

BETSY ALLEN, ESQ.
Nevada Bar No. 6878
LAW OFFICE OF BETSY ALLEN
P.O. Box 46991
Las Vegas, NV 89114

Electronically Filed
Jun 18 2021 03:25 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA)
)
Respondent.)
_____)

Supreme Court Case No.: 80738
District Court No.: A-19-798035-W
e-file

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed.

1. Attorney of Record: Betsy Allen
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Law Office of Betsy Allen

DATED this 18TH day of June, 2021.

s/s Betsy Allen
BETSY ALLEN, ESQ.

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	iv
ROUTING STATEMENT.....	iv
STATEMENT OF ISSUES.....	iv
STATEMENT OF THE CASE AND PROCEDURAL HISTORY.....	1
STATEMENT OF FACTS.....	1
ARGUMENT.....	1-7
I. PETITIONER WAS DENIED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL STAGE.....	1-3
A. COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE APPROPRIATE DEFENSE ON BEHALF OF PETITIONER....	4-5
B. THIS CASE WAS INCORRECTLY SUBJECTED TO A TME BAR UNDER NRS 34.726.....	5-6
II. CONCLUSION.....	7
III. CERTIFICATE OF COMPLIANCE.....	8-9
IV. CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

<u>NEVADA SUPREME COURT CASES</u>	<u>PAGE</u>
<u>Bennet v. State</u> , 111 Nev. 1099, 901 P.2d 676 (1995).....	2
<u>Buffalo v. State</u> , 901 P.2d 647, 111 Nev. 1139 (1995).....	4
<u>Davis v. State</u> , 107 Nev. 600, 817 P.2d 1169 (1991).....	3
<u>Harris v. State</u> , 407 P.3d 348 (Nev. App. 2017).....	6
<u>Kirksey v. State</u> , 112 Nev. 980, 923 P.2d 1102 (1996).....	2
<u>Lozada v. State</u> , 110 Nev. 349, 871 P.2d 944 (1994).....	3
<u>Mazzan v. State</u> , 105 Nev. 745, 783 P.2d 430 (1989).....	2
<u>Nobles v. Warden, Nevada Dept. of Prisons</u> , 106 Nev. 67, 787 P.2d 390 (1990).....	3
<u>Olausen v. State</u> , 105 Nev. 110, 771 P.2d 583 (1989).....	2
<u>Riley v. State</u> , 110 Nev. 638, 878 P.2d 272 (1994).....	2
<u>State v. Love</u> , 109 Nev. 1136, 865 P.2d 322 (1993).....	3
<u>FEDERAL CASES</u>	
<u>Lockhart v. Fretwell</u> , 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed. 2d (1993)....	3
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052 (1984).....	1, 3
<u>NEVADA STATUTES</u>	
NRS 200.070.....	4
NRS 34.726.....	5, 6

I. STATEMENT OF JURISDICTION

The Jurisdictional Statement stand as enunciated in the Opening Brief.

II. ROUTING STATEMENT

The Routing Statement stands as enunciated in the Opening Brief.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The Petitioner received Ineffective Assistance of Counsel

A) Counsel was ineffective for failing to present the appropriate defense on behalf of Petitioner.

B) This case was incorrectly subjected to a time bar under NRS 34.726.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Opening Brief.

STATEMENT OF FACTS

The Statement of Facts stands as enunciated in the Opening Brief.

ARGUMENT

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL STAGE

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984), the United States Supreme Court established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a petitioner's claim of ineffective assistance of counsel.

First, the petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the petitioner. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. Unless both showings can be made, it cannot be

said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

The Nevada Supreme Court has held, “claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to show that counsel’s assistance was deficient and that the deficiency prejudiced the defense.” *See, Bennet v. State*, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

"The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a petitioner must show a reasonable probability that, but for counsel’s error, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine the confidence in the outcome. *See, Kirksey*, 112 Nev. at 980, 923 P.2d at 1102. “Strategy or decisions regarding the conduct of a defendant’s case are virtually unchallengeable, absent extraordinary circumstances.” Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

This Court reviews the denial of a post conviction petition for writ of habeas corpus for an abuse of discretion. Nobles v. Warden, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990). To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, the petition must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's errors were so severe that they rendered the verdict unreliable. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) *citing* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205, (1984).

