgement of Conviction was
24 filed on November 13, 1991.¹

25 Defendant filed a Notice of Appeal on October 30, 1991. On October 4, 1995, the
26 Nevada Supreme Court dismissed Petitioner’s appeal. Remittitur issued on October 24, 1995.

27 //

28

¹ A Second Amended Judgement of Conviction was filed on September 29, 1993, to reflect one hundred eighty (180) days credit for time served.

1 On February 20, 1996, Petitioner filed his first Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its response on April 4, 1996. Petitioner filed a Supplement
3 on June 13, 1996. The State filed its response on June 27, 1996. On July 16, 1996, Petitioner
4 filed a Reply to the State's Response. On July 19, 1996, the district court denied Petitioner's
5 first Petition. On September 6, 1996, the district court filed its Findings of Fact, Conclusions
6 of Law and Order. The Notice of Entry of Order was filed on September 20, 1996. Petitioner
7 filed a Notice of Appeal on September 27, 1996.

8 On April 30, 1998, Petitioner filed a Motion to Modify or in the Alternative Correct
9 Illegal Sentence. The State filed an Opposition on May 8, 1998. On May 28, 1998, the district
10 court entered an Order Denying Defendant's Motion to Modify or Correct Illegal Sentence.
11 On June 13, 1998, Petitioner filed a Notice of Appeal from the Oder denying his motion.

12 On April 20, 1999, the Nevada Supreme Court consolidated the appeal from the orders
13 denying Petitioner's first Petition for Writ of Habeas Corpus and Petitioner's Motion to
14 Modify Sentence or Correct Illegal Sentence. Both decisions were affirmed. Remittitur issued
15 on May 18, 1999.

16 Petitioner filed his second Petition for Writ of Habeas Corpus (Post-Conviction) on
17 January 10, 2006. The State filed a Response and Motion to Dismiss on February 27, 2006.
18 Petitioner filed a Reply to the State's Response on May 24, 2006. On June 26, 2006, the district
19 court denied Petitioner's second Petition for Writ of Habeas Corpus. The district court filed its
20 Findings of Fact, Conclusions of Law and Order on February 8, 2007. Notice of Entry of Order
21 was filed on February 13, 2007. On March 2, 2007, Petitioner filed a Notice of Appeal. On
22 August 16, 2007, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued
23 on September 11, 2007.

24 Petitioner filed his third Petition for Writ of Habeas Corpus (Post-Conviction) on
25 December 8, 2010, in Pershing County. The Petition was transferred to the Eighth Judicial
26 District on April 29, 2011, but was filed under Case No. 11-A640265-W and did not
27 immediately come before the court. Petitioner filed a Supplement to his Petition on November
28 4, 2011. On March 14, 2012, Petitioner filed a Motion for Judicial Action on his Petition. The

1 State filed an Opposition to this motion on March 23, 2012. On May 16, 2012, the State filed
2 a Response and Motion to Dismiss Petitioner's third Petition.

3 On July 16, 2012, the district court denied Petitioner's third Petition for Writ of Habeas
4 Corpus. On August 6, 2012, Petitioner filed a Motion to Reconsider. The State filed an
5 Opposition to Motion to Reconsider on August 9, 2012. On August 13, 2012, the district court
6 issued a Findings of Fact, Conclusions of Law, and Order denying Petitioner's third Petition.
7 A Notice of Entry of Order was filed on August 21, 2012. The district court issued an Order
8 denying Petitioner's Motion to Reconsider on October 5, 2012.

9 On September 17, 2012, Petitioner filed a Notice of Appeal from the order denying his
10 third Petition. The Nevada Supreme Court issued an Order of Affirmance on July 13, 2013.
11 Petitioner filed a Petition for Rehearing on August 6, 2013. On September 25, 2013, the court
12 denied Petitioner's Petition for Rehearing.

13 Petitioner filed his fourth Petition for Writ of Habeas Corpus and Motion for
14 Appointment of Counsel on August 14, 2013. The State responded on September 19, 2013.
15 On October 21, 2013, the court denied Petitioner's fourth Petition for Writ of Habeas Corpus.
16 The Findings of Fact, Conclusions of Law and Order was issued on December 4, 2013. On
17 December 16, 2013, Petitioner filed a Notice of Appeal from the order denying his fourth
18 Petition. The Nevada Supreme Court issued an Order of Affirmance on April 10, 2014.

19 On October 1, 2018, Petitioner filed the instant's fifth Petition for Writ of Habeas
20 Corpus. The State responds herein.

21 **ARGUMENT**

22 **I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT IS** 23 **PROCEDURALLY BARRED UNDER NRS 34.726(1).**

24 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
25 shown for delay. Pursuant to NRS 34.726(1):

26 //

27 //

28 //

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

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

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

11 (Emphasis added). The Supreme Court of Nevada has held that NRS 34.726 should be
12 construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
13 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726
14 begins to run from the date the judgment of conviction is filed or a remittitur from a timely
15 direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

16 The one-year time limit for preparing petitions for post-conviction relief under NRS
17 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
18 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
19 evidence presented by the defendant that he purchased postage through the prison and mailed
20 the Notice within the one-year time limit.

21 Furthermore, the Nevada Supreme Court has held that the district court has a duty to
22 consider whether a defendant's post-conviction petition claims are procedurally barred. State
23 v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The
24 Riker Court found that "[a]pplication of the statutory procedural default rules to post-
25 conviction habeas petitions is mandatory," noting:

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

29 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district
30 court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme
31 Court has granted no discretion to the district courts regarding whether to apply the statutory

1 procedural bars; the rules must be applied.

2 Further, the entry of an Amended Judgement of Conviction does not automatically
3 restart the statutory time limit for post-conviction claims. Sullivan v. State, 120 Nev. 537, 540-
4 41, 96 P.3d 761, 764 (2204). Since the district court may amend the judgement of conviction
5 at any time to correct a clerical error or an illegal sentence, “restarting the one-year time period
6 for all purposes every time an amendment occurs would frustrate the purpose and spirit of
7 NRS 34.726.” Id. at 540, 96 P.3d at 764. Consequently, where a Petitioner is not challenging
8 the proceedings related to an Amended Judgment of Conviction, the one-year time bar runs
9 from the date on which the original Judgement of Conviction was entered or, if an appeal was
10 taken from the original judgment, within one year after the appellate court issues its remittitur.
11 Id. at 540, 96 P.3d at 764.

