



**EIGHTH JUDICIAL DISTRICT COURT  
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Elizabeth A. Brown  
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Court Division Administrator

June 2, 2020

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

RE: JUSTIN PORTER vs. BRIAN WILLIAMS - WARDEN

**S.C. CASE: 80738**

D.C. CASE: A-19-798035-W

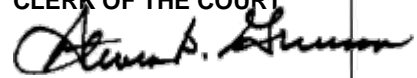
Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated March 30, 2020 and your Order, dated June 1, 2020, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed June 1, 2020 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", is written over a horizontal line.

Heather Ungermann, Deputy Clerk



**OPPS**  
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Attorney for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

**JUSTIN D. PORTER,**  
**#1682627**

Defendant.

CASE NO: **A-19-798035-W**

DEPT NO: **VI**

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

DATE OF HEARING: **FEBRUARY 19, 2020**  
TIME OF HEARING: **9:30 AM**

THIS CAUSE having presented before the Honorable JACQUELINE BLUTH, District Court Judge, on the 19th day of February, 2020; Petitioner present, represented by ADAM GILL, ESQ.; Respondent represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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1 //

2 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

3 **STATEMENT OF THE CASE**

4 On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter  
5 (hereinafter "Petitioner") with over 40 felony counts, including sexual assault, kidnapping,  
6 murder, burglary, and robbery, related to 9 events over a 4-month period, involving 12  
7 victims. On May 2, 2001, an Amended Information was filed in open court to correct a  
8 typographical error. On October 11, 2001, a Second Amended Information was filed  
9 reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in  
10 Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and  
11 Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts  
12 involved a single victim.

13 On May 15, 2008, Petitioner filed a Motion to Sever Counts 30-32 from the remainder  
14 of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court  
15 granted Petitioner's Motion to Sever, and ordered the murder event be tried separately. The  
16 State subsequently filed a Third Amended Information in the instant case on April 30, 2009,  
17 charging Petitioner with: Count 1 – Burglary While in Possession of a Deadly Weapon  
18 (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly  
19 Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a  
20 Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

21 On May 8, 2009, a jury found Petitioner guilty on Count 3 of Second Degree Murder  
22 with Use of a Deadly Weapon. Petitioner was found not guilty of Counts 1 and 2.

23 On September 30, 2009, the Court sentenced Petitioner to the Nevada Department of  
24 Corrections for 120 months to Life, plus a consecutive term of 120 months to Life for the use  
25 of a deadly weapon, with 3,338 days credit for time served. The Judgment of Conviction was  
26 filed on October 13, 2009. On October 29, 2009, Petitioner filed a Notice of Appeal. On  
27 November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction.  
28 Remittitur issued December 3, 2010.

1 //

2 //

3 On February 10, 2012, Petitioner filed his first pro per Post-Conviction Petition for  
4 Writ of Habeas Corpus. The State filed its Response and Motion to Dismiss on March 21,  
5 2012. On April 23, 2012, the Court denied Petitioner's first Petition as untimely. The  
6 Findings of Fact, Conclusions of Law, and Order were filed on June 11, 2012. Petitioner  
7 appealed the denial of his first Petition on May 8, 2012, and on March 11, 2013, the Nevada  
8 Supreme Court affirmed the denial. Remittitur issued on March 19, 2013.

9 On August 26, 2013, Petitioner filed his second pro per Post-Conviction Petition for  
10 Writ of Habeas Corpus, and a separate Motion to Appoint Counsel. The State filed its  
11 Response and Motion to Dismiss on January 3, 2014. On January 13, 2014, the Court denied  
12 Petitioner's second Petition as time-barred. Petitioner filed a Notice of Appeal from the  
13 denial of his second Petition on February 7, 2014, and on June 11, 2014, the Nevada  
14 Supreme Court affirmed the denial. Remittitur issued on July 15, 2014.

15 On October 26, 2015, Petitioner filed his third pro per Post-Conviction Petition for  
16 Writ of Habeas Corpus. On August 17, 2016, the Nevada Supreme Court affirmed the  
17 district court's ruling. Remittitur issued on January 24, 2017.