Once the petitioner establishes that counsel's performance was deficient, the petitioner requesting post-conviction relief must next show that, but for counsel's errors the result of the trial would probably have been different. Strickland, 266 U.S. at 694, 104 S.Ct. 2068; Davis v. State, 107 Nev. 600, 601, 602, 817 P.2d 1169, 1170 (1991). The petitioner must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceedings fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993) *citing* Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed. 2d 180 (1993); Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

///

///

**A. COUNSEL DID NOT PRESENT THE CORRECT OR
EFFECTIVE DEFENSE ON BEHALF OF PETITIONER.**

Counsel for Petitioner failed to recognize what would have been the best and most successful argument during the trial: that is, a manslaughter conviction.

Ultimately, Petitioner confessed to shooting Lungtok. However, he stated that he was running away from what he perceived to be the police and while hiding in what he thought was an abandoned apartment, he shot him in self-defense.

Manslaughter is defined under NRS 200.070:

1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.
2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

His behavior clearly falls within the manslaughter statute. And furthermore, the jury was convinced that Petitioner did not enter the apartment with the intent to do harm to Lungtok, as they did not convict him of first degree murder or the underlying felonies.

Failure to present the appropriate defense is ineffective. In Buffalo v. State, 901 P.2d 647, 111 Nev. 1139 (Nev., 1995) the Court found that counsel for Buffalo presented a “defense” which fell into exactly two categories: 1) the wrong defense, and 2) no defense. Id. at 650. In Buffalo, counsel defended a sexual assault

allegation by arguing that the sexual assault was impossible because there was no sexual gratification, which is not required in the statutory scheme. Much the same was done here. Rather than use the evidence they had to craft a defense based upon law, the attorney's for Mr. Porter simply just asked the jury to find him not guilty, which under the circumstances, was not reasonable.

B. THIS CASE WAS INCORRECTLY SUBJECTED TO A TIME BAR UNDER NRS 34.726

In Nevada, the statutes provide for a time limit on filing post conviction proceedings.

NRS 34.726 Limitations on time to file; stay of sentence.

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

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

The state is correct in that a petition must be filed within a year after the judgment of conviction. However, there is a failure to mention that for "good cause" the Court can allow for a delay. In this case, there was good cause.

Mr. Porter was initially charged with multiple felonies, however the District Court severed the murder counts from all the other ones, prior to the start of trial.

The murder was the only set of counts to actually proceed to trial, as a result, there were numerous other counts outstanding. Mr. Porter was a juvenile at the time of the arrest and incarceration, while awaiting trial. He had no ability to understand or navigate the criminal justice system, procedurally or legally. Finally, he has a limited intelligence to understand the procedures.

Again, not one of Mr. Porter's claims have been reviewed on their merit. They have all been dismissed under NRS 34.726, without consideration for the reasons his petition was not filed timely.

The State fails to address Harris v. State, 407 P.3d 348 (Nev. App. 2017), wherein this Court set forth prongs to determine if good cause has been shown: 1) that petitioner believed counsel filed a petition on petitioner's behalf; 2) this belief was objectively reasonable; 3) counsel abandoned the petitioner without notice and failed to timely file the petition; and 4) the petitioner filed the petition within a reasonable time after the petitioner should have known counsel did not file a petition.

In the instant case, Petitioner has never even been permitted to demonstrate "good cause" for the delay, as every petition has just been summarily denied on the time bar. Petitioner is entitled to a hearing on the good cause for the delay.

///

///

III. CONCLUSION

For the foregoing reasons, the accused herein respectfully request that this Court grant appropriate relief and remand for a new trial or at least a hearing on the merits of the good cause for not filing within the statutory time limit.

Additionally, Appellant requests Oral Argument be granted in this matter.

Dated this 18th day of June, 2021.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 Edition in Arial 14 point font; or

☐ This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. This brief exceeds the with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 4,597 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words; or

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of June, 2021.

/s/ Betsy Allen

Betsy Allen, ESQ.
Nevada Bar No.: 6878
LAW OFFICE OF BETSY ALLEN
P.O. BOX 46991
LAS VEGAS NV 89114
702-386-9700

CERTIFICATE OF SERVICE

The undersigned hereby declares that on June 18, 2021 this document of electronically filed with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT

Nevada Attorney General

STEVEN WOLFSON, ESQ.

Clark County District Attorney

The foregoing document was mailed, first class postage prepaid, to the following:

JUSTIN PORTER

Inmate ID No.: 1042449

HDSP

P.O. Box 650

Indian Springs, NV 89070

/s/ Betsy Allen

Betsy Allen, ESQ.

Nevada Bar No.: 6878