12 In the instant case, Defendant’s Judgement of Conviction was filed on July 7, 1990.
13 Defendant filed a direct appeal, and remittitur was issued on September 17, 1991. An Amended
14 Judgement of Conviction was filed on November 13, 1991, and a Second Amended Judgement
15 of Conviction was filed on September 29, 1993. Petitioner appealed the Second Amended
16 Judgement of Conviction, and remittitur issued on October 24, 1994. Appellant’s instant
17 Petition was not filed until October 1, 2018. This is more than one year after the Judgement of
18 Conviction, the Amended Judgement of Conviction, and the Second Amended Judgement of
19 Conviction. Consequently, it is not necessary to address the argument of whether the one-year
20 period should flow from the date of the original judgment or the date of an amended
21 judgement, as more than one year has passed since the entry of all. Absent a showing of good
22 cause for this delay and undue prejudice, Defendant’s claim must be dismissed because of its
23 tardy filing.

24 **II. DEFENDANT’S FIFTH PETITION IS SUCCESSIVE.**

25 Defendant’s Petition should also be denied as successive pursuant to NRS 34.810(2).
26 The relevant portions of NRS 34.810 state:

27 //

28 //

1 2. A second or successive petition must be dismissed if the judge
2 or justice determines that it fails to allege new or different grounds
3 for relief and that the prior determination was on the merits or, if
4 new and different grounds are alleged, the judge or justice finds
5 that the failure of the Defendant to assert those grounds in a prior
6 petition constituted an abuse of the writ.

7 3. Pursuant to subsections 1 and 2, the petitioner has the burden
8 of pleading and proving specific facts that demonstrate:

9 (a) Good cause for the petitioner's failure to present the claim or
10 for presenting the claim again; and

11 (b) Actual prejudice to the petitioner.

12 Id. This is Defendant's fifth Petition. Defendant has previously filed four other Petitions
13 spanning from February 20, 1996, to August 14, 2013, regarding the same issues. All of these
14 prior Petitions have either been denied or disposed of. Furthermore, Petitioner has given no
15 good cause for the delay, and has failed to demonstrate actual prejudice. As such, this fifth
16 Petition must be denied as successive.

17 **III. DEFENDANT'S FIFTH PETITION IS BARRED BY LACHES.**

18 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
19 exceeding five years between the filing of a judgment of conviction, an order imposing a
20 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
21 filing of a petition challenging the validity of a judgment of conviction..." The statute also
22 requires that the State plead laches, which the State does. NRS 34.800.

23 Defendant's Judgement of Conviction was filed on July 7, 1990. Defendant filed a
24 direct appeal, and remittitur was issued on September 17, 1991. An Amended Judgement of
25 Conviction was filed on November 13, 1991, and a Second Amended Judgement of Conviction
26 was filed on September 29, 1993. Petitioner appealed the Second Amended Judgement of
27 Conviction, and remittitur issued on October 24, 1994. Since more than five years have elapsed
28 from any given date, NRS 34.800 directly applies in this case and a presumption of prejudice
to the State arises. Defendant does not rebut this presumption. Therefore, pursuant to NRS
34.800, Defendant's Petition must be denied.

//

1 **III. DEFENDANT HAS NOT PROVIDED GOOD CAUSE OR EVIDENCE OF**
2 **ACTUAL INNOCENCE TO OVERCOME THE PROCEDURAL BARS**

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

9 In order to establish prejudice, the defendant must show "'not merely that the errors of
10 [the proceedings] created the possibility of prejudice, but that they worked to his actual and
11 substantial disadvantage, in affecting the state proceedings with error of constitutional
12 dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United
13 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there
14 must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev.
15 248, 252, 71 P.3d 503, 506 (2003). Clearly, any delay in the filing of the petition must not be
16 the fault of the petitioner. NRS 34.726(1)(a).

17 Where a petition is procedurally barred and the petitioner cannot demonstrate good
18 cause, the district court may nevertheless reach the merits of any constitutional claims if the
19 petitioner demonstrates that failure to consider those constitutional claims would result in a
20 fundamental miscarriage of justice. Lisle v. State, 351 P.3d 725, 729-730 (2015), citing
21 Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A fundamental miscarriage of
22 justice requires "a colorable showing" that the petitioner "is actually innocent of the crime or
23 is ineligible for the death penalty." Id. This generally requires the petitioner to present new
24 evidence of his innocence. House v. Bell, 547 U.S. 518, 536-37, 126 S. Ct. 2064 (2006);
25 Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851 (1995).

26 When claiming a fundamental miscarriage based on actual innocence, the petitioner
27 "must show that it is more likely than not that no reasonable juror would have convicted him
28 absent a constitutional violation. Crump v. State, 2016 Nev. Unpub. LEXIS 374, *9-10, citing

1 Pellegrini v. State, 117 Nev. at 887, 34 P.3d at 537 (2001). In this context, actual innocence
2 means "factual innocence, not mere legal insufficiency." Mitchell v. State, 122 Nev. 1269,
3 1273-74, 149 P.3d 33, 36 (2006).

4 In the instant case, Petitioner failed to raise any issue of good cause for the untimely
5 delay in filing his Petition. Instead Petitioner asserts his actual innocence and cites to NRS
6 207.010 and Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995) to support his claim that he
7 was wrongfully adjudicated a habitual criminal because nonviolent property crimes do not
8 warrant harsh sanctions under the habitual criminal statute. Petition at 4. This argument was
9 already rejected by the Nevada Supreme Court in Petitioner's first Petition, and as such is
10 barred from other review by the doctrine of the law of the case. "The law of the first appeal is
11 law of the case on all subsequent appeals in which the facts are substantially the same." Hall
12 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337,
13 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more
14 detailed and precisely focused argument subsequently made after reflection upon the previous
15 proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
16 previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v.
17 State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990
18 P.2d 1263, 1275 (1999)).

19 In denying Defendant's first Post-Conviction Petition, the Nevada Supreme Court
20 noted that the State adequately proved Petitioner had three prior convictions and the district
21 court was entitled to use these convictions for sentence enhancement purposes. See Order
22 Dismissing Appeal 10/30/95. Additionally, the case Petitioner cites to was decided after his
23 sentencing and cannot be applied retroactively. Furthermore, Defendant has failed to provide
24 any facts that would show he would be prejudiced by having to comply with the procedural
25 time bar.

26 As such, Petitioner cannot show good cause or actual prejudice and this Petition should
27 be denied.

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CONCLUSION

For all the foregoing, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus be DENIED.

DATED this 30th day of November, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #01565

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 30th day of NOVEMBER, 2018, to:

ROY MORAGA, BAC#31584
N.N.C.C.
P.O. BOX 7000
CARSON CITY, NV 89702

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

FILED

DEC 26 2018

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK OF COURT

ROY D. MORAGA, #31584

Petitioner,

vs,

ISIDOR BACA,

THE STATE OF NEVADA,

Respondent.

CASE NO. A-18-782168-W

Dept. NO. VI

PETITIONER'S REPLY AND OBJECTION
TO STATES RESPONSE TO HABEAS-CORPUS

Comes now Roy D. Moraga, in pro-se with whom does
so presents to and before this court this Reply and
objection to States response to defendants petition for
Writ of habeas Corpus.