18 On July 5, 2019, Petitioner filed the instant pro per Post-Conviction Petition for Writ  
19 of Habeas Corpus (the "instant Petition"). Petitioner then filed a "Supplement" to his Petition  
20 on July 16, 2019. Petitioner filed another "Petition" on July 25, 2019.

21 On September 27, 2019, Petitioner filed a Notice of Appeal in the instant case. The  
22 Nevada Supreme Court dismissed the appeal on October 18, 2019, as there was no order to  
23 be appealed from. Remittitur issued on November 19, 2019. While the appeal was pending,  
24 Petitioner filed a "Motion for Respondent to Petitioner's Habeas Corpus (Post-Conviction)."

25 On December 2, 2019, the State filed its Response and Motion to Dismiss Petitioner's  
26 Petition for Writ of Habeas Corpus, and Motion to Strike Petitioner's Rogue Filings. The  
27 matter came before this Court on December 9, 2019, at which time it was continued for the  
28 appointment of counsel for Petitioner.

1 On February 19, 2020, this matter came before this Court for argument. After hearing  
2 representations of the parties, this Court now finds and concludes as follows:

### 3 ANALYSIS

#### 4 I. PETITIONER'S INSTANT PETITION DOES NOT ENTITLE PETITIONER 5 TO HABEAS RELIEF

##### 6 A. The instant Petition is time-barred

7 The mandatory provision of NRS 34.726(1) states:

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

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

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

17 (emphasis added). “[T]he statutory rules regarding procedural default are mandatory and  
18 cannot be ignored when properly raised by the State.” State v. Dist. Court (Riker), 121 Nev.  
19 225, 233, 112 P.3d 1070, 1075 (2005).

20 Per the language, the one-year time bar prescribed by NRS 34.726 begins to run from  
21 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
22 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998); see Pellegrini v.  
23 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be  
24 construed by its plain meaning).

25 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada  
26 Supreme Court rejected a habeas petition that was filed two days late, pursuant to the “clear  
27 and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the  
28 importance of filing the petition with the District Court within the one-year mandate, absent  
a showing of “good cause” for the delay in filing. Gonzales, 118, Nev. at 593, 590 P.3d at  
902. The one-year time bar is therefore strictly construed. In contrast with the short amount  
of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas

petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

In the instant case, Petitioner's instant Petition is beyond the one-year time bar. The Nevada Supreme Court affirmed Petitioner's judgment of conviction on November 8, 2010, and Remittitur issued on December 3, 2010. As such, Petitioner had until December 3, 2011 to file a post-conviction petition for writ of habeas corpus. The instant Petition was filed on July 5, 2019, nearly eight (8) years after the time allowed by statute. Therefore, this Court finds the instant Petition is time-barred pursuant to NRS 34.726(1).

**B. The instant Petition is successive and an abuse of the writ**

Petitioner's instant Petition is also procedurally barred because it is successive. NRS 34.810(2) reads:

A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for 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 petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on

1 the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In  
2 other words, if the claim or allegation was previously available with reasonable diligence, it  
3 is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,  
4 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231,  
5 112 P.3d at 1074.

6 On February 10, 2012, Petitioner filed his first petition for habeas relief, which was  
7 denied as untimely because the district court concluded that Petitioner did not demonstrate  
8 good cause to overcome the time-bar. On August 26, 2013, Petitioner filed his second  
9 petition for habeas relief, which was once again denied as untimely. Petitioner filed a third  
10 petition for habeas relief on October 26, 2015, which the district court denied as procedurally  
11 barred under NRS 34.726(1), finding that Petitioner’s actual innocence claims were  
12 insufficient to overcome those procedural bars. Petitioner appealed each denial of his  
13 respective petitions, and every denial was affirmed by the Nevada Supreme Court. Petitioner  
14 has clearly had the opportunity to raise the grounds he now alleges are “new and different” in  
15 each of these prior Petitions. Therefore, this Court finds the instant Petition is successive and  
16 constitutes an abuse of the writ; as such, it is subject to denial pursuant to NRS 34.810(2).