First and foremost this petitioner claims, asserts
and charges that he (MORAGA) has presented and
demonstrated Good Cause and has been exposed to
prejudice by this prosecutions knowing and intentional Acts.

WHEREAS petitioner (MORAGA) hereby claims "Actual
Innocence", See Mitchell v. STATE OF NEVADA, 149
P.3d 33. (See Also) NRS 50.095(2)(a)(b).

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DEC 26 2018

CLERK OF THE COURT

MITCHELL V. STATE OF NEVADA, 149 P.3d 33

PROCEDURAL BARS AND LACHES

A post-conviction petition for a writ of habeas corpus must be filed within one year after the entry of the judgment of conviction or, if a timely appeal is taken from the judgment, within one year after this court issues its remitter. 4 Further, a second or successive petition must be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the petitioner's failure to alleged them in the prior petition(s) constitutes an abuse of the writ. 5 A petitioner can overcome the bar to an untimely or successive petition by showing good cause and prejudice. 6

Even when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner can demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 7

"[A]ctual innocence' means factual innocence, not mere legal insufficiency." 8 The conviction of a petitioner who was actually innocent would be a fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition.

However, we have also held that when a holding in a defendant's direct appeal is overruled in a subsequent case, the doctrine of the law of the case should not be applied, because "to do so would unfairly impose a legal application upon [the defendant] (122 Nev. 1275) which we expressly overruled, citing to our published opinion disposing of his direct appeal." Thus, we (149 P.3d 37) decline to apply the law of the case doctrine to Mitchell's Attempted Murder Claim.

MURRAY V. CARRIER, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 Procedural default that is adequate to foreclose appellate review of a claim of constitutional error in a state criminal trial should ordinarily also bar collateral review of such a claim in a federal district court. But the history of the court's jurisprudence interpreting the Acts of Congress authorizing the issuance of the writ of habeas corpus unambiguously requires that we carefully preserve the exception which enables the federal writ to grant relief in cases of manifest injustice that exception cannot be adequately defined by a simply stated rule. The procedural default is always an important factor to be carefully reviewed; as Justice FRANKFURTER explained, "All that has gone before is not to be ignored as irrelevant," BROWN V. ALLEN, 344 U.S., at 500, 97 L. Ed. 469, 73 S. Ct. 397. But it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice.

Whether the inquiry is channeled by the use of the terms "Cause and Prejudice" or by the statutory duty to "dispose of the matter as law and justice require," 28 USC § 2243 [28 USC § 2243]-it is clear to me that Appellate procedural default should not foreclose habeas corpus review of a meritorious constitutional claim that may establish the petitioner's innocence.

Affirm the decision of the Court of Appeals in *Murray v. Carrier*, while reversing the holding of the Court of Appeals that Counsel's inadvertence establishes "Cause," the Court goes on to declare that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal court may grant the writ even in the absence of a showing of cause for the procedural default." Ante, at 496, 91 L. Ed. 2d, at 413. Under such circumstances, the Court explains, "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." Ante, at 495, 91 L. Ed. 2d, at 413 (quoting *Engle v. Isaac*, supra, at 135, 71 L. Ed. 2d 783, 102 S. Ct. 1558). Although I believe that principles of "comity" and "finality" yield upon far less than a showing of actual innocence, because this inquiry represents a narrowing of the "Cause and Prejudice" Test. I agree that it is proper.

NRS 50.095. Impeachment by evidence of Conviction of Crime.

NRS 50.095(2) Evidence of a Conviction is inadmissible under this Section if a period of more than 10 years has elapsed since: (a) The date of the release of the witness from confinement; or (b) The expiration of the period of the witness's parole, Probation or Sentence, whichever is the later date.

NRS 34.195. Application Alleging unconstitutional prior restraint; Court required to render judgment on Application not later than 30 days After Application is Filed.

1. If the Application is Alleging an unconstitutional prior restraint of the Applicant's rights pursuant to the First Amendment to the Constitution of the United States or Section 9 of Article 1 of the Constitution of the State of Nevada, the Applicant shall insert the words "First Amendment Petition" in the caption of the Application for the writ in at least 10-point Type.

2. The Court shall render judgment on an Application for a writ described in Subsection 1 not later than 30 days After the date on which the Application for the writ is Filed. 1999, ch. 79, § 1, p. 176.

STATE LAWS GUARANTEEING A DEFENDANT PROCEDURAL RIGHTS AT SENTENCING MAY CREATE LIBERTY INTERESTS PROTECTED AGAINST ARBITRARY DEPRIVATION BY THE DUE PROCESS CLAUSE OF U. S. CONST. AMEND. XIV. THEREFORE, WHEN A STATE HAS PROVIDED A SPECIFIC METHOD FOR DETERMINING WHETHER A CERTAIN SENTENCE SHALL BE IMPOSED, IT IS NOT CORRECT TO SAY THAT THE DEFENDANT'S INTEREST IN HAVING THAT METHOD ADHERED TO IS MERELY A MATTER OF STATE PROCEDURAL LAW. NEVADA'S LAW REQUIRING A COURT TO REVIEW AND MAKE PARTICULARIZED FINDING THAT IT IS JUST AND PROPER FOR A DEFENDANT TO BE ADJUDGED A HABITUAL OFFENDER ALSO CREATES A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN A SENTENCING PROCEDURE.

AT SENTENCING IN THIS CASE, THE STATE COURT FOUND THAT MORAGA HAD BEEN CONVICTED OF THREE PRIOR FELONIES AND CONCLUDED THAT MORAGA "SHOULD BE ADJUDICATED A HABITUAL CRIMINAL BY REASON OF THREE PRIOR CONVICTIONS." IN REVIEWING THIS PROCEDURE THE DISTRICT COURT CONCLUDED THAT "THE APPLICATION OF NEVADA'S HABITUAL OFFENDER STATUTE, NRS § 207.010, WAS PROPERLY APPLIED IN MORAGA'S CASE. IN NEVADA, 'THE DECISION TO ADJUDICATE A PERSON AS A HABITUAL CRIMINAL IS NOT AN AUTOMATIC ONE.' CLARK V. STATE, 109 NEV. 426, 851 P.2D 426, 427 (NEV. 1993). IN PARTICULAR, 'HAVING COMMITTED THREE FELONIES DOES NOT, OF ITSELF, A HABITUAL CRIMINAL MAKE'."

The Nevada Supreme Court has emphasized that the simple finding of three prior felonies "is not the same as an adjudication of habitual criminal status" and is inadequate because it does not clearly disclose that the court weighed the appropriate factors for and against the habitual criminal enhancement." *Id.* The sentencing judge, therefore, is required to make "an actual judgment on the question of whether it is just and proper for [the defendant] to be punished and segregated as a habitual criminal." *Id.* (emphasis added).

As in Moraga's case the trial court in his case did not "clearly disclose" that it "weighed the appropriate factors for and against the criminal enhancement." Nor did the court decide that it was "just and proper," based on the nature and gravity of his prior convictions, to adjudge Moraga a habitual offender under the relevant statute.

MOREOVER, if the trial court had weighed Moraga's prior convictions, under Nevada law, a prior conviction record for nonviolent property crimes, "though reprehensible, simply does not warrant the harsh sanction available under the habitual criminality statute." *Sessions v. State*, 106 Nev. 186, 789 P.2d 1242, 1245 (Nev. 1990) (per curiam).

WHEREFORE, MORAGA'S Sentence of the habitual Criminal
Must be VACATED AND REMANDED.

IT is Further Requested that District Attorney
STEVEN B. WOLFSON, JAMES R. SWEETIN, Chief Deputy
District Attorney produce the pro-se writ of habeas
Corpus (Post-Conviction) which they Allege Moraga
Filed in 1996, First petition and that it be made
AS part of the record, Since there statement was
made under penalty of perjury, once they can't, or
refuse to produce this writ/Petition, MORAGA
Shall be discharged From Custody.

Furthermore and For the record Moraga has Served
each one of his primary offense, in 1998 at
Nevada State Prison (NSP) Moraga was paroled to
Serve his habitual Criminal Count, Moraga has
Served over 20 years on this life without Sentence
For a Nonviolent property Crime. See Exhibit 2
ON File

CONCLUSION

WHEREAS Mr. MORAGA hereby Challenges this Chief
Deputy District Attorney James R. Sweetin to present,
Show and demonstrate where Moraga ever Argued AND
or Cited Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995)
IN Addition to the Fact that there is "no such record"
that this Argument was either presented to nor rejected
by the Nevada Supreme Court.

Therefore this petitioner claims, asserts and charges that this alleged professional Chief Deputy District Attorney Mr. Sweetin, did so knowing and intentionally present and cite a false assertion of fabricated fact.

(An act of suborn of a perjured testimony) as this clearly perjured statement was made in an effort to advance the states position and to suit their agenda.

Secondly whereas the sentencing court acted erroneously by sentencing Moraga to serve the primary offenses first and separately and then to serve the enhancement subsequently as this enhancement cannot stand alone as this erroneous and "invalid" sentence exposes and reveals that the court has violated the Double Jeopardy Clause and cruel and unusual punishment without due process of law.

Furthermore this newly discovered evidence clearly and without question establishes that the court and the judges treated Moraga with extreme bias and prejudice and as such this petitioner believes that he has overcome the procedural hurdles that this the respondent has mentioned.

Whereas Moraga has presented newly discovered evidence that reveals, uncovers and exposes that a true fundamental miscarriage of justice has occurred *Lisbe v. State*, 351 P.3d 725 (2015) and see *House v. Bell*, 126 S.Ct. 2064 (2006), and *Schlup v. Delo*, 115 S.Ct. 851 (1995).

This petitioner Roy Moraga # 31584 hereby Respectfully
Requests As Justice Demands that this Court To look
at and revein this reply and Objection to the states
response and as such comes to the conclusion that
MORAGA'S Sentence in refurence to the enhancement
AS AN habitual Criminal is "Invalid".

Therefore Moraga prays this Court to remove and
Strike Said Sentence enhancement from his Term of
imprisonment.

Whereas this "Invalid" enhancement is Clearly
UNCONSTITUTIONAL.

CERTIFICATE OF SERVICE

I hereby Certify that ON the 20th day of December 2018, I
mailed a True AND Correct Copy OF the Foregoing:
Petitioner's Reply AND Objection to States response
To Habeas Corpus Addressed To:

JAMES R. Sweetin, D. D. A.
200 Lewis Ave.
LAS Vegas, NV 89155-2212



OSCC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ROY MORAGA, PLAINTIFF(S)
VS.
ISIDOR BACA, DEFENDANT(S)

CASE NO.: A-18-782168-W

DEPARTMENT 6

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 30th day of January, 2019.


DISTRICT COURT JUDGE

CLERK OF THE COURT

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Steven D. Grierson
CLERK OF THE COURT

Steven B. Wolfson

FCCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY MORAGA,
#938554

Defendant.

CASE NO: **A-18-782168-W**
89C092174

DEPT NO: **VI**

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

DATE OF HEARING: **JANUARY 2, 2019**
TIME OF HEARING: **8:30 AM**

THIS CAUSE having presented before the Honorable JAMES BIXLER, District Judge,
on the 2nd day of January, 2019; Petitioner not being present, proceeding IN FORMA
PAUPERIS; Respondent being represented by STEVEN B. WOLFSON, Clark County
District Attorney, by and through ROBERT TURNER, Chief Deputy District Attorney; and
having considered the matter, including briefs, transcripts, arguments of counsel, and
documents on file herein, the Court makes the following Findings of Fact and Conclusions of
Law:

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1 On February 20, 1996, Defendant filed his first Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its response on April 4, 1996. Defendant filed a Supplement
3 on June 13, 1996. The State filed its response on June 27, 1996. On July 16, 1996, Defendant
4 filed a Reply to the State's Response. On July 19, 1996, the district court denied Defendant's
5 first Petition. On September 6, 1996, the district court filed its Findings of Fact, Conclusions
6 of Law and Order. The Notice of Entry of Order was filed on September 20, 1996. Defendant
7 filed a Notice of Appeal on September 27, 1996.

8 On April 30, 1998, Defendant filed a Motion to Modify or in the Alternative Correct
9 Illegal Sentence. The State filed an Opposition on May 8, 1998. On May 28, 1998, the district
10 court entered an Order Denying Defendant's Motion to Modify or Correct Illegal Sentence.
11 On June 13, 1998, Defendant filed a Notice of Appeal from the Oder denying his motion.

12 On April 20, 1999, the Nevada Supreme Court consolidated the appeal from the orders
13 denying Defendant's first Petition for Writ of Habeas Corpus and Defendant's Motion to
14 Modify Sentence or Correct Illegal Sentence. Both decisions were affirmed. Remittitur issued
15 on May 18, 1999.

16 Defendant filed his second Petition for Writ of Habeas Corpus (Post-Conviction) on
17 January 10, 2006. The State filed a Response and Motion to Dismiss on February 27, 2006.
18 Defendant filed a Reply to the State's Response on May 24, 2006. On June 26, 2006, the
19 district court denied Defendant's second Petition for Writ of Habeas Corpus. The district court
20 filed its Findings of Fact, Conclusions of Law and Order on February 8, 2007. Notice of Entry
21 of Order was filed on February 13, 2007. On March 2, 2007, Defendant filed a Notice of
22 Appeal. On August 16, 2007, the Nevada Supreme Court issued an Order of Affirmance.
23 Remittitur issued on September 11, 2007.