17 **C. The instant Petition is subject to Laches**

18 NRS 34.800 creates a rebuttable presumption of prejudice to the State if “[a] period  
19 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
20 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
21 conviction and the filing of a petition challenging the validity of a judgment of conviction...”  
22 The Nevada Supreme Court observed in Groesbeck v. Warden, “[P]etitions that are filed  
23 many years after conviction are an unreasonable burden on the criminal justice system. The  
24 necessity for a workable system dictates that there must exist a time when a criminal  
25 conviction is final.” 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the  
26 statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2).  
27 The State affirmatively pleads laches in the instant case.  
28

1 The instant Petition was filed over ten (10) years after the verdict and the sentencing  
2 hearing, and almost nine (9) years after the Nevada Supreme Court affirmed the judgment of  
3 conviction. Because these time periods exceed five (5) years, this Court finds the State is  
4 entitled to a rebuttable presumption of prejudice. NRS 34.800(2).

5 //

6 **D. Petitioner's claim of "actual innocence" is not, itself, a cognizable claim for**  
7 **habeas relief**

8 Petitioner's first claim is that he is "actually innocent" of those crimes for which he  
9 was convicted at trial. Instant Petition at 13. The United States Supreme Court has held that  
10 actual innocence is "not itself a constitutional claim, but instead a gateway through which a  
11 habeas petitioner must pass to have his otherwise barred constitutional claim considered on  
12 the merits." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). In order for a  
13 petitioner to obtain a reversal of his conviction based on a claim of actual innocence, he must  
14 prove that "'it is more likely than not that *no* reasonable juror would have convicted him in  
15 light of the 'new evidence' presented in habeas proceedings." Calderon v. Thompson, 523  
16 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup).

17 Petitioner seems to acknowledge that his "actual innocence" claim is merely a vehicle  
18 for overcoming the other procedural bars to the instant Petition. Instant Petition at 13.  
19 However, the substance of this claim is merely a challenge to the sufficiency of the evidence  
20 used to convict Petitioner at trial. Id. Petitioner does not offer any evidence that could be  
21 considered "new" or that could support the requisite showing under Calderon. Therefore, this  
22 Court concludes that Petitioner has failed to demonstrate that "actual innocence" establishes  
23 good cause enough to overcome his procedural defaults, and the instant Petition is therefore  
24 subject to dismissal.

25 **E. Petitioner fails to demonstrate good case or prejudice for failing to timely**  
26 **raise his claims of ineffective assistance of counsel**

27 To avoid procedural default, under NRS 34.726, a petitioner has the burden of  
28 pleading and proving specific facts that demonstrate good cause for his failure to present his



1 claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that  
2 he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v.  
3 Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of  
4 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas  
5 petition if it presents claims that either were or could have been presented in an earlier  
6 proceeding, unless the court finds both cause for failing to present the claims earlier or for  
7 raising them again *and* actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646–  
8 47, 29 P.3d 498, 523 (2001) (emphasis added).

9 1. Petitioner has failed to establish good cause.

10 “To establish good cause, appellants *must* show that an impediment external to the  
11 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119  
12 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.  
13 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. “A qualifying  
14 impediment might be shown where the factual or legal basis for a claim was not reasonably  
15 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).  
16 The Court continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81  
17 P.3d at 526. Examples of good cause include interference by State officials and the previous  
18 unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275  
19 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the  
20 petitioner. NRS 34.726(1)(a).

21 Petitioner has failed to address good cause to overcome this late filing, instead relying  
22 upon allegations of “actual innocence” to excuse the procedural bars to the instant Petition.  
23 As addressed in Section I(D), *supra.*, Petitioner fails to meet the standard under Calderon.  
24 Thus, this Court finds that Petitioner does not assert good cause and so fails to overcome the  
25 mandatory procedural bar.

26 2. Petitioner has failed to establish prejudice.  
27  
28

1 In addition, this Court finds Petitioner does not establish prejudice necessary to ignore  
2 the procedural default because the underlying claims of ineffective assistance of counsel are  
3 meritless.