24 Defendant filed his third Petition for Writ of Habeas Corpus (Post-Conviction) on
25 December 8, 2010, in Pershing County. The Petition was transferred to the Eighth Judicial
26 District on April 29, 2011, but was filed under Case No. 11-A640265-W and did not
27 immediately come before the court. Defendant filed a Supplement to his Petition on November
28 4, 2011. On March 14, 2012, Defendant filed a Motion for Judicial Action on his Petition. The

1 State filed an Opposition to this motion on March 23, 2012. On May 16, 2012, the State filed
2 a Response and Motion to Dismiss Defendant's third Petition.

3 On July 16, 2012, the district court denied Defendant's third Petition for Writ of Habeas
4 Corpus. On August 6, 2012, Defendant filed a Motion to Reconsider. The State filed an
5 Opposition to Motion to Reconsider on August 9, 2012. On August 13, 2012, the district court
6 issued a Findings of Fact, Conclusions of Law, and Order denying Defendant's third Petition.
7 A Notice of Entry of Order was filed on August 21, 2012. The district court issued an Order
8 denying Defendant's Motion to Reconsider on October 5, 2012.

9 On September 17, 2012, Defendant filed a Notice of Appeal from the order denying his
10 third Petition. The Nevada Supreme Court issued an Order of Affirmance on July 13, 2013.
11 Defendant filed a Petition for Rehearing on August 6, 2013. On September 25, 2013, the court
12 denied Defendant's Petition for Rehearing.

13 Defendant filed his fourth Petition for Writ of Habeas Corpus and Motion for
14 Appointment of Counsel on August 14, 2013. The State responded on September 19, 2013.
15 On October 21, 2013, the court denied Defendant's fourth Petition for Writ of Habeas Corpus.
16 The Findings of Fact, Conclusions of Law and Order was issued on December 4, 2013. On
17 December 16, 2013, Defendant filed a Notice of Appeal from the order denying his fourth
18 Petition. The Nevada Supreme Court issued an Order of Affirmance on April 10, 2014.

19 On October 1, 2018, Defendant filed the instant's fifth Petition for Writ of Habeas
20 Corpus. The State responded on November 30, 2018. Defendant replied on December 26,
21 2018.

22 **ANALYSIS**

23 **I. THIS PETITION IS PROCEDURALLY BARRED UNDER NRS 34.726(1).**

24 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
25 shown for delay. Pursuant to NRS 34.726(1):

26 *Unless there is good cause shown for delay, a petition that challenges*
27 *the validity of a judgment or sentence must be filed within 1 year of*
28 *the entry of the judgment of conviction or, if an appeal has been taken*
from the judgment, within 1 year after the Supreme Court issues its

1 *remittitur*. For the purposes of this subsection, good cause for delay
exists if the petitioner demonstrates to the satisfaction of the court:

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

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

5 (Emphasis added). The Supreme Court of Nevada has held that NRS 34.726 should be
6 construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
7 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726
8 begins to run from the date the judgment of conviction is filed or a remittitur from a timely
9 direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

10 The one-year time limit for preparing petitions for post-conviction relief under NRS
11 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
12 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
13 evidence presented by the defendant that he purchased postage through the prison and mailed
14 the Notice within the one-year time limit.

15 Furthermore, the Nevada Supreme Court has held that the district court has a duty to
16 consider whether a defendant's post-conviction petition claims are procedurally barred. State
17 v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The
18 Riker Court found that "[a]pplication of the statutory procedural default rules to post-
19 conviction habeas petitions is mandatory," noting:

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

23 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district
24 court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme
25 Court has granted no discretion to the district courts regarding whether to apply the statutory
26 procedural bars; the rules must be applied.

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1 Further, the entry of an Amended Judgement of Conviction does not automatically
2 restart the statutory time limit for post-conviction claims. Sullivan v. State, 120 Nev. 537, 540-
3 41, 96 P.3d 761, 764 (2204). Since the district court may amend the judgement of conviction
4 at any time to correct a clerical error or an illegal sentence, “restarting the one-year time period
5 for all purposes every time an amendment occurs would frustrate the purpose and spirit of
6 NRS 34.726.” Id. at 540, 96 P.3d at 764. Consequently, where a Petitioner is not challenging
7 the proceedings related to an Amended Judgment of Conviction, the one-year time bar runs
8 from the date on which the original Judgement of Conviction was entered or, if an appeal was
9 taken from the original judgment, within one year after the appellate court issues its remittitur.
10 Id. at 540, 96 P.3d at 764.

11 In the instant case, Defendant’s Judgement of Conviction was filed on July 7, 1990.
12 Defendant filed a direct appeal, and remittitur was issued on September 17, 1991. An Amended
13 Judgement of Conviction was filed on November 13, 1991, and a Second Amended Judgement
14 of Conviction was filed on September 29, 1993. Defendant appealed the Second Amended
15 Judgement of Conviction, and remittitur issued on October 24, 1994. Appellant’s instant
16 Petition was not filed until October 1, 2018. This is more than one year after the Judgement of
17 Conviction, the Amended Judgement of Conviction, and the Second Amended Judgement of
18 Conviction. Consequently, it is not necessary to address the argument of whether the one-year
19 period should flow from the date of the original judgment or the date of an amended
20 judgement, as more than one year has passed since the entry of all. Absent a showing of good
21 cause for this delay and undue prejudice, this Court finds Defendant’s claim must be dismissed
22 because of its tardy filing.

23 II. DEFENDANT’S FIFTH PETITION IS SUCCESSIVE

24 Defendant’s Petition is also successive pursuant to NRS 34.810(2). The relevant
25 portions of NRS 34.810 state:

26 2. A second or successive petition must be dismissed if the judge or
27 justice determines that it fails to allege new or different grounds for
28 relief and that the prior determination was on the merits or, if new and
different grounds are alleged, the judge or justice finds that the failure

of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Id. This is Defendant's fifth Petition. Defendant has previously filed four other Petitions spanning from February 20, 1996, to August 14, 2013, regarding the same issues. All of these prior Petitions have either been denied or disposed of. Furthermore, Defendant has given no good cause for the delay, and has failed to demonstrate actual prejudice. As such, this Court finds this fifth Petition must be denied as successive.

III. DEFENDANT'S FIFTH PETITION IS BARRED BY LACHES

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction...." The statute also requires that the State plead laches, which the State does. NRS 34.800.

Defendant's Judgement of Conviction was filed on July 7, 1990. Defendant filed a direct appeal, and remittitur was issued on September 17, 1991. An Amended Judgement of Conviction was filed on November 13, 1991, and a Second Amended Judgement of Conviction was filed on September 29, 1993. Defendant appealed the Second Amended Judgement of Conviction, and remittitur issued on October 24, 1994. Since more than five years have elapsed from any given date, NRS 34.800 directly applies in this case and a presumption of prejudice to the State arises. Defendant does not rebut this presumption. Therefore, pursuant to NRS 34.800, this Court finds this Petition must be denied.

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1 **IV. DEFENDANT HAS NOT PROVIDED GOOD CAUSE OR EVIDENCE OF**
2 **ACTUAL INNOCENCE TO OVERCOME THE PROCEDURAL BARS**

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

9 In order to establish prejudice, the defendant must show "not merely that the errors of
10 [the proceedings] created the possibility of prejudice, but that they worked to his actual and
11 substantial disadvantage, in affecting the state proceedings with error of constitutional
12 dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United
13 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there
14 must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev.
15 248, 252, 71 P.3d 503, 506 (2003). Clearly, any delay in the filing of the petition must not be
16 the fault of the petitioner. NRS 34.726(1)(a).

17 Where a petition is procedurally barred and the petitioner cannot demonstrate good
18 cause, the district court may nevertheless reach the merits of any constitutional claims if the
19 petitioner demonstrates that failure to consider those constitutional claims would result in a
20 fundamental miscarriage of justice. Lisle v. State, 351 P.3d 725, 729-730 (2015), citing
21 Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A fundamental miscarriage of
22 justice requires "a colorable showing" that the petitioner "is actually innocent of the crime or
23 is ineligible for the death penalty." Id. This generally requires the petitioner to present new
24 evidence of his innocence. House v. Bell, 547 U.S. 518, 536-37, 126 S. Ct. 2064 (2006);
25 Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851 (1995).

26 When claiming a fundamental miscarriage based on actual innocence, the petitioner
27 "must show that it is more likely than not that no reasonable juror would have convicted him
28 absent a constitutional violation. Crump v. State, 2016 Nev. Unpub. LEXIS 374, *9-10, citing

1 Pellegrini v. State, 117 Nev. at 887, 34 P.3d at 537 (2001). In this context, actual innocence
2 means "factual innocence, not mere legal insufficiency." Mitchell v. State, 122 Nev. 1269,
3 1273-74, 149 P.3d 33, 36 (2006).

4 In the instant case, Defendant failed to raise any issue of good cause for the untimely
5 delay in filing his Petition. Instead Defendant asserts his actual innocence and cites to NRS
6 207.010 and Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995) to support his claim that he
7 was wrongfully adjudicated a habitual criminal because nonviolent property crimes do not
8 warrant harsh sanctions under the habitual criminal statute. Petition at 4. This argument was
9 already rejected by the Nevada Supreme Court in Defendant's first Petition, and as such is
10 barred from other review by the doctrine of the law of the case. "The law of the first appeal is
11 law of the case on all subsequent appeals in which the facts are substantially the same." Hall
12 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337,
13 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more
14 detailed and precisely focused argument subsequently made after reflection upon the previous
15 proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
16 previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v.
17 State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990
18 P.2d 1263, 1275 (1999)).

19 In denying Defendant's first Post-Conviction Petition, the Nevada Supreme Court
20 noted that the State adequately proved Defendant had three prior convictions and the district
21 court was entitled to use these convictions for sentence enhancement purposes. See Order
22 Dismissing Appeal 10/30/95. Additionally, the case Defendant cites to was decided after his
23 sentencing and cannot be applied retroactively. Furthermore, Defendant has failed to provide
24 any facts that would show he would be prejudiced by having to comply with the procedural
25 time bar.

26 As such, Defendant cannot show good cause or actual prejudice and this Court finds
27 this Petition must be denied.

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ORDER

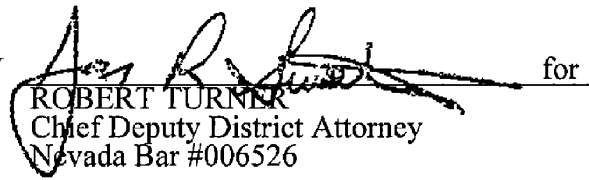
THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and is, DENIED.

DATED this 28 day of January, 2019.


DISTRICT JUDGE

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

BY


ROBERT TURNER
Chief Deputy District Attorney
Nevada Bar #006526

for

hjc/SVU



1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 ROY MORAGA,

6 Petitioner,

Case No: A-18-782168-W

Dept No: VI

7 vs.

8 ISIDOR BACA,

9 Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on January 31, 2019, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on February 5, 2019.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Debra Donaldson

18 Debra Donaldson, Deputy Clerk

19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 5 day of February 2019, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:
23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:
25 Roy Moraga # 31584
26 P.O. Box 7000
Carson City, NV 89702

27 /s/ Debra Donaldson

28 Debra Donaldson, Deputy Clerk

ORIGINAL

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1/31/2019 4:35 PM
Steven D. Grierson
CLERK OF THE COURT

Steven B. Wolfson

FCCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY MORAGA,
#938554

Defendant.

CASE NO: **A-18-782168-W**
89C092174

DEPT NO: **VI**

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

DATE OF HEARING: **JANUARY 2, 2019**
TIME OF HEARING: **8:30 AM**

THIS CAUSE having presented before the Honorable JAMES BIXLER, District Judge,
on the 2nd day of January, 2019; Petitioner not being present, proceeding IN FORMA
PAUPERIS; Respondent being represented by STEVEN B. WOLFSON, Clark County
District Attorney, by and through ROBERT TURNER, Chief Deputy District Attorney; and
having considered the matter, including briefs, transcripts, arguments of counsel, and
documents on file herein, the Court makes the following Findings of Fact and Conclusions of
Law:

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Defendant's jury trial began on March 12, 1990. On March 15, 1990, the jury found Defendant guilty of all counts. On June 4, 1990, the State filed a Notice of Motion to Amend Information in order to seek habitual treatment. On June 13, 1990, pursuant to an Amended Information filed the same day, Defendant was sentenced to life imprisonment without the possibility of parole under the "large" habitual criminal statute, NRS 207.010. Defendant filed a Notice of Appeal on June 27, 1990. The Judgement of Conviction was filed on July 7, 1990.

On October 21, 1991, pursuant to the Nevada Supreme Court's Remand Order, the district court took notice of the felony convictions entered at Defendant's initial sentencing and resented Defendant to the following: as to Count I – ten (10) years in the Nevada Department of Corrections ("NDC"); as to Count II- ten (10) years in NDC consecutive to Count I; as to Count III – life imprisonment with parole eligibility beginning after five (5) years, consecutive to Count II; and as to Count IV – pursuant to NRS 201.010, life without the possibility of parole, consecutive to Count III. The Amended Judgement of Conviction was filed on November 13, 1991.¹

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1 On February 20, 1996, Defendant filed his first Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its response on April 4, 1996. Defendant filed a Supplement
3 on June 13, 1996. The State filed its response on June 27, 1996. On July 16, 1996, Defendant
4 filed a Reply to the State's Response. On July 19, 1996, the district court denied Defendant's
5 first Petition. On September 6, 1996, the district court filed its Findings of Fact, Conclusions
6 of Law and Order. The Notice of Entry of Order was filed on September 20, 1996. Defendant
7 filed a Notice of Appeal on September 27, 1996.