4 The Sixth Amendment to the United States Constitution provides that, “[i]n all  
5 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel  
6 for his defense.” The United States Supreme Court has long recognized that “the right to  
7 counsel is the right to the effective assistance of counsel.” Strickland v. Washington, 466  
8 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138,  
9 865 P.2d 322, 323 (1993).

10 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
11 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test  
12 of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138,  
13 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's  
14 representation fell below an objective standard of reasonableness, and second, that but for  
15 counsel's errors, there is a reasonable probability that the result of the proceedings would  
16 have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada  
17 State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland  
18 two-part test). “[T]here is no reason for a court deciding an ineffective assistance claim to  
19 approach the inquiry in the same order or even to address both components of the inquiry if  
20 the defendant makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct.  
21 at 2069.

22 The court begins with the presumption of effectiveness and then must determine  
23 whether the defendant has demonstrated by a preponderance of the evidence that counsel  
24 was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective  
25 counsel does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the  
26 range of competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev.  
27 430, 432, 537 P.2d 473, 474 (1975).

1 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
2 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
3 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
4 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
5 (2002).

6 Based on the above law, the role of a court in considering allegations of ineffective  
7 assistance of counsel is “not to pass upon the merits of the action not taken but to determine  
8 whether, under the particular facts and circumstances of the case, trial counsel failed to  
9 render reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708,  
10 711 (1978). This analysis does not mean that the court should “second guess reasoned  
11 choices between trial tactics nor does it mean that defense counsel, to protect himself against  
12 allegations of inadequacy, must make every conceivable motion no matter how remote the  
13 possibilities are of success.” Id. To be effective, the constitution “does not require that  
14 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,  
15 counsel cannot create one and may disserve the interests of his client by attempting a useless  
16 charade.” United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19  
17 (1984).

18 “There are countless ways to provide effective assistance in any given case. Even the  
19 best criminal defense attorneys would not defend a particular client in the same way.”  
20 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
21 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
22 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
23 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's  
24 challenged conduct on the facts of the particular case, viewed as of the time of counsel's  
25 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

26 Even if a defendant can demonstrate that his counsel's representation fell below an  
27 objective standard of reasonableness, he must still demonstrate prejudice and show a  
28 reasonable probability that, but for counsel's errors, the result of the trial would have been

1 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
2 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability  
3 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-  
4 89, 694, 104 S. Ct. at 2064–65, 2068).

5 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the  
6 disputed factual allegations underlying his ineffective-assistance claim by a preponderance  
7 of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,  
8 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief  
9 must be supported with specific factual allegations, which if true, would entitle the petitioner  
10 to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and  
11 “naked” allegations are not sufficient, nor are those belied and repelled by the record. Id. “A  
12 claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the  
13 time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).  
14 NRS 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the  
15 claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may  
16 cause your petition to be dismissed.” (emphasis added).

17 Here, Petitioner alleges his trial counsel was ineffective in four ways: (1) failing to  
18 instruct the jury on Petitioner’s theory of the case; (2) conceding guilt as to second degree  
19 murder; (3) failing to subject prosecution’s case to a meaningful adverse testing process; and  
20 (4) failing to object to Petitioner’s statement as involuntary. Instant Petition at 19-24.  
21 However, Petitioner’s allegations are subject to the law of the case doctrine, as they have  
22 been previously raised, and rejected, in earlier petitions.

23 “The law of a first appeal is law of the case on all subsequent appeals in which the  
24 facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)  
25 (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the  
26 law of the case cannot be avoided by a more detailed and precisely focused argument  
27 subsequently made after reflection upon the previous proceedings.” Id. at 316, 535 P.2d at  
28 799. Under the law of the case doctrine, issues previously decided on direct appeal may not

1 be reargued in a habeas petition. Pellegrini v. State, 117 Nev. at 879, 34 P.3d at 532 (citing  
2 McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this  
3 Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

4 *i. Failure to Instruct the Jury on Petitioner's Theory of the Case*

5 Petitioner raised the allegation that trial counsel failed to proffer proper jury  
6 instructions in his third Petition. The district court determined that this allegation was  
7 without merit in that Petition, and the district court's determination was upheld on appeal.  
8 See, Findings of Fact, Conclusions of Law and Order, filed on March 14, 2016 in Case  
9 Number 01C174954 ("3/14/16 FCL") at 5; see also, Order of Affirmance, filed on August  
10 17, 2016 in Supreme Court Case 70206 ("8/17/16 Affirmance"). Therefore, this Court finds  
11 this issue has already been raised and addressed and that it is therefore subject to the law of  
12 the case doctrine.

13 *ii. Conceding Second Degree Murder*

14 Petitioner raised the allegation that trial counsel improperly conceded the issue of  
15 guilt as to second degree murder in his second Petition. See Third Petition at 7. The district  
16 court rejected this allegation and dismissed Petitioner's third Petition, a ruling that was also  
17 upheld on appeal. See generally, 2/14/14 FCL; see also, 6/11/14 Affirmance. Because  
18 Petitioner already unsuccessfully raised this allegation, and because there are no new facts  
19 that would affect the Nevada Supreme Court's earlier determination of this issue, this Court  
20 finds this claim is subject to the law of the case doctrine and cannot demonstrate prejudice.

21 *iii. Failure to Subject Prosecution's Case to a Meaningful Adverse Testing*  
22 *Process*

23 Petitioner's third allegation in support of his claim of ineffective assistance of trial  
24 counsel relies on the same actions of trial counsel as addressed in Section I(E)(2)(ii), *supra*.  
25 – namely, that trial counsel conceded the issue of guilt as to second degree murder. As  
26 addressed above, this claim has already been substantively addressed, and Petitioner's  
27 position has been rejected by both the district court and the Nevada Supreme Court. Because  
28 both courts have already ruled on this specific issue, this Court finds this claim is subject to

1 the law of the case doctrine. Furthermore, because it has no merit, this Court further finds  
2 this claim cannot demonstrate prejudice.

3 *iv. Failure to Object to Petitioner's Statement as Involuntary*

4 Petitioner initially raised trial counsel's alleged failure to object to his statement to  
5 police as involuntary on his direct appeal. See, Appellant's Opening Brief, filed on April 21,  
6 2010 in Supreme Court Case 54866 at 7-10. However, the Nevada Supreme Court expressly  
7 rejected the notion that Petitioner's statement to police was involuntary or unknowing,  
8 instead concluding "[t]he totality of the circumstances reveals that Porter voluntarily,  
9 knowingly, and intelligently waived his Miranda rights... and the district court therefore did  
10 not err in admitting his confession." 11/08/2010 Affirmance at 2. Because the Nevada  
11 Supreme Court found the issue of voluntariness to be without merit, trial counsel could not  
12 be ineffective for failing to raise the issue.

13 Petitioner's allegation is further belied by a review of the district court record. On  
14 September 26, 2002, trial counsel filed a "Motion to Suppress Defendant's Confessions and  
15 Admissions to Metro and Chicago Detectives Based on Violation of his Miranda Rights and  
16 Involuntariness and Request for Jackson v. Denno Hearing." Because Petitioner's allegation  
17 is belied by the record and subject to the law of the case doctrine, this Court finds this claim  
18 cannot demonstrate prejudice to overcome the procedural bars to the instant Petition.

19 Petitioner further alleges his appellate counsel was ineffective in two ways: (1) failing  
20 to raise prosecutorial misconduct on appeal; and (2) failing to allege ineffective assistance of  
21 trial counsel on appeal, both of which have also been addressed and rejected.

22 *i. Failure to Raise Issue of Prosecutorial Misconduct on Direct Appeal*

23 Petitioner's argument that his appellate counsel was ineffective for not alleging  
24 prosecutorial misconduct is based on Petitioner's argument that mental disability rendered  
25 his voluntary statement to detectives inadmissible, and that the statement should not have  
26 been used at trial. See, Instant Petition at 26. This claim was, in fact, substantively raised on  
27 direct appeal, and was rejected by the Nevada Supreme Court as being without merit.  
28 11/08/2010 Affirmance at 2. Because this claim was previously substantively raised, and

1 rejected, this Court finds it is subject to the law of the case doctrine. It further cannot be used  
2 to overcome the procedural bars precluding the instant Petition from being reviewed on its  
3 merits.

4 *ii. Failure to Raise Issue of Ineffective Assistance of Trial Counsel*

5 Petitioner repeats his earlier four arguments regarding ineffectiveness of trial counsel,  
6 and argues that appellate counsel was ineffective for failing to raise these issues on appeal.  
7 Aside from the same conclusory statements made in support of his earlier claims, which  
8 were all addressed and rejected on Petitioner's direct appeal, or in one of Petitioner's  
9 numerous habeas petitions since, Petitioner fails to support his claim, and fails to show how  
10 any of these justify overcoming the procedural bars to the instant Petition. Therefore, this  
11 Court finds that Petitioner's claim is subject to the procedural bars.

12 //

13 //

14 **F. Petitioner's remaining claims of Prosecutorial Misconduct and Abuse of**  
15 **Discretion are subject to the law of the case doctrine**

16 Petitioner also claims that admission of his statement to detectives at trial amounted to  
17 prosecutorial misconduct, and that the trial court abused its discretion when it allowed the  
18 statement to be used at trial. Instant Petition at 30-36. However, these claims are  
19 substantively the same as Petitioner's claims regarding ineffective assistance of trial and  
20 appellate counsel, as they all rely on Petitioner's argument that mental or cognitive  
21 handicaps prevented his knowing and/or voluntary waiver of his Miranda rights. As  
22 addressed, *supra.*, Petitioner substantively raised this issue on direct appeal. The Nevada  
23 Supreme Court rejected the claim, concluding that the totality of the circumstances supported  
24 the notion that Petitioner's statement was knowing and voluntary. 11/08/2010 Affirmance at  
25 2. Therefore, this Court finds that, pursuant to Hall, these claims are subject to the law of the  
26 case doctrine.

27 Because Petitioner's substantive claims are subject to the law of the case doctrine, and  
28 further, because Petitioner fails to demonstrate good cause or prejudice to overcome the

1 procedural bars to the instant Petition, this Court concludes the instant Petition is ripe only  
2 for summary dismissal.

3 **II. PETITIONER'S SUPPLEMENT AND SUBSEQUENT "PETITION" ARE**  
4 **STRICKEN**

5 NRS 34.750(5) precludes the filing of any supplemental pleadings to a post-  
6 conviction petition for writ of habeas corpus without leave of the court. The instant Petition  
7 was filed on July 5, 2019. On July 16, 2019, absent any order or leave of this Court,  
8 Petitioner filed a "Supplement to Habeas Corpus Postconviction." Then, on July 25, 2019,  
9 again without order or leave of this Court, Petitioner filed another "Petition for Writ of  
10 Habeas Corpus." Petitioner was not granted, nor did he even seek, leave of this Court to  
11 supplement the instant Petition. NRS 37.750(5). Therefore, this Court concludes the  
12 subsequent filings should be stricken as rogue and improper.

13 //

14 //

15 **CONCLUSION**

16 THEREFORE, **COURT ORDERED**, the State's Motion to Dismiss Pursuant to  
17 Laches shall be and is GRANTED.

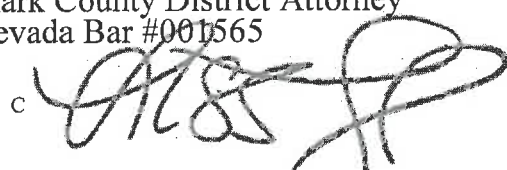
18 **IT IS FURTHER ORDERED**, Petitioner Justin Porter's Petition for Writ of Habeas  
19 Corpus (Post-Conviction) shall be and is DISMISSED.

20 **IT IS FURTHER ORDERED**, Petitioner Justin Porter's July 16, 2019 Supplement  
21 to Habeas Corpus Petition and July 25, 2019 Petition for Writ of Habeas Corpus shall be and  
22 are STRICKEN.

23 DATED this 21<sup>st</sup> day of May, 2020.

24   
25 \_\_\_\_\_  
26 DISTRICT COURT JUDGE 

27 Respectfully submitted,

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




1  
2 BY

LISA LUZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056

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June 2, 2020



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