8 On April 30, 1998, Defendant filed a Motion to Modify or in the Alternative Correct
9 Illegal Sentence. The State filed an Opposition on May 8, 1998. On May 28, 1998, the district
10 court entered an Order Denying Defendant's Motion to Modify or Correct Illegal Sentence.
11 On June 13, 1998, Defendant filed a Notice of Appeal from the Oder denying his motion.

12 On April 20, 1999, the Nevada Supreme Court consolidated the appeal from the orders
13 denying Defendant's first Petition for Writ of Habeas Corpus and Defendant's Motion to
14 Modify Sentence or Correct Illegal Sentence. Both decisions were affirmed. Remittitur issued
15 on May 18, 1999.

16 Defendant filed his second Petition for Writ of Habeas Corpus (Post-Conviction) on
17 January 10, 2006. The State filed a Response and Motion to Dismiss on February 27, 2006.
18 Defendant filed a Reply to the State's Response on May 24, 2006. On June 26, 2006, the
19 district court denied Defendant's second Petition for Writ of Habeas Corpus. The district court
20 filed its Findings of Fact, Conclusions of Law and Order on February 8, 2007. Notice of Entry
21 of Order was filed on February 13, 2007. On March 2, 2007, Defendant filed a Notice of
22 Appeal. On August 16, 2007, the Nevada Supreme Court issued an Order of Affirmance.
23 Remittitur issued on September 11, 2007.

24 Defendant filed his third Petition for Writ of Habeas Corpus (Post-Conviction) on
25 December 8, 2010, in Pershing County. The Petition was transferred to the Eighth Judicial
26 District on April 29, 2011, but was filed under Case No. 11-A640265-W and did not
27 immediately come before the court. Defendant filed a Supplement to his Petition on November
28 4, 2011. On March 14, 2012, Defendant filed a Motion for Judicial Action on his Petition. The

1 State filed an Opposition to this motion on March 23, 2012. On May 16, 2012, the State filed
2 a Response and Motion to Dismiss Defendant's third Petition.

3 On July 16, 2012, the district court denied Defendant's third Petition for Writ of Habeas
4 Corpus. On August 6, 2012, Defendant filed a Motion to Reconsider. The State filed an
5 Opposition to Motion to Reconsider on August 9, 2012. On August 13, 2012, the district court
6 issued a Findings of Fact, Conclusions of Law, and Order denying Defendant's third Petition.
7 A Notice of Entry of Order was filed on August 21, 2012. The district court issued an Order
8 denying Defendant's Motion to Reconsider on October 5, 2012.

9 On September 17, 2012, Defendant filed a Notice of Appeal from the order denying his
10 third Petition. The Nevada Supreme Court issued an Order of Affirmance on July 13, 2013.
11 Defendant filed a Petition for Rehearing on August 6, 2013. On September 25, 2013, the court
12 denied Defendant's Petition for Rehearing.

13 Defendant filed his fourth Petition for Writ of Habeas Corpus and Motion for
14 Appointment of Counsel on August 14, 2013. The State responded on September 19, 2013.
15 On October 21, 2013, the court denied Defendant's fourth Petition for Writ of Habeas Corpus.
16 The Findings of Fact, Conclusions of Law and Order was issued on December 4, 2013. On
17 December 16, 2013, Defendant filed a Notice of Appeal from the order denying his fourth
18 Petition. The Nevada Supreme Court issued an Order of Affirmance on April 10, 2014.

19 On October 1, 2018, Defendant filed the instant's fifth Petition for Writ of Habeas
20 Corpus. The State responded on November 30, 2018. Defendant replied on December 26,
21 2018.

22 ANALYSIS

23 **I. THIS PETITION IS PROCEDURALLY BARRED UNDER NRS 34.726(1).**

24 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
25 shown for delay. Pursuant to NRS 34.726(1):

26 *Unless there is good cause shown for delay, a petition that challenges*
27 *the validity of a judgment or sentence must be filed within 1 year of*
28 *the entry of the judgment of conviction or, if an appeal has been taken*
from the judgment, within 1 year after the Supreme Court issues its

1 *remittitur*. For the purposes of this subsection, good cause for delay
2 exists if the petitioner demonstrates to the satisfaction of the court:

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

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

6 (Emphasis added). The Supreme Court of Nevada has held that NRS 34.726 should be
7 construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
8 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726
9 begins to run from the date the judgment of conviction is filed or a remittitur from a timely
10 direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

11 The one-year time limit for preparing petitions for post-conviction relief under NRS
12 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
13 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
14 evidence presented by the defendant that he purchased postage through the prison and mailed
15 the Notice within the one-year time limit.

16 Furthermore, the Nevada Supreme Court has held that the district court has a duty to
17 consider whether a defendant's post-conviction petition claims are procedurally barred. State
18 v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The
19 Riker Court found that "[a]pplication of the statutory procedural default rules to post-
20 conviction habeas petitions is mandatory," noting:

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

25 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district
26 court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme
27 Court has granted no discretion to the district courts regarding whether to apply the statutory
28 procedural bars; the rules must be applied.

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1 Further, the entry of an Amended Judgement of Conviction does not automatically
2 restart the statutory time limit for post-conviction claims. Sullivan v. State, 120 Nev. 537, 540-
3 41, 96 P.3d 761, 764 (2204). Since the district court may amend the judgement of conviction
4 at any time to correct a clerical error or an illegal sentence, “restarting the one-year time period
5 for all purposes every time an amendment occurs would frustrate the purpose and spirit of
6 NRS 34.726.” Id. at 540, 96 P.3d at 764. Consequently, where a Petitioner is not challenging
7 the proceedings related to an Amended Judgment of Conviction, the one-year time bar runs
8 from the date on which the original Judgement of Conviction was entered or, if an appeal was
9 taken from the original judgment, within one year after the appellate court issues its remittitur.
10 Id. at 540, 96 P.3d at 764.

11 In the instant case, Defendant’s Judgement of Conviction was filed on July 7, 1990.
12 Defendant filed a direct appeal, and remittitur was issued on September 17, 1991. An Amended
13 Judgement of Conviction was filed on November 13, 1991, and a Second Amended Judgement
14 of Conviction was filed on September 29, 1993. Defendant appealed the Second Amended
15 Judgement of Conviction, and remittitur issued on October 24, 1994. Appellant’s instant
16 Petition was not filed until October 1, 2018. This is more than one year after the Judgement of
17 Conviction, the Amended Judgement of Conviction, and the Second Amended Judgement of
18 Conviction. Consequently, it is not necessary to address the argument of whether the one-year
19 period should flow from the date of the original judgment or the date of an amended
20 judgement, as more than one year has passed since the entry of all. Absent a showing of good
21 cause for this delay and undue prejudice, this Court finds Defendant’s claim must be dismissed
22 because of its tardy filing.

23 **II. DEFENDANT’S FIFTH PETITION IS SUCCESSIVE**

24 Defendant’s Petition is also successive pursuant to NRS 34.810(2). The relevant
25 portions of NRS 34.810 state:

26 2. A second or successive petition must be dismissed if the judge or
27 justice determines that it fails to allege new or different grounds for
28 relief and that the prior determination was on the merits or, if new and
different grounds are alleged, the judge or justice finds that the failure

of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Id. This is Defendant's fifth Petition. Defendant has previously filed four other Petitions spanning from February 20, 1996, to August 14, 2013, regarding the same issues. All of these prior Petitions have either been denied or disposed of. Furthermore, Defendant has given no good cause for the delay, and has failed to demonstrate actual prejudice. As such, this Court finds this fifth Petition must be denied as successive.

III. DEFENDANT'S FIFTH PETITION IS BARRED BY LACHES

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction...." The statute also requires that the State plead laches, which the State does. NRS 34.800.

Defendant's Judgement of Conviction was filed on July 7, 1990. Defendant filed a direct appeal, and remittitur was issued on September 17, 1991. An Amended Judgement of Conviction was filed on November 13, 1991, and a Second Amended Judgement of Conviction was filed on September 29, 1993. Defendant appealed the Second Amended Judgement of Conviction, and remittitur issued on October 24, 1994. Since more than five years have elapsed from any given date, NRS 34.800 directly applies in this case and a presumption of prejudice to the State arises. Defendant does not rebut this presumption. Therefore, pursuant to NRS 34.800, this Court finds this Petition must be denied.

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1 **IV. DEFENDANT HAS NOT PROVIDED GOOD CAUSE OR EVIDENCE OF**
2 **ACTUAL INNOCENCE TO OVERCOME THE PROCEDURAL BARS**

3 A showing of good cause and prejudice may overcome procedural bars. "To establish
4 good cause, Defendant must show that an impediment external to the defense prevented their
5 compliance with the applicable procedural rule. A qualifying impediment might be shown
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15 248, 252, 71 P.3d 503, 506 (2003). Clearly, any delay in the filing of the petition must not be
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25 Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851 (1995).

26 When claiming a fundamental miscarriage based on actual innocence, the petitioner
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28 absent a constitutional violation. Crump v. State, 2016 Nev. Unpub. LEXIS 374, *9-10, citing

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4 In the instant case, Defendant failed to raise any issue of good cause for the untimely
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17 State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990
18 P.2d 1263, 1275 (1999)).

19 In denying Defendant's first Post-Conviction Petition, the Nevada Supreme Court
20 noted that the State adequately proved Defendant had three prior convictions and the district
21 court was entitled to use these convictions for sentence enhancement purposes. See Order
22 Dismissing Appeal 10/30/95. Additionally, the case Defendant cites to was decided after his
23 sentencing and cannot be applied retroactively. Furthermore, Defendant has failed to provide
24 any facts that would show he would be prejudiced by having to comply with the procedural
25 time bar.

26 As such, Defendant cannot show good cause or actual prejudice and this Court finds
27 this Petition must be denied.

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ORDER

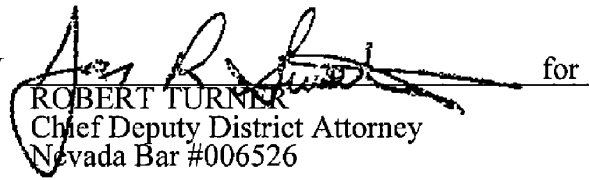
THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and is, DENIED.

DATED this 28 day of January, 2019.


DISTRICT JUDGE

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

BY


ROBERT TURNER
Chief Deputy District Attorney
Nevada Bar #006526

for

hjc/SVU

DISTRICT COURT
CLARK COUNTY, NEVADA

Steven D. Grierson

ROY MORAGA,

CASE NO: A-18-782168-W

Petitioner,

Dept. No: VI

VS.

ISIDOR BACA,

Respondent.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that: Roy Moraga,
hereby Appeals the, Notice of entry of Findings of Fact,
Conclusions of Law and Order Entered in by this Court
ON or About the, 5th day of Feb. 2019.

Dated this 10th day of Feb. 2019.

Respectfully Submitted,

Roy Moraga

Roy Moraga # 31584

Nr N. C. C. P. O. Box 7000

CARSON City, NV 89702

RECEIVED
FEB 14 2019
CLERK OF THE COURT

ROY D. MORAGA # 31584
N.M.C.C. P.O. Box 7000
CARSON CITY NV 89702

Legal
Mail

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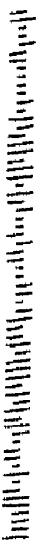


Clerk of the County

200 Lewis Avenue 3rd Floor

LAS VEGAS, NEVADA 89155

BN 01#6300



NORTHERN NEVADA CORRECTIONAL CENTER

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10 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
11 **STATE OF NEVADA IN AND FOR**
12 **THE COUNTY OF CLARK**

13 ROY D. MORAGA,

14 Petitioner(s),

15 vs.

16 ISIDOR BACA,

17 Respondent(s),

Case No: A-18-782168-W

Dept No: VI

18
19 **CASE APPEAL STATEMENT**

20 1. Appellant(s): Roy Moraga

21 2. Judge: James Bixlar

22 3. Appellant(s): Roy Moraga

23 Counsel:

24 Roy Moraga #31584
25 P.O. Box 7000
26 Carson City, NV 89702

27 4. Respondent (s): Isidor Baca

28 Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

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- 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
- Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
- 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
- 7. Appellant Represented by Appointed Counsel On Appeal: N/A
- 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: October 1, 2018
- 9. Date Commenced in District Court: October 1, 2018
- 10. Brief Description of the Nature of the Action: Civil Writ
Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus
- 11. Previous Appeal: No
Supreme Court Docket Number(s): N/A
- 12. Child Custody or Visitation: N/A
- 13. Possibility of Settlement: Unknown

Dated This 20 day of February 2019.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Roy Moraga

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 02, 2019

A-18-782168-W Roy Moraga, Plaintiff(s)
vs.
Isidor Baca, Defendant(s)

**January 02, 2019 8:30 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Bixler, James

COURTROOM: RJC Courtroom 10C

COURT CLERK: Keith Reed

RECORDER: De'Awna Takas

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Defendant not present.

Present on behalf of the State, Deputy District Attorney Brad Turner. Court noted the late reply to the State's opposition. Matter submitted on the pleadings by Mr. Turner. Court stated findings and ORDERED, Defendant's request for appointment of counsel DENIED, Petition For Writ of Habeas Corpus DENIED; State to prepare the order.

NDC

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated March 11, 2019, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 67.

ROY D. MORAGA,

Plaintiff(s),

vs.

ISIDOR BACA,

Defendant(s),

Case No: A-18-782168-W

Dept. No: VI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 22 day of March 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk